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## Books Reviewed

Anton-Hermann Chroust

Joseph P. Witherspoon

Antonio Truyol

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## BOOKS REVIEWED

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GESCHICHTE DES NATURRECHTES. By Felix Flückiger. Erster Band: Altertum und Frühmittelalter. Evangelischer Verlag, Zollikon-Zürich, 1954. Pp. 475. Fr. 26.40.

Flückiger, a prominent and certainly a learned Swiss theologian, correctly points out in his introduction that any comprehensive study dealing with the history of natural law will have to consider a great many philosophical, theological, juristic, political, and historical problems. Perhaps the most interesting part of Flückiger's work is his discussion of the Graeco-archaic (mythological) conceptions of law and justice. The idea that true law is always of divine origin seems to have been deeply ingrained in Greek thought. It is still repeated, for instance, by Plato: Zeus (or some other deity) gave men, and men alone, the Dike (*δίκη*) which prevents them from destroying one another.<sup>1</sup> People who, like the Cyclopes, deny the gods and ignore the divine ordinances are not human. For divine laws are the basis of all *humanitas* without which there can be no law, no order, no peace, and no human community.<sup>2</sup>

The Olympian Zeus, as the guardian of the law, is, however, a relatively late notion. Zeus worship, among other things, suggests that the old matriarchal kinship organizations had partially been superseded by patriarchal "political ideas." Zeus, the new "political (or *πόλις*) deity," is the guarantor of a new "societal justice." The Homeric epics no less than the great tragedies of the fifth century B.C. also refer to a pre-Olympian "law," to an ancient sacred order which was observed long before Zeus and the Olympian gods were accepted. This most ancient law, which was at the basis of the primeval kin society, is the Themis (*θέμις*). It is Themis, for instance, to worship the divine ancestor, to honor one's parents, to practice hospitality, to bury the dead, not to kill a kindred person or to indulge in blood feud. But Themis is not merely a pre-Olympian concept of what is "right"; it is also a personal goddess, a sort of "cosmic force" which watches over this "right." Themis (also called Aisa, Metis and Mnemosyne) is a Titanic deity; she is Moira (*μοῖρα*) or Fate, and she personifies the belief in a preordained fate in which man's life is inextricably enmeshed. The newer Olympian or Zeus religion both adopted and adapted the Themis-idea and made the Themis the adviser and even the spouse of Zeus.<sup>3</sup> Despite this attempted assimilation, the contrast and conflict between Themis-law and Zeus-law persisted: Zeus, the new male god who also represents the principle of the patriarchate, is, so to speak, the lord of the Polis (city) and the new social order; Themis, the female symbol of matriarchate and kin order,<sup>4</sup> is still *μοῖρα* or Fate, that primitive

1. *Protagoras* 322A ff.

2. Hesiod, *Erga* 11 ff.; Homer, *Odyssey* 9.125 ff.; 9.275.

3. Hesiod, *Theogony* 910 ff.

4. Themis is also related to Gaia. Cf. Aeschylus, *Prometheus* 209.

inexorable destiny to which even the Olympian gods must submit. Hence in Greek drama the representatives of this Themis-Moira are always women: Antigone, Clytemnestra, Medea. Perhaps the classical example of the conflict between Themis-law and Zeus-law is to be found in the Orestes tragedy of Aeschylus.

Like the Themis, the Dike (*δίκη*) is both a principle and a personal goddess who watches over the *δικαιοσύνη* ("justice"). This Dike is one of the newer or Olympian deities: she is the daughter of Zeus and Themis, and as such she gradually replaces, though never fully eliminates, her mother Themis. The Dike, which is not yet "natural law," sees to it that "everyone receives his due," and that punishment visits those who claim more than their own. Dike, as a principle, signifies that which under the circumstances may be justifiably claimed by some one, even by the Themis. But the Dike does not create law or "rights"; she merely enforces what Zeus or Themis has ordained either as "law" or as fate. Dike-justice is that which is man's own according to the dictates of either Zeus or Themis. Dike-justice, on the other hand, is never abstract moral justice, but merely the realization that whatever is ordained is just. Thus it is possible for Dike to conflict with Dike, or for Dike to become the perdition of what otherwise seems to be a morally "just" or, at least, "morally innocent" man, as happens so frequently in Greek tragedy. Dike, it must be borne in mind, is some irrational (irrational at least from the point of view of a rational ethics), though nevertheless efficient principle which carries out the mandates of fate or of the gods. In Greek literature this Dike is often referred to as that "force" which "brings everything to its ultimate fulfillment"—which, in other words, sees to it that whatever fate has ordained will be done.<sup>5</sup> Hence we may distinguish in the Dike-idea three separate notions: Dike is what is man's own or due either according to fate and divine assignment, or according to law (which is also of divine origin), or according to "nature" which is an instrument of the divine will or of fate. But whoever makes this assignment (Themis or Zeus) is the true source of "justice," while Dike merely "executes" this "justice." Conversely, the heroic man of classical antiquity is "just" when he submits to this "justice" without flinching.

The Dike finds her expression in man through the virtue of "justice" (*δικαιοσύνη*). This justice really means the "doing of one's own" and the "giving to every one what is his due," or, to be more exact, the complete submission to the Dike. The notion of "giving to every one his due" was subsequently taken over by the Stoics and was ultimately incorporated into the Code of Justinian (*sum cuique tribuere*).

Dike, Moira, and Themis often reveal or realize themselves in natural events or in a given situation. Hence, whatever happens is always justified or Dike, because it happens as Themis or Moira; and the only question which remains to be answered is: why did it happen the way it happened? It is here that the oracles and the inspired seer come into their own. To understand the mysteries of Themis, Moira, and Dike, man often requires a kind of knowledge that comes to him by inspiration.

