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THE RELATION OF NATURAL TO POSITIVE LAW

IN GENERAL. The distemper of modern legal philosophy may be traced in large part to a lack of precision in the ideas advanced by its several schools. The literature of the subject abounds in such terms as "tendency" and "approach," and such phrases as "laws which may be broken," "ought propositions" and even "law stuff." While a great deal of this may be unavoidable in the present state of human knowledge, the situation has nonetheless prevented the formulation of definite issues (between conflicting theories) and has made it difficult for the theories themselves to be experimentally tested. In this brief essay, we shall attempt to set forth what we consider the most convenient definitions of two elementary terms, positive law and natural law, attempting to employ language sufficiently definite to indicate the extent to which the two laws are similar and the precise way in which they differ. Only by doing this can we hope to draw the issue between them, and to simplify the study of instances in which the contents of the two laws conflict — the so-called problem of "unjust" positive law.

Let us begin on a modest scale. Instead of attempting at the outset to formulate a definition of "law," either natural or positive, it is preferable to limit ourselves to the study of a simple "right-duty" relationship, as the term is employed in the Hohfeld system of legal analysis. For many purposes the word "claim," suggested by Kocourek, would be preferable to the word "right". But because "right" is a term equally at home either in positive or in natural law, whereas "claim" has been confined predominantly to discussions of positive law alone, the Hohfeld terminology will be used in this discussion. We shall therefore endeavor to distinguish a positive or "jural" right (as the term appears in positive law) from the corresponding "natural" right (as the term appears in natural law).
A “right” itself, whether appearing in the positive or in the natural law, may be defined as a legal authority to require a positive or negative act of another person. It is, of course, elementary that the other person is under a correlative “duty” to perform the act in question at the behest of the holder of the right; and that the entire concept “right-duty” is one indivisible relationship. Nevertheless, for our present purposes, it will suffice to consider the relationship solely from the standpoint of the “right.” Proceeding from the definition of a “right” in general, we shall endeavor to suggest the most convenient criteria by which the genus “right” may be subdivided into species and, specifically, by which some rights may be classed as positive or “jural” while others are classed as “natural.”

The Distinction Proposed. We have defined a right as an authority to require a positive or a negative act of another person. The meaning of this definition can be better understood if we recall John Dewey’s observation “a thing is what it does,” and endeavor to see how a right actually operates in practice. Let us consider, for example, a typical right of property, the right of the owner of a marble statue to insist that a non-owner leave the statue alone. This right means that if the non-owner violates his duty and, let us say, destroys the statue, he will be penalized and the owner will be compensated. In the beautiful language of Justice Holmes “A legal duty so called is nothing but a prediction that if a man does or omits certain things he will be made to suffer in this or that way . . .; and so of a legal right.”

Now the foregoing description of a right is applicable to any right, whether jural, natural or otherwise. It is submitted that the true distinction between the various classes of rights will be found to turn upon the way in which the pre-

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1 “Collected Legal Papers” by Oliver Wendell Holmes, Jr., (1920) at page 169.
2 It is true that Holmes, in the foregoing quotation, was discussing jural rights, as also in his famous statement: “What the courts do in fact, and nothing more pretentious is what I mean by law (italics supplied).” But the reasoning is of general applicability.
dicted consequences come about, i.e., the type of sanction which operates if the right is violated. For example, if the non-owner of the statute, upon violating his duty and destroying the statue, will be punished by the state, then the right in question is a positive or "jural" right. If he will be punished by the operation of an invariant principle in nature (under which merit always finds its proper reward) then the right in question is a "natural" right. There are, of course, many other possible types of "right," but these two, jural and natural, are of such unique importance that we will confine ourselves to them in the more detailed discussions which follow.

