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THE EPISTEMOLOGICAL BACKGROUND OF NATURAL LAW

Two years ago Professor Karl Pribram expressed his conviction that the present partition of the world between East and West is, in the final analysis, the outgrowth of a philosophical difference that is traceable to the days of Plato and which reached its climax, although by no means its end, in the scholastic disputes concerning Universals.¹ The fundamental dichotomy of thought, according to Pribram, is represented on the one hand by those who believe in the identity of thinking and being, who recognize a real existence, outside the human mind, of general ideas or universal concepts, and who give credence to the ability of the human mind to understand the laws by which the universe is governed.² Because of its belief in the reality of ideas or universals, this school of thought has been designated Realism or Universalism. On the other hand there are those who deny that the mind can grasp the truth directly and, hence, insist that universal concepts are mere abstractions, products of the mind with no corresponding reality in the outside world. Since, for these thinkers universals are mere names, *nomina*, their school has come to be known as Nominalism. Human reasoning, they conclude, must be based on hypothetical assumptions³ with all the consequences of tolerance, Relativism and Subjectivism these assumptions entail. These two patterns of thought have, during the course of intellectual history, entered into a variety of combinations. Pribram elaborates on two of these combinations, calling them the intuitional and dialectic patterns.⁴

¹ PRIBRAM, *CONFLICTING PATTERNS OF THOUGHT* (1949). The importance of this book for political theory has not yet been sufficiently recognized.

² *Id.* at 2, 7.

³ *Id.* at 2, 11. For a concise presentation of the problems involved and the history of the dispute, see De Wulf, *Nominalism, Realism, Conceptualism*, 11 *CATH. ENCYC.* 90 (1913).

⁴ PRIBRAM, *op. cit. supra* note 1, at 3, 21, 36 *et seq.*

Anyone who, with Pribram's thesis in mind, has followed the recently revived dispute between the Natural Law school and the adherents of positive law,⁵ undoubtedly ponders the question whether his dichotomy underlies the dispute in political philosophy. This paper attempts to consider the conflict between Natural Law and legal Positivism by projecting it against the background of the various theories of knowledge evolved during the periods of Hellenic and Hellenistic thought. Because of limited space, a discussion of medieval and modern views must be omitted, although some arguments will be brought forward in the light of historical study and recent experience.⁶

I.

Plato and the Sophists

The juxtaposition of Natural Law and legal positivism was first formulated scientifically in the controversy between Plato and the Sophists. Although the latter did not have a uniform school of thought either in metaphysics or ethics,⁷ we know from Plato's writings at least one definite Sophistic trend as developed by Protagoras. In *The Theaetetus* the

⁵ See Wormuth, *Return to the Middle Ages*, 2 WEST. POL. Q. 202 (1949); Kelsen, *The Natural Law Doctrine Before The Tribunal of Science*, 2 WEST. POL. Q. 481 (1949). Bodenheimer, *The Natural Law Doctrine Before The Tribunal of Science: A Reply To Hans Kelsen*, 3 WEST. POL. Q. 335 (1950). For additional references, see note 86, *infra*.

⁶ Application to political thought is briefly indicated by PRIBRAM, *op. cit. supra* note 1, at 89. The few essays and books that deal with the philosophical foundation of the Natural Law theory such as KELSEN, note 86 *infra*; LE BOUTILLIER, *AMERICAN DEMOCRACY AND NATURAL LAW* (1950); CHROUST, *On The Nature of Natural Law in INTERPRETATIONS OF MODERN LEGAL PHILOSOPHIES* 70 *et seq.* (Sayre ed. 1947); Oppenheim, *Relativism, Absolutism and Democracy*, 44 AM. POL. SCI. REV. 951 *et seq.* (1950), do not go into the epistemological background. The only book that does so is SAUTER, *DIE PHILOSOPHISCHEN GRUNDLAGEN DES NATURRECHTS* (1932), to which the writer of this article is indebted. Naturally Sauter could not take into account Pribram's theories. The thesis that epistemological and political doctrines are logically interrelated is expressly denied by Oppenheim, *supra* at 959.

⁷ JAEGER, 1 *PAIDEIA* 292 *et seq.* (2d ed. 1945), distinguishes on the basis of their educational philosophy three schools of Sophists, of which Protagoras represents one. Jaeger warns, *id.* at 294, however, against generalizing and overestimating the ideas put forth by Protagoras.

followers of Protagoras are said to "speak of justice and injustice . . . as having no natural or essential basis."⁸ Truth they hold to be a matter of agreement by the political community or the State. This most extreme positivistic attitude is corroborated by two similar passages.⁹ At the same time, Protagoras is the father of Relativism, the famous dictum, "Man is the measure of all things," being attributed to him.¹⁰ Epistemologically he approaches Nominalism. Truth, for him, exists only in relation to the person who asserts it, and there is no true reality except in the cognizant mind.¹¹ For him there is no absolute; truth can be established only by sense perception.¹² Thus Protagoras is the classical example of Relativism in epistemology coinciding with Positivism in law, a combination that has been affirmed repeatedly by Kelsen.¹³

On the other hand, Plato's Socrates is the representative of the belief in absolute ideas and, at the same time, the

⁸ PLATO, *THEAETETUS* 172 b (Jowett's transl. 1892).