5. Cf. Aeschylus, *Agamemnon* 781; Sophocles, *Ajax* 1390.

Euripides, it could be maintained, is probably the first Greek author to declare the causal nexus between Nature (*φύσις*) and Dike: man's preordained fate frequently becomes operative in his blind natural passions which completely dominate him, and the Dike avenges the deeds which he commits while under the spell of passion. Hence the Dike of Euripides manifests itself as the daemonic forces of nature which can be hostile to man, but always demand what is their due, irrespective of man's weal or woe. These natural forces in a way are "divine" in that they are instruments of a divine plan, and man must submit to this plan. Obviously, the working of these forces, which are as often conflicting with one another as they are "irrational," cannot be consonant with the Christian notion of nature: they are "selfish" powers like the gods themselves who are constantly warring upon one another. This interaction of nature and Dike erroneously has been called by some authors the starting point of natural law thought in antiquity. The "monistic" notion of a single and, on the whole, benevolent nature was alien to the early Greek mind. Only the Stoics, it seems, and later the Christians did away with the irrational and pernicious conflict between virtue and blind (natural) necessity, between man and nature; for nature, at least for the Stoics and Christians, is not a blindly working compulsion or an instrumentality of a vicious fate, operating according to some capricious design of mystical powers external and, in many instances, inimical to man.

It is wishful thinking to see any natural law implications in the *Antigone* of Sophocles. Antigone, it should be borne in mind, merely fulfils the Themis-law of the kin-group when she buries her brother Polyneices. In this she "does Dike" from the point of view of the Themis, but, at the same time, defies the Polis-law of King Creon. To bury a blood kin is also the Dike of Hades who demands his "own." But in this instance the Titanic Themis-Dike (on which Antigone stubbornly insists) and the Hades-Dike collide with the Polis-Dike and the Olympian Zeus-Dike. In this conflict between Themis-Dike and Polis-Dike Antigone, who is merely a pawn of mightier forces, is crushed, a fate which she accepts without flinching. It could even be maintained that this conflict to which Antigone succumbs in a way is a re-enactment of the primeval struggle between the Titanic gods and the Olympian gods, between Hades and Zeus who both have, and insist upon, their own Dike. King Creon, on the other hand, is by no means a villain or, perhaps, the representative of "positive law," while Antigone "upholds" the "natural law." Creon, too, follows a divine ordinance (and, hence, stands on his Dike), namely, on the Polis (Zeus)-law which insists that, like any father-murderer, no citizen who turns against his native city may be buried.<sup>6</sup> To say, therefore, that Antigone defies the "vicious positive law" of Creon which runs contrary to "natural law," is sheer nonsense. It is one of the many merits of Flückiger's book to have pointed this out. Since Zeus Poleos is the source of Creon's Polis-law, his law too is sacred law and, hence, Dike in that it reveals the will and the preordained order of the deity. To abide by the Polis-law means to abide by the "just" law of Zeus,<sup>7</sup> and to defy it is tantamount to defying the god. Hence Creon's law is also declaratory of the new Olympic religion.

6. The kin group of the Themis-law becomes the City in the Polis-law. Hence under the Polis-law a traitor is tantamount to a father-murderer.

7. Cf. Aristotle, *Politics* 1287a28.

Greek polytheism, especially the "dualism" of Titanic and Olympian gods, not only permits but actually necessitates conflicting laws and a conflicting "justice" in that opposing forms of Dike are possible. This conflict, incomprehensible to the Christian mind, is at the basis of many Greek tragedies. In the final analysis, the true tragic element, therefore, is the pluralism and conflict of different *Dikai*. The conflict between Themis-Dike and Polis-Dike can only be resolved either by philosophical and ethical monism, which recognizes one single and supreme rational moral principle, or through the Christian-Judaic monotheism, which accepts one single divine will (or norm) to which all other wills (or norms) are subjected.

In the course of the fifth century B.C. the hold which religious convictions and authority once had on the Greek mind gradually began to wane. This religious decline, which was part of the Greek enlightenment, had far-reaching effects as regards the problems of law and civic order. Law was no longer regarded as divine ordination, but as something essentially accidental, determined by time and circumstance. The Sophists, with their relativistic or "historical" approach to all matters touching on morality or law, pointed out that law and human institutions frequently were contrary to nature, and in doing so, they made "nature," especially "human nature," the universal basis as well as the criterion of all social phenomena. In this sense they might be called the true founders of a variety of natural law theories. The law of nature, they insisted, demands that man's natural talents and aspirations should receive full recognition and be permitted to assert themselves "naturally."

Such considerations soon led to a sharp contrast between "law according to nature" and "man-made law," and this contrast, in the main, dominated the entire legal philosophy of that period. If there is anything universally valid in law, it must be that which is valid "by nature" for all men irrespective of time and place. Conversely, man-made law is often tyrannical, oppressive, and arbitrary. Obviously, many of the proposed natural law theories proceeded from a systematic criticism of existing social, legal, and political conditions—from a demand for radical social changes, including the demand of equal rights for all people, the rejection of slavery, the insistence upon equality of property and education, and the demand for the abolition of nobility. Hippodamus had already devised the outlines of an ideal State (which Plato might have copied) regulated according to the principles of "nature" and "reason."