A Natural Right. We have described a natural right as a right sanctioned by a uniform way in which, in nature, certain human acts are always followed by certain effects. It is a law of cause and effect, like any other, except that its terms are not confined to volumes, masses and such like physical qualities, but contain also the mental qualities, volition and preference. Of course, whatever relationship actually exists between act and effect is the natural right. But the regnant theory of natural rights tends to teach rather definitely what the relationship is. It teaches, for example, that human exertion and sacrifice will, inevitably, be accompanied by an increased state of well-being or, in other words, by the satisfaction of a larger proportion of one's preferences. Philosophers of a mathematical turn of mind have suggested that one's ultimate well-being is proportioned to his exertion with the exactness of an algebraic equation, under a principle which preserves the result of every volition as inexorably as the influence of every physical atom is preserved by the "law of substance" or the principle of the conservation of mass and energy. Indeed, these two laws (the material world exhibiting the one, and the other operating in the mental) have been considered as altogether parallel principles which have perhaps a common origin and may even, in some future coup of science, be resolved into a higher unity. Both serve to outlaw the element of chance
and, by confirming the regularity of all nature, carry to its furthest development our human confidence in the perfect order of the world.

The argument for the existence of such a principle in the moral world is advanced by its proponent in much the same manner as Helmholtz argued for the acceptance of the physical law of substance. Experience seems to confirm it where it can be tested, and thus suggests its acceptance even where it cannot be tested. It is an inductive proposition. Thus it is pointed out that individuals who injure their neighbors are beset by fear, by remorse, and by ill fortune in unrelated matters; and that individuals who do good meet with inward satisfaction, outward acclaim, and by good fortune in many ways. The wholehearted acceptance of this belief by the average man is sufficiently proved by the observation that no theatrical production or work of literature in which the villain triumphed would be thought of for a moment as true to life. Examples of the acceptance of this belief in intellectual circles are endless; and on at least one occa-

3 The positive law itself is, of course, a part of nature, and therefore one of the factors which operate in the enforcement of natural relations.
4 "He who wishes to secure the good of others has already secured his own." —Confucius.
"Pain is the outcome of Sin."—Buddha.
"No evil is without its compensation. —The less money, the less trouble, —the less favor, the less envy. —Even in those cases which put us out of wits, it is not the loss itself, but the estimate of the loss that troubles us."—Seneca.
"All advantages are attended with disadvantages. —A universal compensation prevails in all conditions of being and existence."—Hume.
"Fear follows crime, and is its punishment."—Voltaire.
"When fate has allowed to any man more than one great gift, accident or necessity seems usually to contrive that one shall encumber and impede the other." —Swinburne.
"Guilt, though it may attain temporal splendor, can never confer real happiness. The evident consequences of our crimes long survive their commission, and, like the ghosts of the murdered, forever haunt the steps of the malefactor."—Walter Scott.
"Though the mills of God grind slowly, yet they grind exceedingly small."—F. Von Logan in "Retribution" (translated by Longfellow).
"When Infinite wisdom established the rule of right and honesty, he saw to it that justice should always be the highest expediency."—Wendell Phillips.
"Whatever difference may appear in the fortunes of mankind, there is, nevertheless, a certain compensation of good and evil which makes them equal."—Roche-foucauld.

Such references occur in the Bible almost without number. The following are probably best known to the general reader: "He that diggeth a pit, shall fall into
sion it has been compared to the principle of contradiction. Even where it seems to fail, as in the case of tragedy, its proponents argue that in reality the fault lies in the incompleteness of our observations.

The old physical law of conservation of mass, and its counterpart, the law of conservation of energy, were originally formulated under the impression that the world of mass had been sharply divided from that of energy, so that neither substance could be transmuted into the other. But when this seeming isolation of the two material worlds was shattered by the discovery that mass can be converted into energy and can in turn reappear when the energy is spent, the two laws lost their independent validity and became merged in a more profound principle of truth. In much the same way, modern students of ethics are beginning to suspect that while there is, in this existence, a rough principle of compensation by which men tend to meet their just reward, still this principle is imperfect, like the old law of mass. To formulate the correct principle we must look also to a future existence, a world of reward and punishment which keys in with our present world of good and evil. The two states, taken together, make possible a completeness of life which neither by itself contains, and furnish a system in which the natural law can be observed in all its meticulous exactness.