⁹ *Id.* at 172 a and 167 c. SAUTER, *op. cit. supra* note 6, at 199, denies that these sentences prove Protagoras' Positivism; he quotes them as testifying to the latter's Natural Law theory. The difference seems to be one of text, translation and interpretation. Concurring with the text above are FREYTAG, *DIE ENTWICKLUNG DER GRIECHISCHEN ERKENNTISTHEORIE BIS ARISTOTELES* 21 (1905); POHLENZ, *STAATSGEDANKE UND STAATSLERE DER GRIECHEN* 38 (1923); JAEGER, *op. cit. supra* note 7; Kelsen, *Metamorphoses of the Idea of Justice* in *INTERPRETATIONS OF MODERN LEGAL PHILOSOPHIES* 418 (Sayre ed. 1947). HEINIMANN, *NOMOS UND PHYSIS* 110 *et seq.*, 116 (1945), is also in agreement. For an absolutely unambiguous statement of Positivism imputed to the Sophists in general, see PLATO, *LAWS* 889 e (Jowett's transl. 1892): "[They would say] that the principles of justice have no existence at all in nature but that mankind is always disputing about them and altering them, and that the alterations which are made by art and by law have no basis in nature, but are of authority for the moment and at the time at which they are made."

¹⁰ PLATO, *THEAETETUS* 152 a (Jowett's transl. 1892). Against this statement Plato says emphatically in the *LAWS* 716 c: "God is the measure of all things."

¹¹ For Protagoras' Relativism see GROTE, *ARISTOTLE* 431 (3d ed. 1883); GROTE, *PLATO AND THE OTHER COMPANIONS OF SOCRATES* 325 *et seq.* (1865). See also BEARE, *GREEK THEORIES OF ELEMENTARY COGNITION* 214 *et seq.* (1906).

¹² CATLIN, *THE STORY OF THE POLITICAL PHILOSOPHERS* 30 (1939); FREYTAG, *op. cit. supra* note 9, at 20 *et seq.*; NATORP, *FORSCHUNGEN ZUR GESCHICHTE DES ERKENNTNISPROBLEMS IM ALTERTUM* 22, 47 (1884); PRANTL, *GESCHICHTE DER LOGIK IM ABENDLANDE I* 12 *et seq.* (1855); dissenting, SAUTER, *op. cit. supra* note 6, at 200.

¹³ KELSEN, *GENERAL THEORY OF LAW AND STATE* 396 *et seq.* (1949); KELSEN, *VOM WESEN UND WERT DER DEMOKRATIE* 103 (1929); Kelsen, *Absolutism and Relativism in Philosophy and Politics*, 42 *AM. POL. SCI. REV.* 906, 911 (1948).

early champion of Natural Law. Plato's doctrine of ideas is too well known to merit detailed description. Suffice it to say that for him universal ideas alone have reality; they alone can be the subject of cognition (but perception is not a means to cognition as the Sophists claim); they are permanent, absolute and independent of the changing physical world;¹⁴ they alone have substance (*ousia*), and it is by participation in the general ideas that the phenomena of this world acquire their particular essence and existence.¹⁵ This doctrine is known as exaggerated Realism and is expressed in the medieval formula *universalia sunt ante rem*.¹⁶

A specific application of this doctrine is Plato's theory of Natural Law manifested in his search for justice. The latter is an absolute idea like beauty and good¹⁷ and can be apprehended by those who adhere to the true philosophy.¹⁸ Frequently it is referred to as that which is "by nature just";¹⁹ the Natural Law, in contrast to the conventional and the written law, is described as the juxtaposition of *physis* and *nomos* which traverses the entire Platonic era and beyond.²⁰ The *Republic*, having the search for justice as its main subject, depicts the ideal State in which there is practically no need for laws²¹ because the rulers are at the same time philosophers and, therefore, know what is just.²² That is, they rule by Natural Law. Justice is rather formally defined as the condition of "doing one's own business,"²³

14 Plato's theory of ideas, which is closely linked with his theory of knowledge and his tenet of the immortality of the soul is expressed in CRATYLUS 439 a *et seq.*; PHAEDO 65 b, 67 b; REPUBLIC 514 a *et seq.*; SYMPOSIUM, *passim*; THEAETETUS 186 a *et seq.*; *Timaeus* 29 b, 34 b. In MENO 85 e *et seq.* he develops the theory of innate ideas.

15 "By beauty all beautiful things become beautiful." PHAEDO 100 c.