The idea that all laws should be based on the "natural" principle of letting human nature achieve its fullest unfolding, at least in its practical application, led to much confusion and many divergent views. Since the concept of "nature" seems frequently to have been identified with self-interest or self-preservation, the natural law promoted by the Sophists tended to become extremely subjective. With the help of the principle of self-interest or self-preservation all composite institutions of social existence, including the State, were to be explained, justified, and, if necessary, rejected. It will be noted that Epicurus, who in this is somewhat under the influence of the Sophists (Protagoras), voiced similar ideas.<sup>8</sup>

8. Cf. Chroust, *The Philosophy of Law of the Epicureans*, 16 *THE THOMIST* 82-117, 217-267 (1953).

This alone should be an indication that the legal ideas advanced by the Sophists never were, and never would be, completely eliminated. The obvious moral and legal relativism of the earlier Sophists, however, was only a transitory phase in the history of Western philosophy. Its main accomplishments were the undermining of the traditional beliefs (Moira, Themis, Dike). At the same time it raised the paramount question whether there is a single supreme standard or principle for evaluating human conduct. Already Euripides had raised this question when he asked: "... incomprehensible one, shall I call thee principle or man's reason?" Heraclitus of Ephesus bluntly pointed out that the deity (*δαίμων*) was the *ἦθος* (disposition, character, nature) of a man.<sup>9</sup> Hippias, Antiphon, Thrasyarchus, and others were probably the first philosophers who declared that the essential human nature (*φύσις*) was the basic moral (and legal) norm, and it is not impossible that they derived their notion of human nature from the School of Cos (Hippocrates). To live according to nature (*φύσει*) is the *φύσει δίκαιον*, the "law of nature." But *φύσει δίκαιον* means also that man has the "natural right" fully to assert his natural gifts and talents. In this sense the *φύσει δίκαιον* also becomes the principle of individual free self-assertion. The far-reaching consequences of this thesis for law and the State need not be discussed here, especially since the present reviewer already has dealt with this problem.<sup>10</sup>

The radical individualism of certain Sophists, which in some instances<sup>11</sup> led to undesirable results, was strongly modified by the author of *Anonymus Jamblichi*, perhaps the most important pre-Platonic work on legal and social philosophy. This work insists that the unchecked and ruthless use of one's natural faculties (*φύσις*), advocated by some Sophists, is the greatest of evils and the gravest of dangers. Hence this individual *φύσις* must be tempered and subjected to some common principle of goodness. This principle is "justice under good laws" or eunomics, for only justice under good laws, which has its basis in nature, makes human society possible. Justice, law, and the State are a necessity which arises from human nature.<sup>12</sup> Conversely, justice, law, and the State can only survive and function properly if the citizens are "virtuous." *Anonymus Jamblichi* probably constitutes the historical transition from Sophistic individualism to Plato's legal and political theories. An investigation of the extent to which Plato was dependent on this work would make an interesting study. But it should never be forgotten that it was the Sophist attempt to declare human nature the basis of all legal theory which actually laid some of the foundation of subsequent natural law theories. To have recognized this fully is one of the great merits of Flückiger's book. Since the days of the Sophists the crucial antithesis of "natural law" or "justice according to nature" (*φύσει δίκαιον*) and "positive law" (*νόμος δίκαιον*, *θέσει δίκαιον*) has never ceased to preoccupy philosophers.

For reasons which he cannot state here in detail, the present reviewer has

9. Frag. 119, Diels.

10. Chroust, *The Origin and Meaning of the Social Compact Doctrine*, 57 *ETHICS* 38-56 (1946).

11. Cf. Plato, *Protagoras*, *Gorgias*, *Republic*, et passim.

12. *Anonymus Jamblichi*, it will be noticed, anticipates here the Aristotelian notion that the State is a necessary "natural institution."

to disagree with Flückiger's presentation of Socrates' alleged notion of law and legal philosophy. The author, it seems, is not fully aware of the fact that the Socratic sources on which he relies (Plato, Xenophon, and Aristotle) are conflicting and unreliable and, hence, may very well be of legendary origin. Instead of stating that Socrates in a way was the precursor of Stoic natural law, he might have pointed out that it was Antisthenes and the Antisthenian Cynics who had this influence. For does not Diogenes Laertius report that the Stoics "rode into philosophy on the tail of a dog" (meaning the Cynics)? The Socratic tradition, it appears, has ascribed to Socrates many ideas which were definitely Antisthenian. A treatment of the Antisthenian "philosophy of law," despite the almost desperate source situation, on the other hand, would have been desirable and, at the same time, most instructive. Antisthenes, according to the testimony of Diogenes Laertius, wrote extensively on law and on the State, and the present reviewer is of the opinion that Antisthenes contributed much to ancient (and Stoic) natural law philosophy.

The Sophist notion, so common to many natural law theories, that in a properly ordered society man's natural talents should find their fullest unfolding and that everyone should do what is his "business" according to his own individual nature, is still reflected in Plato's ideal State. But with Plato this notion is merely one minor aspect of the perfect society, never its basic norm. Plato's "true nature," irrespective of whether this term applies to the State, to the law, or to human society in general, is not the human nature of experience, but a highly idealized, "divine," or transcendental "nature of things." In this Plato seems to revert to a kind of absolute which was so characteristic of the religious ideologies of the pre-Sophist age (Moirai, Dike, Themis), although his notion of a rational "justice-idea" is fundamentally different from the irrational Themis notion of old. Plato's social and legal philosophy—if Plato has a legal philosophy—can be understood only in the light of older religious views concerning the divine origin and foundation of the City: it is from the gods that the City derives its ultimate meaning. Hence the Platonic City or civic order is conceived of as a divinely ordained institution, the product of the typically Platonic Logos from which it receives its final significance and justification. Thus Plato, perhaps under the influence of Orphic-Pythagorean ideas, in a way renews the concept of a "divine law" or *lex aeterna*. This Platonic *lex aeterna* is a timeless and immutable Logos-law. But Plato (and, incidentally, also Aristotle) completely failed to show how this Logos-law could affect historical existence in the form of positive law, except in and through the person of the "king-philosopher." All this should also explain why Plato rejects the notion that the individual, of his own free choice and in free competition with his fellow citizens, may attempt to carve his own little niche in this static society: with Plato the ideal society is one which, in the interest of preserving the social *status quo*, keeps the individual in the place which had been assigned to him by an allegedly superior theoretical intellect.