There is, however, a very respectable body of opinion which argues that natural law, as we have defined it, does not exist; that not only is there no exact principle proportioning man's well-being to his voluntary exertions, but that

it: and he that roileth a stone, it shall return to him." Proverbs xxxvi, 27. "They shall sow wind, and reap a whirlwind." Hosea viii, 7. "All those who take the sword will perish by the sword." Matt. xxvi, 52. "What a man sows, that he will also reap." Gal. vi, 8. And note the famous comment of Saint Paul with further reference to this topic, "Now he who plants and he who waters are one, yet each will receive his own reward according to his labor." 1 Cor. iii, 8.

5 "It is as impossible for a man to be cheated by anyone but himself, as for a thing to be, and not to be, at the same time." From "Compensation," by Ralph Waldo Emerson.
there is no such principle of any kind — at least no such principle of sufficient constancy to serve as a practical guide. This point of view is shared apparently by many legal positivists and by some members of the modern school of legal realism. It does not deny that there are certain physical laws of cause and effect which correlate human acts (and thereby the human individual) with physical nature; but it does deny, apparently that there is any such correlation of mental elements such as volition and preference. The implications of this viewpoint we shall consider hereafter.

Assuming for the moment that an invariant principle does exist, proportioning man's well-being to his exertions, let us consider its operation in practice. Under this principle a sculptor who exerts himself through labor and toil to produce a work of art, let us say a marble statue, may confidently expect to have a greater proportion of his preferences satisfied than will be the case of a stranger who does nothing. Therefore, when a question arises concerning the disposition of the completed statue, if it is disposed of in accordance with the preferences of the sculptor rather than in accordance with the preference of the stranger, the expected has happened and no repercussions are to be anticipated. But if, on the contrary, the stranger disposes of the statue in accordance with his own preference rather than the preference of the sculptor, the sculptor will be compensated in some other way and the stranger will be penalized. This is expressed in legal terminology by saying that the sculptor has a natural right that the stranger should not interfere with the statue.

The Position of the Extreme Scholastic. The doctrine of natural law, as set forth in the preceding paragraph, will probably meet with the approval of the great majority among those who adhere to the scholastic point of view. But scholasticism normally goes a step further and attempts to explain why the natural law exists. It teaches that the natural law has come about as follows: The Deity has bestowed certain rights upon the individual man, and has promul-
gated certain commands in order to secure the observance of these rights. These commands are said to be "binding in conscience" in the sense that they impose an "ought" relation altogether apart from and independent of any sanction which may enforce them.

One need not at all dissent from the truth of this position to argue that it contributes nothing to our understanding of natural law — that it is, on the contrary, somewhat confusing. Granted that the Deity may be the author of natural law, He must be considered equally the Author of all natural constants, e. g., the law of gravitation and the Newtonian laws of motion. All laws of nature, whether physical or moral, stand at last on the same footing. Religion will argue that the Deity is the Author of all; while non-believers will purport to find the common source in mysterious "world forces," or not at all. But no one will argue that the Deity supports the moral law in some way separate and distinct from the way in which He supports physical law. And if the Deity supports both laws, why stress His participation in the moral law?

It is impossible not to pause here to suggest that natural law theory stands to benefit if it refrains from any controversy as to how the natural law comes to be. When originally promulgated by Aristotle, and even when put into final form by St. Thomas Aquinas, in the thirteenth century, natural law theory was handicapped by the limited develop-

6 "From psychology and theodicy, Natural Law took over as postulates the existence of a creator, a rational spiritual soul, consciousness and free will. - - - Man is thus de jure and free. He has certain fundamental duties and rights given him by God which no man has a right to destroy."—"Natural Law and Legal Realism" by Francis E. Lucey, S.J., Georgetown Law Journal, April 1942. Volume 30, No. 6, Page 524.

7 "—in considering objectively what a thing is in itself, it may be of the utmost importance to know where it came from and the manner in which it is revealed to us. But it would be helpful to clear thinking if these matters were discussed separately and excluded from the definition."—"Natural Law in American Jurisprudence," by William P. Sternberg, 13 Notre Dame Lawyer 89, January 1938.