16 For an excellent, concise but substantial description, see GROTE, ARISTOTLE 553 *et seq.* (3d ed. 1883).

17 PHAEDO 65 b *et seq.*; PARMENIDES 130 b *et seq.*

18 SEVENTH EPISTLE 326 b.

19 REPUBLIC 501 b.

20 See the thorough philological study by HEINIMANN, *op. cit. supra* note 9.

21 REPUBLIC 425 c *et seq.* enumerates the various fields of civil, criminal and procedural law where the need for written laws is denied.

22 REPUBLIC 473 d, 540 a *et seq.*; SEVENTH EPISTLE 326 b.

23 REPUBLIC 433 d.

for if every class and every member of the class does the work assigned him, the entire State will achieve happiness.²⁴ And happiness is the basis of Plato's social ethics. To achieve it, he builds a rigid political hierarchy, static as in all Utopias where no one is permitted to change his place in society. This pattern has been identified with the Natural Law theory as such, and the latter has therefore been marked as authoritarian and reactionary.²⁵ In so doing, the fact has been overlooked that Plato's *Republic* corresponds exactly to his exaggerated Realism as outlined above; it is from his ontology that his exaggerated theory of Natural Law follows. As is well known, in his later works he compromised. Although he holds the government of wise men to be better than that of laws,²⁶ because laws must be general and cannot do justice to the individual case,²⁷ Plato concedes that in the absence of the perfect ruler and because of the imperfection of man,²⁸ laws are necessary.²⁹ Yet, the State where positive law rules is only the second best,³⁰ and the wise statesman can at any time deviate from the written law,³¹ because the written law is only the image of the true law.³² Positive law is the worldly phenomenon of Natural Law and as such is not real. This is why it must serve the general welfare,³³ that is, it must be under the guidance of Natural Law. For apportioning to the citizen that "which according to reason and art is the most just"³⁴ is the one great rule the wise statesman must observe.

²⁴ *Id.* at 420 b *et seq.*

²⁵ Wormuth, *Return to the Middle Ages*, 2 WEST. POL. Q. 202 (1949).

²⁶ STATESMAN 294 a.

²⁷ *Id.* at 294 b, 295 b.

²⁸ This is an anticipation of St. Augustine's thesis that the foundation of the State is caused by the fall of man.

²⁹ STATESMAN 301 d, e; LAWS 874 d, 875 d.

³⁰ STATESMAN 297 e, 301 d; LAWS 875 d.

³¹ STATESMAN 296 d, e; but not arbitrarily: LAWS 714 a *et seq.*

³² STATESMAN 300 c.

³³ LAWS 715 b.

³⁴ STATESMAN 297 a, b. Author's translation; Jowett's translation of this phrase is inaccurate.

II.

Aristotle

When Aristotle attacked the theory of ideas put forth by his teacher Plato, he by no means denied the existence of universals. He only denied their being prior to and separate from particulars. This he did in a negative way by refuting Plato's theory in a number of arguments,³⁵ and in a positive way by advancing his own theory of categories. Of the ten categories he established, he ascribed substance (*ousia*) only to the first one, the concrete individual thing, and placed what according to Plato was the essence of a thing, that is its quality, in the third category.³⁶ It is here that he differs from Plato's teachings.³⁷ For Aristotle, reality belongs to the individual thing or person, and the general idea exists only in or along with the particular.³⁸ This doctrine is fundamentally opposed to Plato's Realism, but it is Realism nevertheless, inasmuch as it does attribute reality to ideas. Therefore, it is called moderate Realism and is expressed in the formula *universalia sunt in re*.³⁹ It is generally recognized today that, in spite of the important differences in their metaphysics, Aristotle throughout his life remained basically a disciple of Plato.⁴⁰

It is therefore not surprising that we find expressions of Positivism as well as Natural Law in Aristotle's writings, although there is no doubt that he is fundamentally a Natural Law theorist and that the few positivistic statements,⁴¹

³⁵ METAPHYSICS 987 b 6 *et seq.*, 990 b 8 *et seq.*, 1028 b 18, 1038 b 6.

³⁶ CATEGORIES, 2 a 11, 2 b 10. See GROTE, ARISTOTLE, c. iii, 67 (3d ed. 1883).

³⁷ GROTE, *op. cit. supra* note 36, App. I, 563.

³⁸ For a full discussion see GROTE, *op. cit. supra* note 36, App. I, 558 *et seq.* Although the authenticity of the CATEGORIES is no longer undisputed, it is recognized that they contain Aristotle's teachings. FREYTAG, *op. cit. supra* note 9, at 89; JAEGER, ARISTOTELES: GRUNDLEGUNG EINER GESCHICHTE SEINER ENTWICKLUNG 45 (1923).

³⁹ METAPHYSICS 1038 b 16 contains the clearest expression of this formula.

⁴⁰ DILTHEY, EINLEITUNG IN DIE GEISTESWISSENSCHAFTEN 258 *et seq.* (1883); JAEGER, *op. cit. supra* note 38, at 404-5; SAUTER, *op. cit. supra* note 6, at 27, with extensive literature.