Unfortunately, Flückiger is not acquainted with the excellent work of Karl Popper, *The Open Society and its Enemies*. Hence he does not mention the rather revolting practical consequences of this Platonic "natural (or rational)

order." The inherent danger of Plato's social, legal, and political teachings consists in the fact that it furnishes the ideal blueprint for a totalitarian society.<sup>13</sup> Not even the fact that Plato, perhaps inadvertently, became the founder of an idealistic "natural law," can in the least diminish this danger, for it is often the unrealistic and, hence, inhuman idealist, the dreamy "philosopher-king," who has caused mankind untold misery and suffering. Especially revolting, at least to the Anglo-American way of thinking, is Plato's suggestion that in the ideal society (ideal only for Platonists) under the ideal law, the philosopher-king, who is really a rather unimaginative though conceited doctrinaire, is the *lex animata* (the living law) and, hence, as the true fountain of law and justice, is also above the law. Such notions, which had a pernicious influence on certain mediaeval and modern theorists, are an invitation to unlimited political absolutism of the worst kind. Recent events make one wonder whether the monstrous proposals of Plato have not retained some of their evil attractions. The present reviewer feels that Flückiger's treatment of Plato is perhaps the least rewarding part of his book. He is also at a loss to explain why the author should have omitted all references to the pseudo-Platonic *Minos* where we are told (321B ff.) that true law is nothing other than the eternal truth about what really is. Hence the proper knowledge of law is the art of right reasoning which starts from true being and has as its foremost object true being. Such knowledge also comprises a practical realization of the good and the just.

Aristotle's conception of a natural law is extremely difficult to define. Whatever it might be, it is not, however, as some people have suggested, the forerunner of Scholastic natural law. The πολιτικὸν δίκαιον (the law of the State or, of society), according to Aristotle, is composed of two "elements," namely τὸ φυσικὸν (natural law?) and τὸ νομικόν. The νόμος φυσικὸς is that law which is valid independently of all human enactment. The Aristotelian "natural law," being but an aspect of the "political law," always remains co-ordinated to the positive law: it is not the criterion, norm, or justification of the positive law.

With Aristotle the State (πόλις) and the πολιτικὸν δίκαιον are natural institutions which correspond to essential human nature, that is, the perfect society in which alone man can achieve his fullest humanity and live the perfect life. Since the State is "by nature," it follows that according to his nature and end man is a "political being."<sup>14</sup> Within the State the distinction between ruler and ruled is likewise "natural," as is the distinction between a free man and a slave. Hence to be ruled (or to be a slave) is as much "according to nature" as it is to be a ruler or to be a free man. The distinction between the "naturally free man" (or natural ruler) and the natural slave is also at the basis of Aristotle's justification of war: "War is a natural art of acquisition . . . which we ought to practice . . . against men who, though intended by nature to be governed, will not submit. Such a war is naturally just."<sup>15</sup> This is Hitler's *Herrenvolk* idea with a vengeance, and one may ponder at this point whether, at least

13. One has only to read *Republic* 377C-401A.

14. The term "political" signifies here that in order to achieve perfection, man must rise above mere clan or tribe and fully partake in the State. But it also means that rational man must abandon the Themis-Dike and subject himself to the Polis-Dike.

15. *Politics* 1256 b 22 ff.



according to Aristotle, Hitler's attempt to enslave the eastern (Slavic) *Untermenschen* was not "according to nature" and, hence, "just."

The organically articulated pluralist State of Aristotle, like the oppressively monolithic State of Plato, is based on "natural law." That unity and diversity are not necessarily mutually exclusive, however, is shown by the "corporate State" of the late Middle Ages where the sovereign was an absolute one (Plato) and the society over which he ruled was an organically articulated plurality (Aristotle). Aristotle's main contribution to the history of natural law probably rests in the fact that to a large degree he succeeded in harmonizing a purely formal ethics with an essentially material ethics. But this "integration" in some instances also became the bane of subsequent natural law theories in that it suggested that purely traditional views or values, which were mere historical phenomena (such as the Roman law), are also "natural law." The result was that in the hands of incompetents, natural law frequently has become "all things to all men": it has also been invoked to justify irreconcilable social phenomena, depending on the traditionally accepted views of time and place.

Although it absorbed and adapted many ideas enunciated by earlier philosophers, Stoic philosophy definitely expresses a novel attitude toward the world in general in that it tried, but not always successfully, to combine "nature" and virtue, that is, old theocratic notions and more recent moral concepts. The Logos, that eminently rational though impersonal force which governs the universe, was for the Stoic "nature." Accordingly, to be virtuous is to be in harmony with the cosmic Logos, and everything which is contrary to the Logos (or, to reason) is also contrary to nature and, hence, evil. It is here that we may detect the true beginnings of natural law. The *lex naturae* of the Stoics is both a moral norm and a principle of being. Since the *lex naturae*, which also embraces the human being, is the instinct of survival as well as the right to survive, the *lex naturae* becomes the *ius naturale*. To live virtuously means to live according to nature or according to the "law of God" (the Logos). This idea, it should be remembered, already had been expressed by Heraclitus of Ephesus when he stated that all true laws receive their substance from that one law which is of God. Hence goodness is really participation in the divine Logos: the *scientia dei*. This idea, which was certainly influenced by the Platonic μέθεξις, was received into Christian moral theology through the efforts of St. Ambrose and St. Augustine.

Cicero, the prolific as well as fairly shallow eclectic who combined not only Stoic and Platonic notions, but also other philosophical as well as juristic concepts, maintained the identity of the ontological and deontological problem. It was he who stated: "*Lex [which is a norm and a standard—iuris atque iniuriarum regula] est ratio summa [Platonic-Stoic] insita in natura [Stoic] quae iubet [as ius naturale—Stoic] quae facienda sunt, prohibetque contraria.*"<sup>16</sup> This *summa ratio* is also implanted in man. At the same time man's reason properly employed partakes in this *summa ratio*. These Ciceronian statements, as can be easily ascertained, had a lasting influence on mediaeval natural theories. Cicero also maintains that the *lex naturae* is the *lex divina et humana* which originated

16. *De legibus* 1.6.18.

with God (*orta est . . . simul cum mente divina*), and the *mens divina* is the *summa lex* which governs everything that is.<sup>17</sup> In *De leg.* 2.4.8, Cicero once more defines natural law: "*Est quidem lex recta ratio, naturae congruens, diffusa in omnibus, constans sempiterna . . . Huic legi nec abrogari fas est . . . nec vero aut per senatum aut per populum solvi hac lege possumus. . .*" Like Polybius, Cicero believed that the true *lex naturae* was realized in the Roman State—the *Roma aeterna*—and in the Roman law. The theory which equated the *naturalis ratio*, the *lex naturae*, and Roman law had far-reaching consequences; in some instances it led to the assumption that Roman law was natural law.