8 "The rule of dramatic poetry, not to introduce a God upon the stage unless a crisis appears demanding the Divine intervention, should be the rule of philosophy also:

ment of science which then obtained. Law, as the derivation of the word suggests, was thought of as something laid down by authority — something imposed in the same way upon matter and upon man. Since then the classic observation of David Hume (1711-1776) has taught us that experience is limited to the orderly progression of events, and cannot discern the ultimate forces or powers which lie behind phenomena. This lesson has been taken to heart in the physical sciences where the old concept of force is now completely overthrown. It has been taken to heart, too, within the last fifty years, by some few exponents of the positive law. And it can be safely trusted to deal fairly with natural law.  

A JURAL RIGHT. We have described a jural right as a right sanctioned by the uniformity with which the State attaches certain consequences to certain acts. For example, if a stranger were to destroy the statue, which we have been employing in our illustration, the state would require him to pay to the sculptor a sum of money equal to the statue in value. This is expressed in legal terminology by saying that the sculptor has a "jural right" that the stranger shall not destroy the statue.

9 From the Greek word lego, to lay. Later forms are the Latin lex, and the Anglo Saxon leogan.

10 "The 'laws of nature', by those who first used the term in this sense, were viewed as commands imposed by the Deity upon matter, and even writers who do not accept this view often speak of them as 'obeyed' by the phenomena, or as agents by which the phenomena are produced."—The Oxford Dictionary, Volume 6, Page 115, Law, 17.

11 The failure of natural law to take the lead in this development seems to lie largely in the history of human thought. In the antique world laws were thought of as uniformities imposed by power. The laws of natural science were thought to be imposed upon matter by mysterious "forces" of nature, the positive law was thought to be imposed upon men by a sovereign, and the moral law was thought of as a set of rules imposed by God. Of course no one really believed that these three phenomena were really supported by separate powers. But the moral law, being developed by religious teachers, naturally stressed the authority of God, while the positive law stressed the more immediate authority of the state.

After David Hume pointed out, in 1740, that ultimate causes are not discoverable by experience, natural science ceased to concern itself with them since they cannot be subjected to its tools; religion continued to emphasize them, because of their undoubted existence and importance. Positive law, finding itself between two conflicting points of view, has had great difficulty in arriving at a satisfactory compromise.
There is no dispute as to how jural rights are sanctioned, because the machinery of the state is in the ordinary instance direct and obvious; nor is there any serious body of opinion which would argue that jural rights do not exist. Sporadic attacks on the "certainty" of positive law are in effect attacks upon its existence; for of course the essence of law is uniformity, and complete uncertainty would be complete absence of all law. But no sustained argument of this sort has appeared in the last decade.

The Weakness of Positivist Theory. There is little that can be said in opposition to positive law. It seems clearly to exist, and while it may not be as far reaching as some might wish, may be somewhat uncertain in its statement and inconsistent in its provisions, it is yet theoretically impregnable. If the proponents of positive law were to rest here, they might rest beyond the reach of controversy.

There is, however, a tendency among them to go further and actually enter the lists against natural law. Kelsen, for example, considers justice an "irrational ideal" and practically calls natural law "a wishfulfilling fantasy;" and Holmes states with consummate honesty, "The jurists who believe in natural law seem to me to be in that naive state of mind that accepts what has been familiar and accepted