⁴¹ NICOMACHEAN ETHICS 1129 b 12 (Chase's transl. 1890): "By lawful we understand what have been defined by the legislative power and each of these

like the various contradictory passages in his *Metaphysics*, do not seriously affect his Natural Law doctrine. This theory divides the law of the State into the legal (*nomikon*) and the natural (*physikon*) law, the latter having the same force everywhere similar to the "fire that burns in Greece as well as in Persia." *Physikon* is independent of opinion and reception, whereas individual laws do not rest on nature but on convention and enactment.⁴² Natural Law is also called the universal (*koinos*) law and written law the particular (*idios*),⁴³ a clear parallel to the theory of ideas. It is to the Natural Law that man must — and can, for that matter — appeal when the positive law is insufficient, as is illustrated by Sophocles' *Antigone*: "The law that is neither of today nor of yesterday but eternal and whose origin is unknown," but which, as Aristotle says, all men divine.⁴⁴ Natural Law is sometimes called equitable⁴⁵ and seems to be the source of equity, though not identical to it. The latter is meant to fill the gaps of the written law which is necessarily general and unable to adjust itself to meet every individual case.⁴⁶ In discussing equity as a means to correct the flaws and faults of the written law, Aristotle anticipates a principle of interpretation that has become famous through adoption by one of the most modern civil law codes — that is, the principle that the omission of the written law ought to be filled by ruling as the lawmaker himself would rule if he were present, or as he would have ruled if he had foreseen

we say is just." *POLITICS* 1253 a 37: "Justice is a thing of the state. For the law is the order of the political community, and the law determines what is just." (Author's translation.) Jowett's translation is not correct. See BARTHELEMY-SAINT-HILAIRE 9 (1874): "La justice est une nécessité sociale, car le droit est la règle de l'association politique, et la décision du juste est ce qui constitue le droit." Similar is Rolfe's translation (1921).

⁴² *NICOMACHEAN ETHICS* 1134 b 18-1135 a 15.

⁴³ *RHETORIC* 1368 b 7.

⁴⁴ *Id.* at 1373 b 6, 1375 b 1.

⁴⁵ *Id.* at 1375 a 31.

⁴⁶ *Id.* at 1374 a 26; *NICOMACHEAN ETHICS* 1137 a 31-1138 a 3.

the case at hand.⁴⁷ It is obvious that such a gap-filling rule presupposes an *a priori* principle outside and above the positive law.

III.

The Stoics

Thus far, we have been able to follow Pribram's "Patterns of Thought" without difficulty. Perplexities arise, however, when we come to the Stoics. Their physical theory of the universe was materialistic sensualism; everything, including God and the soul, was matter, and only matter was real. Consequently, sensation was the only source of perception, and the general concepts, of which the Stoics were well aware, could not possibly be real, but existed only in the human mind.⁴⁸ Therefore, the Stoics are held by different authors to have been either nominalists⁴⁹ or conceptualists,⁵⁰ a distinction which is of no particular importance to us as in either case universals are considered unreal. Stoicism imagined the human mind at birth to be a *tabula rasa* on which sense perceptions were impressed as on a wax pad (Zeno, Cleanthes).⁵¹ This theory was revived and popularized by Locke. Through experience and analogy, the Stoics taught, the human mind forms "natural concepts of universals,"⁵² whose truth is confirmed when they are generally recognized.⁵³ Among these, ethical concepts such as good and evil assume a special significance, because it is with reference to them that Chrysippus speaks of "implanted ideas."⁵⁴ This expression caused some scholars to conclude

⁴⁷ NICOMACHEAN ETHICS 1137 b 19. See SWISS CIVIL CODE art. 1, § 2 (1907).

⁴⁸ POHLENZ, *STOA UND STOIKER* 36, 37 (1950).

⁴⁹ PRANTL, *op. cit. supra* note 12, at 416, 427; ZELLER, *THE STOICS, EPI-
CUREANS AND SCEPTICS* 83 (1870).

⁵⁰ De Wulf, *supra* note 3. In accord is STOCK, *STOICISM* 26 (1908).

⁵¹ DAVIDSON, *THE STOIC CREED* 66 *et seq.* (1907); POHLENZ, 1 *DIE STOA*
56 *et seq.* (1948).

⁵² These are called "anticipations" (*prolepsis*); LAERTIUS, *DE VITIS . . .
CLARORUM PHILOSOPHORUM*, VII, i, 54. The statement is attributed to Chrysippus.

⁵³ POHLENZ, *op. cit. supra* note 48, at 38. Also see BARTH, *DIE STOA* 51, 52
(5th ed., Goedeckemeyer, 1941).