There has been, and still is (Flückiger not excepted), much loose talk about "natural law" (and equity) in Roman law and Roman jurisprudence. In keeping with their predominant interest in the concrete realities of life and law, the Roman jurists or jurisconsults down to the third century A.D. did not discuss or meditate about the nature of law and justice; and speculations as to the ideal law or the ideal society did not attract them. The forensic orators, who should never be identified or confounded with the jurists, on the other hand, at times reveled in their scanty and superficial knowledge of certain aspects of Greek philosophy. For mere rhetorical effect they adopted the Greek contrasts of *ius naturae* (or *ius gentium*) and *ius civile*; of *ius* and *aequitas*; of *lex* and *mos*; and of *ius scriptum* and *ius non scriptum*. These borrowings and translations from Greek philosophy, Greek philosophical nomenclature, and Greek rhetoric, which were totally alien to Roman law, invaded Roman jurisprudence only during the late classical and post-classical period. Cicero, who was never a jurist or jurisconsult (he knew little law and often boasted about his ignorance of the law), but a mere forensic orator or advocate, does not represent "the spirit of the Roman law." The concepts of *ius naturae* and *ius civile*, often used as contrasts, are ill-advised translations of the Greek terms φύσει δίκαιον and νόμῳ (or θέσει) δίκαιον. The use of the designation of *ius civile* in this connection is wholly misleading, since *ius civile* meant the law *inter cives Romanos* or plainly, *ius privatum* (private law). The Ciceronian use of the term *ius civile*—which in Cicero has no uniform meaning because at times he writes as an incompetent Roman lawyer, and at times as a not always competent translator of Greek philosophy—is basically different from that of the jurists. The same holds true as regards the contrast of *ius gentium* and *ius civile*, which are respectively translations from the Greek (Aristotelian) κοινὸν δίκαιον and ἰδιον (or πολιτικὸν) δίκαιον. The early Roman jurists never made this distinction, which does not appear in legal literature before the time of Gaius. Neither is it true, as so many people claim, that the early jurists called *ius gentium* that law which applied to *peregrini* (non-citizens) as well as to citizens. Aristotle, it appears, had introduced the concept of ἐπιείκεια (equity?) which the Roman forensic orators simply rendered as *aequitas*, and confronted it with *lex* (or *ius*). But for the jurist this distinction of *ius* and *aequitas* was absolutely meaningless. As practicing lawyers—not as mere spellbinders like Cicero—the jurists merely asked the following question: can a particular concrete situation be met either

17. St. Augustine defines the *lex aeterna* as follows: "ratio divina vel voluntas Dei. . . ." *Contra Faustum Manichaeum* 22.27.

by statutory interpretation or by proposing a novel *actio* or *exceptio*? If this could not be done, the issue was closed; but if it could be done, the affirmative was simply law and not "equity." This should also explain why in early legal phraseology the term *aequitas* does not appear.<sup>18</sup> The terms *ius scriptum* and *ius non scriptum* merely render the Greek distinction of γεγραμμένος and ἀγράφως. This distinction had no meaning for the jurist. Neither did he pay any attention to the idea that *mores* and *leges* (a translation of the Greek ἥθη καὶ νόμοι) were at the basis of *ius*, because he did not concede any legal significance to *mores* and customary law.

The Stoics were also responsible for the three *praecepta iuris* (Ulpian, *lib. prim. regul.*; *Digest* 1.1.10; *Inst.* 1.1.pr.1.3), while Cicero (*De leg.* 1.6.18) is probably the immediate source of these precepts. The *sum cuique tribuere*, as the essence of justice, was often stated by Greek philosophers<sup>19</sup> and repeated by Cicero.<sup>20</sup> The same holds true as regards the *honeste vivere* which Cicero ascribes to the Stoics (*De fin.* 2.2.23; 3.8.29). The *alterum non laedere* may go back to Cicero (*De fin.* 3.21.70) and, ultimately, to some Stoic source. The same may be said about the definition of jurisprudence. And the definition of natural law in the *Institutiones* of Ulpian, which found its way into the Justinian Code, in all likelihood is a post-classical insertion. Flückiger's error, it seems, is his assumption that Cicero was a jurist and that he represented true Roman jurisprudence.

Neo-Platonism, true to its basic tenor, contributed little if anything to the theory of natural law, with the exception that it stressed the hierarchical order of all values which culminate in one single value. Applied to the problem of law this *principium unitatis*, which also affected some of St. Ambrose's and St. Augustine's notions of natural law (*summum bonum*, *bonum commune*, etc.), strongly suggested the monarchical absolutism which was introduced by Emperor Diocletian (284-305).

Since the Church in the first centuries was primarily a missionary Church, the philosophical concept of natural law seems to have had little meaning for the first Christians. Flückiger is quite correct when he denies, as did St. Augustine,<sup>21</sup> that the famous passage in Romans 2:14 ff. ("For when the Gentiles, who have not the law, do by nature the things contained in the law . . .") does refer to natural law as it is commonly understood. Only during the second century A.D. did the concept of natural law make its appearance in Christian literature, and then only by way of reception from essentially Stoic sources. The Gnostics (Valentinus and Basilides), on the other hand, tried to establish a natural law based on the Scriptures or the "New Law of Christ," as well as on Greek philosophy. Philo of Alexandria, who attempted the first great synthesis of the Old Testament and Greek philosophy, identified the Mosaic law with natural law. H. Wolfson, in his outstanding work on Philo, is certainly right, at least as regards Scholastic natural law theories, when he maintains that Philo in many respects must be considered the forerunner and model

18. *Aequum* in pre-classical Roman Law meant "this is the law," and nothing else.