13 The last such attack of any consequence was probably advanced by Jerome Frank in his controversial book "Law and the Modern Mind" which appeared at the close of the 1920's. There Justice Frank seemed to take the position that there was practically no uniformity in existing positive law.
14 "The Pure Theory of Law" by Hans Kelsen, 50 Law Quarterly Review 474, 482 (October 1934). And note how Kelsen, along with others, with telling effect, argues that because natural laws have not been formulated in detail, they do not exist. This was the argument used against chemistry before Lavoisier and against astronomy before Newton. It is an argument of great apparent power. See "The Pure Theory of Law and Analytical Jurisprudence" by Hans Kelsen, 55 Harvard Law Review, 44, 47 (November, 1941). "But none of the numerous natural law theories has so far succeeded in defining the content of this just order in a way even approaching the exactness and objectivity with which natural science can determine the content of the physical laws of nature, or jurisprudence the content of any given positive legal order."
15 "The Law as a Specific Social Technique" by Hans Kelsen, 9 University of Chicago Law Review 75, 78. (December, 1941).
by them and their neighbors as something that must be accepted by all men everywhere.” 16 Nor do these authorities stand alone. It is hardly an exaggeration to state that legal positivism, legal realism, the pure theory of law and perhaps all recent theories generally, have been associated in practice with the active denial of natural law. And therein lies their great weakness: For it leads them inescapably to the doctrine that might makes right. It is quite clear that a jural right or duty is simply a statement as to what the state will do to individuals if they act thus and so, and that the state in turn is simply our fellow human beings 17 acting jointly, and therefore acting as the majority or the dominant group desire. These considerations show that the content of positive law depends upon the will of the majority and upon nothing else. 18 When the majority changes its mind, or when physical power shifts from one group to another, the positive law changes. No objective criterion, no standard of merit, 19 can stand in the way. 20 It is just the expression of might and, as such, is indistinguishable from tyranny.

Thus there is no denying that in Warsaw today (1942) it is the jural right of Aryan citizens to heap untold indignities upon those of Polish blood; and it is the jural duty of Poles

16 “Collected Legal Papers,” by Oliver Wendell Holmes, Page 312.
17 “Why do we feel at liberty sometimes to denounce a regularly enacted statute as wrong, tyrannical, and unjust? It is because it is but the product of the will of one or a few men, and is liable to be affected by the ignorance, passion, and error to which their judgments are subject.” “Law, Its Origin, Growth and Function,” by James Carter Coolidge, Page 159.
18 “—when it comes to the development of a corpus juris the ultimate question is what do the dominant forces of the community want and do they want it hard enough to disregard whatever inhibitions may stand in the way.”—“Book Notices, Uncollected Letters and Papers” by Oliver Wendell Holmes, Jr. (1936) page 187.
19 “I suppose, in the mind of men, the idea of a supreme law that attaches happiness to virtue, unhappiness to crime. Omit the idea of this law, and the judgment of merit and demerit is without foundation.”—“Lectures on The True, The Beautiful, and the Good,” by M. V. Cousin, at Page 320.
20 Note how all standards are expressly repudiated by a great positivist. “Our morality seems to me only a check on the ultimate domination of force—. When the Germans in the late war disregarded what we called the rules of the game, I don’t see there was anything to be said except: we don’t like it and shall kill you if we can.”—“Book Notices, Uncollected Letters and Papers” by Oliver Wendell Holmes, 187 (1936).
to submit. This is the positive law. Were an order to be promulgated in Berlin, making citizenship depend upon the killing of a Jew, that, too, would be the law: And it would be perfectly valid in every sense.\[21\] If there be no natural law, it is not even unwise for a dominant race to legislate away the property and life of a subject people. It may be, on the contrary, the obvious measure of enlightened self-interest.

Quite understandably, these conclusions (which follow irresistibly from a denial of natural law) shock the conscience of the civilized world. And there is no escape from them. It signifies very little to point out that individual scholars, although denying the existence of natural law, privately support ideas of justice, of mercy, and even generosity. The fact remains that their doctrines (if logically pursued) would lead to a law of the jungle, — to the very worst examples of those arbitrary forms of government which now rear their heads in central Europe. The failure of the extreme positivists to pursue their belief to that point betrays a weakness in their faith. Their hesitation belies their doctrines; but it doesn’t redeem it. The hands are “the hands of Esau,” though the voice may yet speak as “the voice of Jacob.”