⁵⁴ 3 *STOICORUM VETERUM FRAGMENTA* [hereinafter S.V.F.] No. 69 (Arnim
coll. 1903).

that the early Stoics believed in innate ideas, at least in the field of ethics.⁵⁵ It is difficult to see how innate ideas, of whatever content, could have a place in a philosophy of monistic materialism which by its nature denies independent reality to general concepts. The prevailing school of thought,⁵⁶ therefore, holds that, to the Stoics of that period, what was "implanted" was not the concept but the predisposition and ability of the mind to form and develop this concept.⁵⁷ This constituted the theory of the early Stoics whose last representative was Chrysippus (c. 280-c. 208 B.C.). During the Roman period, however, especially with Epictetus, a reversion to Platonism took place and general concepts again assumed the character of innate ideas.⁵⁸ It is doubtful whether one can properly follow the path of Barth⁵⁹ and say that the "natural universals" of Chrysippus are hypothetical ideas. Hypothetical reasoning is characteristic of Nominalism,⁶⁰ self-evident truths are not. However, the "generally recognized" concepts of the early Stoics are not identical to self-evident truths. Their evidence is based on the "general consent of mankind," which is "the index of their truth."⁶¹ Also, there seems to be a certain empirical element in this pattern of thought.

When we examine the Natural Law theory of the Stoics, we find practically no difference from that of Plato or Aristotle. Chrysippus is reported to have said that the law (*dikaion*) is in nature and not in enactment.⁶² He recognized no other origin of justice than God and universal nature.⁶³

⁵⁵ E.g., SAUTER, *op. cit. supra* note 6, at 51.

⁵⁶ BARTH, *op. cit. supra* note 53, at 51; DAVIDSON, *op. cit. supra* note 51, at 69, 70; POELENZ, 1 *DIE STOA* 58 (1941); POELENZ, *op. cit. supra* note 48, at 41; ZELLER, *op. cit. supra* note 49, at 79.

⁵⁷ For details see POELENZ, *GRUNDFRAGEN DER STOISCHEN PHILOSOPHIE* 84, 92 *et seq.* (1940).

⁵⁸ BARTH, *op. cit. supra* note 53, at 197.

⁵⁹ *Id.* at 59.

⁶⁰ PRIBRAM, *op. cit. supra* note 1, at 2, 12.

⁶¹ SENECA, *EPISTLE* 117, quoted by DAVIDSON, *op. cit. supra* note 51, at 69.

⁶² LAERTIUS, *op. cit. supra* note 52, at 128; 3 *S.V.F.*, *op. cit. supra* note 54, No. 308.

⁶³ 3 *S.V.F.*, *op. cit. supra* note 54, No. 326.

Later Cicero elaborated on Stoic teachings. Positive law, as he illustrates in detail, is by no means always just; ⁶⁴ as a matter of fact, it is frequently most unjust, and the only means of distinguishing between good and bad laws is the rule of nature. ⁶⁵ The "true law is right reason, in agreement with nature, diffused among all men, unchanging and eternal." ⁶⁶ All of these statements could have been made by Aristotle or even Plato. Some of the Stoic doctrines became part of the Roman law and were incorporated in Justinian's *Corpus Iuris Civile*. ⁶⁷

IV.

Consistencies and Inconsistencies

Are we, then, to conclude that our basic pattern, Nominalism and legal Positivism on the one hand, Realism and Natural Law on the other, is impaired? As for the early Stoics, the answer is in the affirmative. They confront us with a nominalistic epistemology which, with the help of implanted but not innate ideas, produces a genuine Natural Law doctrine. It is patent that, from the standard of strict consistency, the two areas of their philosophy are incompatible. This fact — and the prevailing influence of Platonism — is perhaps the reason why the later Stoics replaced the general concepts with innate ideas, thus returning to Platonic Realism. For while the belief in innate ideas is not essential to Realism, that is, to moderate Realism as the examples of Aristotle and Thomas Aquinas show, the mere existence of this belief categorically excludes Nominalism. The Stoic attempt to reconcile a nominalistic epistemology and a realistic theory of Natural Law was repeated by Locke whose theory

⁶⁴ CICERO, I DE LEGIBUS 15, 42; 3 S.V.F., *op. cit. supra* note 54, No. 319.

⁶⁵ CICERO, I DE LEGIBUS 16, 43; 3 S.V.F., *op. cit. supra* note 54, No. 321.

⁶⁶ III DE RE PUBLICA 33; 3 S.V.F., *op. cit. supra* note 54, No. 325.

⁶⁷ The Roman definition calls jurisprudence the *divinarum atque humanarum rerum notitia*. See ULPIAN 1, I REGULARUM; [Justinian] DIGEST I, 1, 10, 2; [Justinian] INSTITUTES I, 1, 1. See Chroust, *The Function of Law and Justice in the Ancient World and the Middle Ages*, 7 J. HIST. OF IDEAS 298, 307 n.29 (1946). In DIGEST I, iii .2, the jurist Marcianus expressly refers to Chrysippus.