19. Cf. Stobaeus, *Eclog.* 2.59.4.

20. *De invent.* 2.53.160.

21. *De spiritu et littera* 26 ff.

of Scholastic thinking. For Philo (who also influenced Clement of Alexandria and St. Ambrose of Milan) achieved a workable assimilation of Stoic and Biblical thought. With Clement of Alexandria Greek natural law ideas gradually gained acceptance in Christian literature. With the reception of Stoic ethical notions the whole of Christian ethics acquired a more scientific form: natural law became the law of right reason, that is, of natural reason (Clement), while Tertullian could maintain that "*lex ratione constat.*"

In passing it should be noted that Gregory of Nyssa's comparison of Christ with a physician is originally a Cynic analogy which was borrowed by the Stoics. While Lactantius and St. Ambrose of Milan to a very large extent were still influenced by Cicero and, hence, by Stoic natural law ideas, St. Augustine, though still strongly under ancient influences, tried to strike out in a fundamentally novel direction when he reformulated the impersonal cosmic Logos proposed by the Stoics by calling the *lex aeterna* the will or intellect of a personal God. This personal will or intellect of God is at once the proper end of everything. Flückiger, in the opinion of the present reviewer, treats St. Augustine rather scantily and, on the whole, inadequately. St. Augustine's notions about natural law (and law in general) are, to be sure, unsystematically dispersed through many of his major as well as minor works. Nevertheless, some of his ideas had such a lasting not to say decisive influence on future Christian authors, including St. Thomas himself, that a more exhaustive treatment would have been warranted.<sup>22</sup> Flückiger might also have found some important materials touching on law in St. Augustine's *Epist.* 93, 105, 153, and 157; *Quaestiones in Heptateuchum*; *Contra Mendacium*; *De Catechizandis Rudibus*; *De Genesi ad Litteram*; *De Trinitate*; *De Doctrina Christiana*; *Ennaratio in Psalmum* 9; 57; 144; 145; *De Spiritu et Littera*; *Quaestiones Decem Evangelii*; *Opus Imperfectum contra Julianum*; *Sermo* 62; and *Tractatus in Joannis Evangelium*.

Since the author has failed somewhat to give St. Augustine his proper and due treatment, it is not surprising that he should overlook this important fact: the whole of the lego-philosophical tradition from St. Augustine to St. Thomas, so far as its fundamental ideas and concepts are concerned, essentially moved along lines which had been laid down authoritatively by St. Augustine. Many of the jurisprudential notions of this period were borrowed also from Cicero or from Roman law, the two universal sources of legal inspiration. In this we see the influence of Isidore of Seville. Likewise the *Decretum Gratiani* and Gratian's commentators, who themselves were under the influence of post-classical Roman law, contributed much to the jurisprudential discussions of that time. Beginning with the thirteenth century Aristotle was quoted with increasing frequency, something which should not be taken too seriously: most of these references were primarily ornamental rather than informative. St. Augustine, in the main, remained the only true and unchallenged authority. But despite the general reliance on one single authority, one can discern among the various authors on natural law theories a certain diversity of points of view. At the same time a noticeable lack of balance mars most of these groping efforts to integrate the many vexing problems of law, right, and justice into a single major

22. Cf. Chroust, *St. Augustine's Theory of Law*, 25 NOTRE DAME LAW. 285-315 (1950).

and consistent system. It remained for St. Thomas Aquinas to achieve this balanced integration.<sup>23</sup>

Flückiger, as might be expected after his scanty treatment of St. Augustine, does not sufficiently stress St. Thomas' dependence on St. Augustine in matters concerning natural law. Thus the Thomistic *lex aeterna* is Augustinian (and theistic), and not, as the author maintains, Stoic. The Thomistic concept of the natural law and its relationship to the *lex aeterna* likewise is Augustinian; it is not, as Flückiger states, "an emanation" of the *lex aeterna*. And both in St. Augustine and St. Thomas the *lex naturalis* is man's participation in the *lex aeterna*.

On the whole Flückiger's book is a very fine study, and it can only be hoped that in the succeeding volumes he will maintain the high scholarship which distinguishes the present volume. Perhaps the author might have treated St. Augustine more in detail and with a deeper insight into the lasting significance of his contribution to subsequent theories about natural law. But it is exactly the shortcomings of this work which remind us of the immense difficulties which any author has to face who proposes to write a comprehensive history of natural law. And for American readers Flückiger is perhaps too much concerned with political theory, although the present reviewer is aware of the fact that in Europe political theory is part of *Rechtsphilosophie*. There are a few *errata*: On page 176 the text contains two footnotes 41, and footnotes 48-49 on pages 299-301 surely must read *Ad Aut.*

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23. Cf. Chroust, *The Philosophy of Law from St. Augustine to St. Thomas Aquinas*, 20 *THE NEW SCHOLASTICISM* 26-71 (1946).

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THE MORAL DECISION. By Edmond Cahn. Bloomington: Indiana University Press, 1955. Pp. ix, 342. \$5.00.

Mr. Cahn's book is an attempt to provide a moral orientation for an age which he recognizes as one suffering from a growing confusion and skepticism in moral matters.