**The Meaning of Unjust Law.** But suppose that the proponents of positive law and the proponents of natural law were each content to lay aside the controversial factors which have been ingrafted on their respective doctrines. Suppose that the positivists were to drop their attack on natural law and to admit that individuals who do “right” (i.e., enhance the well-being of their fellow men) really receive a proportionate reward by the inexorable operation of an invariant natural rule. Suppose, too, that the Scholastics were to be satisfied with this concession, and were

\[21\] For a contrary opinion see “Natural Law and Legal Realism” by Francis E. Lucey, S.J., Georgetown Law Journal, April 1932, Volume 30, No. 6, Page 515. “While the realists’ theory demands that all law is completely and absolutely changeable, because there are no ultimate objective values or norms, I doubt that any of them would say that at some time in the future murder, arson, fraud, slander, etc., would be, or could be, pre-requisites for citizenship.”
content with the fact of natural law without insisting upon imputing it to any source, Divine or otherwise. What then would be the relationship of natural to positive law?

It will be helpful here to proceed by considering an illustration, perhaps again the case of the sculptor who creates a valuable statue out of a worthless piece of stone and thereby acquires a natural right to control it. Let us assume that a tyrannical state, instead of enacting a similar right in the positive law, decrees that the statue is to belong to another, perhaps a favorite of the dominant race, and that the sculptor, instead of a jural right over the statue, is to have a duty not to touch it. What is the legal result of this decree? It is submitted that both the natural law and the positive law may operate without conflict. The pampered favorite will obtain the statue, just as the positive law decrees, or he will obtain damages in its stead: But under the natural law the sculptor will be compensated, and the favorite will be curbed, in the timeless phrase of Adam Smith “as by an unseen hand” in unexpected ways.

While the positive law will be valid and will be strictly carried out, it will fail in its purpose. For the state, in awarding the statue to its favorite, was in reality attempting to augment his well-being at the expense of the sculptor. And this, because of the natural law, it could not accomplish. Thus the action of the state is ultimately futile, a waste of effort, the vain and pointless pursuit of an illusion. “Unjust” laws are therefore simply “unwise” laws, laws which are written in ignorance of one of the immutable constants in the nature of the world. They fail just as any other undertaking, of the

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22 For a contrary conception of natural law, see “The Adequacy of Scholastic Idealism,” by William Sternberg, 20 Nebraska Law Review 317, 326, September 1941. “According to the natural law view, there are some moral precepts which do have the force of law; consequently the binding character of a statute may sometimes be determined by comparing the ‘is’ of the statute with the ‘ought’ of the moral law. To the positivists on the other hand, the rules of morality are ‘merely’ precepts, not law; consequently the binding character of any enactment can never in any way depend on its content. A statute may be law, no matter how flagrantly it violates the rules of moral conduct.”
state or of an individual, must fail if it runs counter to an invariant principle. It is precisely the case of the proverbial man who attempts to lift himself by tugging at his boot straps. He may indeed exert a pull greater than his weight, but his purpose is defeated because, in the language of Newton's third law of motion (a law, incidentally, which has a familiar counterpart in the natural law) an "equal and opposite reaction" increases his apparent weight by the same amount.

**CONCLUSION.** To sum up, we may say that the great weakness in juristic "positivism," as that doctrine is expounded by its more aggressive proponents, lies in its dogmatic assumption that (aside from the accomplishments of positive law itself) there is no invariant principle of nature under which one's actions inevitably draw upon one such consequences as they merit.

The corresponding weakness of scholasticism in America today seems to be an unwillingness to admit that such an invariant principle of nature (which it invariably champions under the name of natural law) is no different from any other invariant principle of nature in the physical sciences; that in no sense is it any *more* dependent upon Divine support.

There is a great advantage to be gained by viewing every claim, as Justice Holmes viewed jural relations, simply as a situation in which "if a man does or omits certain things he will be made to suffer in this or that way." If he will be made to suffer by the state, the relation is "jural"; if by an invariant principle of nature, the relation is "natural."

Under a doctrine of this sort, the ancient problem as to the validity of positive law (when it conflicts with natural law)
resolves itself. Both relations remain valid in the sense that both exist, and will be carried out in full. But the purpose which the state seeks to accomplish by means of the jural relation will necessarily fail; so that the jural relation, though entirely valid, becomes unwise and futile, like a statute which attempts to ignore the principle of supply and demand or the law of gravity.

Leroy Marceau.