of knowledge is nominalistic,⁶⁸ while his Natural Law doctrine is *a priori* and rationalistic.⁶⁹ Such occasional contradictions, however, do not vitiate Pribram's basic pattern of division which can be traced throughout the Middle Ages. Here the Natural Law theory reached its climax with Thomas Aquinas⁷⁰ whose theory of knowledge is in complete agreement with Aristotle's moderate Realism.⁷¹ In William of Ockham, a nominalist,⁷² on the other hand, the Positivism of the Middle Ages finds its renewed expression, not in the *denial* of Natural Law, but in its thesis that Natural Law has its derivation from the will of God as a mere divine command independent of reason.⁷³

A discussion of the place which Soviet Russia holds in the struggle between Natural Law and Positivism would require a more thorough investigation than is possible within the scope of this paper. As Pribram points out, dialectic materialism, the official Soviet pattern of thought, has a strong affinity to Realism.⁷⁴ Although denying the existence of innate ideas, this school affirms the ability of the human mind to grasp absolute truth and to understand the operation of antagonistic forces in the universe and in human society. One can readily appreciate how such ideology would help to build a social structure where an élite makes the law

⁶⁸ Universals "belong not to the real existence of things but are the inventions and creatures of the understanding." LOCKE, 3 ESSAY CONCERNING HUMAN UNDERSTANDING 3, 11 (1824). See also 2 ESSAY ON HUMAN UNDERSTANDING 9, 11 (1824). But see GIBSON, LOCKE'S THEORY OF KNOWLEDGE 322 (1917); SABINE, A HISTORY OF POLITICAL THEORY 529 (1950); Simon, *John Locke*, 45 AM. POL. SCI. REV. 390, 398 (1951).

⁶⁹ LOCKE, THE SECOND TREATISE OF CIVIL GOVERNMENT XI 135 (1690). This treatise was written several years prior to his ESSAY CONCERNING HUMAN UNDERSTANDING.

⁷⁰ ST. THOMAS, SUMMA THEOLOGIAE, I. IIae, quaest. 91, art. 2, quaest. 94, quaest. 95, art. 4.

⁷¹ *Id.*, I. Iae, quaest. 84, art. 3.

⁷² Cf. Turner, *William of Ockham*, 15 CATH. ENCYC. 636 (1913). The medieval formula for Nominalism is *universalia post rem*.

⁷³ GIERKE, POLITICAL THEORIES OF THE MIDDLE AGE 173 (Maitland's transl. 1938); SABINE, *op. cit. supra* note 68, at 306.

⁷⁴ PRIBRAM, *op. cit. supra* note 1, at 36 *et seq.*

according to its own idea of justice.⁷⁵ This "élite situation" will be even more necessary after the state has "withered away" — a Marxist-Leninist ideal which, although indefinitely postponed in 1939,⁷⁶ has not been entirely abandoned, at least not in theory. Russian legal tradition to be sure, like 19th and 20th century German legal thought, has been positivistic.⁷⁷ But the very fact that the validity of Soviet laws is conditioned upon the consent of the Party⁷⁸ and that the politically suspect are outside the pale of law and left to the mercy of the secret police reveals the rule of a distorted "equity" in the Aristotelian sense.

V.

The Case against Positivism

Many contemporary students of the problem discussed in this paper, unless they chance to be followers of Thomas Aquinas, will give preference to the nominalistic school. This does not mean, however, that they will want to discard justice as an essential part of law. The ramifications of Kelsen's "pure theory of law" as treated below seem to make some supra-legal, though not extra-judicial, standard imperative. Furthermore, some of the reproaches leveled at the Natural Law theory by Kelsen are unwarranted.

In the first place, positivist identification of Natural Law with authoritarianism must be refuted. Wormuth's separation of Natural Law from the doctrine of natural rights⁷⁹ is untenable. Although Natural Law philosophers have frequently used their doctrine in favor of the powers that be, it is also true that from the time of the Stoics the claim for

⁷⁵ Cf. MOORE, *SOVIET POLITICS: THE DILEMMA OF POWER; THE ROLE OF IDEAS IN SOCIAL CHANGE* 236 (1950).

⁷⁶ *Id.* at 224; PRIBRAM, *op. cit. supra* note 1, at 48.

⁷⁷ SCHLESINGER, *SOVIET LEGAL THEORY, ITS SOCIAL BACKGROUND AND DEVELOPMENT* 3, 243 (1945).

⁷⁸ *Id.* at 245.

⁷⁹ Wormuth, *supra* note 25, at 203.

equality and human rights has been part of Natural Law.⁸⁰ Medieval law, which was Natural Law, implied not only support of, but also limitations upon, the ruler, thus protecting ruler and ruled alike.⁸¹ It even developed an elaborate doctrine of the right to resist the ruler who overstepped his limitations.⁸² Furthermore, it is difficult to understand how one can deny that individual rights have emerged from Natural Law.⁸³ In Locke's *Second Treatise of Civil Government*, Natural Law and individual human rights are combined, and Locke directly influenced the authors of the Declaration of Independence⁸⁴ as well as earlier American political writers.⁸⁵ The reference in the famous passage of the Declaration to "self-evident truths" clearly indicates the impact of *a priori* thinking. The Natural Law doctrine underlying the American Revolution may be "unscientific," but no one can dispute that it has made history.