Like the positive law process which the author discussed in *The Sense of Injustice*, the moral process discussed in this book "is busy with individuals, with the here-and-now."<sup>1</sup> Both involve the making of particular decisions in concrete cases. The problem of orientation is especially acute in the moral process because no one can really escape making his own particular moral decisions. Cahn frequently makes the following point in different forms: "... there are absolutely no moral experts or authorities, whether they call themselves priests, ministers, rabbis, farmers, or professors."<sup>2</sup> Each is his own "moral legislator."<sup>3</sup> Cahn thus regards our age as enlightened in at least one respect with regard to its moral confusion: "What is genuinely new in our era is not the outbreak of local rebellion

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1. *THE SENSE OF INJUSTICE* 7 (1949).

2. *THE MORAL DECISION* 253 (1955).

3. *Id.* 25.

but the fact of general revolution, not a momentary breaking away from chains but a persistence in remaining emancipated" from the "dogmatic cults," "moral codes," "clerical ritualists and fanatics"<sup>4</sup> of past generations.

This coincidence between the asserted true nature of the moral process and the modern disregard for moral codes has tremendous consequences. It has created the necessity, contends the author, for each person to make "an independent search for moral standards" and secondly, to assume "a heavy unaccustomed responsibility for construing the standards and applying them to concrete cases."<sup>5</sup> In this book we are presented with an effort to provide "literate" Americans with an empirical orientation for performing these tasks.<sup>6</sup>

Where shall we look in our search for moral standards? Not to the precepts of the natural law, Cahn answers, for these are "immutable" and "authoritarian" and thus inherently incapable of responding to the here-and-now nature and contingent matter of the moral process.<sup>7</sup> Besides, we can observe "the history of continual mutations in the so-called 'immutables'" which impeached their possible validity.<sup>8</sup> Cahn has thus lumped all theses of natural law into one bag without distinguishing the classical thesis of the realist philosophers from that of the 17th and 18th century publicists. In his earlier work Cahn at least had recognized a distinction to be drawn here, even if he failed to assess its fundamental character. In that book he discussed St. Thomas Aquinas' analysis of the natural law as being "lofty enough" but incapable of real directive help in the moral process since it consisted of "vague maxims" which could be cited "for any position whatever, for revolution and reaction, plutocracy and community of goods."<sup>9</sup> He also apparently conceived that the classical realist thesis views the derivation of positive law from the natural law as a process by which from "self-evident truths concerning justice" the human mind deduces "legal norms less obvious in their nature" rather than "trusting to experience and observation."<sup>10</sup> The vital distinctions between a conclusion from and a determination of natural law, between science and prudence which are made by Aquinas and subsequent philosophical realists, apparently have escaped the author's attention.

In view of Cahn's earlier characterization of the classical realist thesis of natural law and his present lumping of all theses of natural law into one homogeneous category, we must say that he has again substantially failed to come to terms with the classical realists in philosophy from Aristotle to Aquinas to Hooker to modern authors such as Wild, Adler, Maritain and Gilson. Moreover, he has worked a major disfiguration of the facts. Cahn seems to refer rather to the modern tradition to which Sir Frederick Pollock referred in 1930 when he stated that the last English writer, until just before the turn of the twentieth century, to possess the realist theory of natural law as developed or matured by Aquinas was Richard Hooker (1553-1600) who "accordingly stated a consistent and

4. *Id.* 21-2, 20, 32.

5. *Id.* 22.

6. *Id.* 4, 18-19, 27-28, 30, 63. Cf. *THE SENSE OF INJUSTICE* 13.

7. *THE MORAL DECISION* 25.

8. *Ibid.*

9. *THE SENSE OF INJUSTICE* 7.

10. *Id.* 4, 12.

intelligible doctrine."<sup>11</sup> Pollock went on to say: "Much that has been written about the law of nature in modern times is extremely confused—one cause which alone would be sufficient is the neglect of the Scholastic tradition . . . the Schoolmen took some pains to know what they were talking about."<sup>12</sup> While the limited purpose of this review must exclude a statement of what the classical realist thesis of natural law is and the support for it, one must initially conclude that Cahn continues in this book to reject that thesis upon the basis of criticisms which cannot fairly be addressed to it if one sticks to the facts as to the content given it by those who expound it.

If we cannot look to the natural law in our search for moral standards, may we look to the socially established mores, the current social conventions which the positivists urge are the only "standards" of human behavior? Cahn rejects the answer of positivism primarily for pragmatic reasons: "We cannot tell whether 'mores' means (1) what the society desires, or (2) what it popularly articulates, or (3) what it practices, or (4) some combination of these."<sup>13</sup> The positivists would answer, I believe, that Cahn is looking for an inherent will-o'-the-wisp, that there really are no objective moral standards, and that one is free to advocate whatever moral standards he likes—just as Cahn in fact does. After all, they would retort, it is only a matter of opinion; and Cahn does not really address himself to this major facet of their position. And the best proof the positivists could cite would be Cahn's advocacy of the legitimacy of suicide under certain circumstances, i.e., ". . . if demonstrably necessary for self-defense, that is to save the intrinsic self from destruction when no less extreme action will suffice."<sup>14</sup> Cahn includes this within his list of "responsible" moral standards. These are standards which he characterizes as, among other things, flexibly conforming "to the needs of the people."<sup>15</sup> We shall have more to say about such standards and in particular his earth-bound notion of the destruction which the human being should fear.

If in our search for objective moral standards we cannot look either to the natural law or to the current model of social conventions, where shall we look for them? Fortunately, observes Cahn, man is not utterly without guidance: "Our moral choices are not made in an unformed chaotic mist . . . our deliberations have their stuff prepared for them . . . every factor we observe resembles some kind of precedent, every interest seeks its place somewhere in some pre-established category."<sup>16</sup> Here, the author seems almost Kantian in orientation with a modern pragmatic twist. But let us proceed. Just as we were told in his earlier work that there is a "sense of injustice" at work in the positive law process of our courts and legislatures, so is there a less firm and precise "sense of wrong" at work in the moral process of each human person. This sense of wrong or "moral constitution," as he prefers to call it, is a "blend of reason that recognizes, of emotion that evaluates, and of glands that pump physical preparations for action. In a single combined response our muscles tighten and our judgment

11. Sir Frederick Pollock's notes to Maine's *Ancient Law* 120-1 (1930).

12. *Ibid.*

13. *THE MORAL DECISION* 26.