As for Kelsen's attacks,⁸⁶ it must be submitted that his own "theory of pure law" stands on questionable grounds. According to his teachings, positive law derives its authority not from its mere existence — since it has no substantive justification — but from the existence (legitimate or illegitimate) of the lawmaker, whose authority is delegated from the "original constitution."⁸⁷ This presupposed "original

⁸⁰ Cf. [Justinian] *INSTITUTES* I, ii, 2: "Iure enim naturali omnes homines ab initio liberi nascebantur."

⁸¹ Kern, *Recht und Verfassung im Mittelalter*, 120 *HISTORISCHE ZEITSCHRIFT* 45 *et seq.* (1919).

⁸² KERN, *GOTTESGNADENTUM UND WIDERSTANDSRECHT IM FRUHEREN MITTELALTER* (1914) *passim*.

⁸³ Cf. CATLIN, *op. cit. supra* note 12, at 274; LAUTERFACHT, *INTERNATIONAL LAW AND HUMAN RIGHTS* 73-89, 95 *et seq.*, 111 *et seq.* (1950).

⁸⁴ WRIGHT, *AMERICAN INTERPRETATIONS OF NATURAL LAW* 10 (1931).

⁸⁵ *Id.* at 46, 65 *et seq.* See also *id.* at 329, 330 and 341, where Wright speaks of the individual rights phase of natural law.

⁸⁶ Kelsen's monograph, *Die philosophischen Grundlagen der Naturrechtslehre und des Rechtspositivismus* (1929), can be found in 1 *20TH CENTURY LEGAL PHILOSOPHY SERIES: KELSEN, GENERAL THEORY OF LAW AND STATE* 391 (Wedberg's transl. 1945); Appendix, *Metamorphoses of the Idea of Justice* in *INTERPRETATIONS OF MODERN LEGAL PHILOSOPHIES* 390 *et seq.* (Sayre ed. 1947); Kelsen, *The Natural Law Doctrine before the Tribunal of Science*, 2 *WEST. POL. Q.* 481 (1949).

⁸⁷ Kelsen, *Die philosophischen Grundlagen der Naturrechtslehre und der Rechtspositivismus* (1929), found in 1 *20TH CENTURY LEGAL PHILOSOPHY SERIES: KELSEN, GENERAL THEORY OF LAW AND STATE* 396 (Wedberg's transl. 1945).

constitution" or "basic norm" must be something similar to Aristotle's "unmoved mover," an *a priori* before which there was nothing.⁸⁸ Compared to this notion, Plato's "real ideas" do not seem far beyond comprehension. Inasmuch as Kelsen considers valid any positive law that stands the test of delegation,⁸⁹ he renounces the legal, though not the moral, right to protest unjust laws. This is because the concept of an "unjust law" has no meaning in Positivism. However, there exists no objective standard of good and evil outside the positive law,⁹⁰ and if justice is an irrational ideal,⁹¹ then, to cite only one absurd consequence, men and women who married in violation of the racial laws of the Nazis should have been barred from entrance into the United States — for in the eyes of the government from which they had fled, they were common criminals. Augustine's famous comparison of the State without justice to a robbers' gang⁹² is certainly lost to the disciples of Positivism.

The "pure theory of law" also leads to rather unsatisfactory results in the interpretation of law. If it is true that no legal criterion exists for finding the right interpretation of a norm the meaning of which is ambiguous,⁹³ then the decisions of judges are primarily political in nature.⁹⁴ This deprives the legal scholar — whose task it is to interpret the law — of the function and authority he has had throughout the centuries. The unfortunate results of such a

⁸⁸ It should be noticed that this source of validity is missing in international law. The source of the latter is seen in Christian Wolff's *civitas maxima*, whose nature Kelsen admits to be of Natural Law character; cf. his *DAS PROBLEM DER SOUVERAENITAET UND DIE THEORIE DES VOELKERRECHTS* 252 (1928).

⁸⁹ Kelsen, *supra* note 87, at 394.

⁹⁰ For an extensive rejection of this opinion see Bodenheimer, *The Natural Law Doctrine before the Tribunal of Science: A Reply to Hans Kelsen*, 3 WEST. POL. Q. 335, 345 *et seq.* (1950).

⁹¹ Kelsen, *supra* note 87, at 13; *Metamorphoses of the Idea of Justice in INTERPRETATIONS OF MODERN LEGAL PHILOSOPHIES* 397 (Sayre ed. 1947).

⁹² ST. AUGUSTINE, *DE CIVITATE DEI* IV, 4. See also CICERO, *DE LEGIBUS* I, 15, 42 in 3 S.V.F., *op. cit. supra* note 54, No. 319.

⁹³ Kelsen, *The Pure Theory of Law*, 50 L.Q. REV. 474, 525 (1934), as quoted by Bodenheimer, *supra* note 90, at 341 n.22.

⁹⁴ Kelsen, *THE LAW OF THE UNITED NATIONS* xiii *et seq.* (1950).

polity can be seen in Kelsen's statements on the Charter of the United Nations. His commentary, certainly the work of a great scholar, loses much of its potential value through its underlying theory of interpretation.⁹⁵ Any person who has practiced law either as an attorney or as a judge, knows that a decision based on "right reason" is more important to the parties concerned — and it is for them that the law exists — than a masterly opinion written in a learned and literary style. In continental Europe the ability to reach a decision based on "right reason," that is, to see where justice lies in a given case, is called *iudicium*; and the quality of a lawyer, especially while he is studying the profession, is judged according to his *iudicium*. This is not an irrational or arbitrary state of mind, but rather an inherent characteristic of any good jurist who must find a just solution to the case. True, it presupposes the existence of justice and the possibility of its realization, however imperfect in this imperfect world of ours.⁹⁶

Positivists have repeatedly claimed that the concept of justice in Plato, Aristotle and throughout the Hellenistic and medieval periods, whenever defined, had no significant content.⁹⁷ As far as classical definitions are concerned, this criticism is certainly justified in view of the fact that this concept had to be stated in its worst generalized form. However, this does not mean that Natural Law has no content whatever. Medieval and modern authors,⁹⁸ have tried to formulate, in detail, the law that is "natural" to all civilized

⁹⁵ *Ibid. passim*. Kelsen's frequent conclusions, "the opposite interpretation is not excluded" or "not impossible" (e.g., *id.* at 369, 391) without giving definite preference to one or the other leave the reader in mid-air. For Kelsen's viewpoint that justice is a political concept, see *id.* at 478, 527.

⁹⁶ "I like to think that I never impose either a light sentence or a heavy sentence, but rather a just sentence within the framework of the facts in this case." Federal Judge Irving R. Kaufman in the Rosenberg-Greenglass case, N. Y. Times, April 7, 1951, p. 6., col. 6.

⁹⁷ Kelsen, *Metamorphoses of the Idea of Justice* in INTERPRETATIONS OF MODERN LEGAL PHILOSOPHIES 395 *et seq.* (Sayre ed. 1947).

⁹⁸ E.g., ST. THOMAS, *SUMMA THEOLOGIAE*; MESSNER, *DAS NATURRECHTS* (1950). The same can be said of BRUNNER, *JUSTICE AND THE SOCIAL ORDER* (Hottingen's transl. 1945).

men.⁹⁹ There is, however, one general concept of a very definite substance that stands out in the present struggle between East and West: the dignity of individual man. If this ancient Natural Law concept is recognized and accepted by all nations, millions will no longer languish in labor camps, nor will people be shipped in cattle cars at the whim of governments. The Declaration of Human Rights¹⁰⁰ is a step toward the realization of justice. No "Tribunal of Science" can minimize the momentousness of this modern document of Natural Law.

VI.

Conclusion

The utter helplessness in which Positivism had placed German jurisprudence at the time Hitler came to power has at last been recognized by German scholars. The late German legal philosopher, Gustav Radbruch, stressed the necessity of recognizing a "supra-legal law" in the light of which the arbitrary and inhuman features of Nazi legislation would retroactively be regarded as never possessing the force of law.¹⁰¹ Such a proposition is by no means of mere theoretical significance. Jurisprudence, he said on another occasion, ought to remember the age-old wisdom of antiquity, the Middle Ages and the Enlightenment — that there is a Natural Law under which "wrong remains wrong even though it assumes the form of a law."¹⁰²

B. F. Wright, in his excellent study of the application of Natural Law by American thinkers, indicated:¹⁰³

In order to prove that Natural Law is an outworn or harmful concept it is necessary to do more than demonstrate that it has sometimes been used harmfully. . . . It is necessary

⁹⁹ For a brief discussion of some fundamental rules see Bodenheimer, *supra* note 90, at 346 *et seq.*

¹⁰⁰ General Assembly of United Nations, Doc. A/810 (Dec. 10, 1948).

¹⁰¹ RADBRUCH, *VORSCHULE DER RECHTSPHILOSOPHIE* 108 (1947).

¹⁰² Radbruch, *Die Erneuerung des Rechts* in *DIE WANDLUNG* 8 *et seq.* (1947).

¹⁰³ WRIGHT, *op. cit. supra* note 84, at 343.

to show that political philosophy has no need of a concept which is expressive of standards of rights and justice other than, perhaps higher than, those set forth in the positive laws. . . .

Positivism still owes us this proof.

The dispute over universals has quieted down with the passage of time. The concept of innate ideas and even the moderate Realism of Aristotle and Thomas Aquinas may not appeal to many contemporary students of political thought. But the need for a modern theory of Natural Law, on whatever logical basis, is as great as ever. Perhaps the Stoic compromise of Nominalism with its implanted ideas was not so unreasonable after all.

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