14. *Id.* 240.

15. *Id.* 101.

16. *Id.* 27.

condemns, anger fills us with heat or our spirits slide down with sorrow."<sup>17</sup> This sense of wrong provides us with primary moral principles "ready and waiting to be processed."<sup>17a</sup> These primary principles, then, are the "prepared stuff" for our moral deliberation. It is they which give the moral process its empirical anchor.

At this point, one could raise several questions about the operational relationship between the sense of wrong and the ready-made primary moral principles it brings to the human person. The first is that if there is a sense of wrong, must we not also affirm that there is a sense of right which is not derivative from the other? Human living is not merely concerned with action which is an avoidance of what is deemed to be wrong. And even when we choose to avoid doing wrong, we do so because it is deemed good in some respect to do so. It is within the experience of each person (and Cahn invokes experience) that when he wills to do something from a great sense of inner compulsion, he does so frequently not from an apprehension that the contrary to that act would be wrong but from an apprehension that the act willed is itself eminently right. Cahn does not and cannot easily fit this undeniable sense of right or good, to borrow from his terminology, into what he has called a sense of wrong.

Secondly, unless Cahn really does intend to adopt some modification of the Kantian position that our general moral standards are wholly unrelated to experience, he must affirm that they arise from experience. He seems in fact to affirm, and in this the realist philosophers heartily agree with him. But this position commits Cahn to include the attainment of the primary moral standards within the operation of the sense of wrong since they come to be and were not always in the mind. Yet if they come to be, they do so either from the sense of wrong described by Cahn or some prior one, for we cannot proceed indefinitely backwards in this process. Let us then examine one of the affirmative primary moral standards which he asserts is part of the ready-made "stuff" which our mind furnishes to our moral deliberations: e.g., every human person "should love his neighbors as manifestations of his own self; and . . . he should do unto other selves as he would have them do unto him."<sup>18</sup> I agree that this is one of the basic or primary moral standards for human living. But can it be true that this affirmative standard is afforded us *initially* in operation in a single combined response to *wrong* in which our muscles tighten, our judgment *condemns*, and *anger* fills us with heat or our spirit slides down with *sorrow*? I should say that if this affirmative standard is necessarily drawn from experience it cannot be drawn from some primordial experience in which not it but its contradictory is realized. Can one ever illustrate to five-year-old Jack what showing love to his four-year-old sister, Jill, is by telling him what showing love is not, or rather must one give him examples of affirmative as well as negative conduct in which the affirmative notion of love is realized? We may sometimes spank Jack to bring home what he is not to do, but by doing so we have instructed him somewhat in the affirmative notion realized in that form of not doing. And so it is with the basic affirmative moral principle in question here as well as with others.

17. *Id.* 18, 53.

17a. *Id.* 27.

18. *Id.* 20.



To affirm that this principle can be drawn from an experience in which it is not realized is to deny the principle of noncontradiction, whereas it is obvious that Cahn affirms that principle.

Thirdly, in *The Sense of Injustice* Cahn criticized the classical realist thesis of the natural law as being an inadequate base from which to make here-and-now decisions in particular cases. It consisted, he said, of vague maxims incapable of real direction of human conduct and susceptible of supporting either one of contradictory positions one wished them to support. The realist philosophers, however, as Cahn should have known, include in their statement of the principles of the natural law principles substantially similar to the several primary moral principles he now mentions favorably in this book. He now asserts that these and other like principles in conjunction with the "sense of wrong" give an empirical foundation to the moral process.<sup>19</sup> As a matter of fact, if these principles are incapable of providing true moral direction for human conduct, as Cahn now plainly sees, the whole fabric of his *The Sense of Injustice* and of this book loses its anchor and remits him to the position of moral skepticism which he abhors and denounces. By these principles, therefore, in conjunction with the "sense of wrong," we avoid "relativism and solipsism."<sup>20</sup>

The remaining problem for Cahn is thus one of determining how each person can isolate accurately the primary moral principles and then how, in his particular moral process, he can move objectively from these primary principles to the making of particular moral decisions about concrete moral problems. He thus raises not only the question of how one objectively determines the primary moral principles but also the question of how one likewise determines the moral principles or precepts intermediately placed between the former and the particular moral decisions each person has to make. If each person is his own moral legislator, where shall he go to find the primary and intermediate moral principles and still further to discover how to construe and to apply them properly to concrete moral problems?

Where else shall he go, is Cahn's deceptively simple answer, than to the case law of American courts? Why to the case law, the decisional law of courts? Cahn answers that judges, in performing their official duty to decide concrete cases, are constantly assessing moral interests and resolving problems of right and wrong. It is thus "realistic to look at the law not merely as a technical institution performing various political and economic functions but also as a rich repository of moral knowledge which is continually reworked, revised, and refined."<sup>21</sup> Since this is true, much critical reflection upon the primary moral principles will not be necessary, because these will be implicit in "adequate" and "responsible" proliferations made of them by judges for solving concrete moral problems in the law. Critical evaluation will be necessary only with respect to the intermediate moral precepts developed by the judges and their modes of construing and applying them. Why, however, should we look to American as opposed to French, Japanese, or Soviet judges? This question is eventually raised by Cahn himself. He answers: "Because it seems desirable at least, if not strictly necessary, that the

19. *Id.* 27-38, 25-26, 30, 63.

20. *THE SENSE OF INJUSTICE* 13, 24.

21. *THE MORAL DECISION* 3.

decisions grow out of economic conditions and cultural circumstances in a single national society."<sup>22</sup> We can thus expect to find a Soviet morality, a Third Reich morality, and an American morality, each good in its own sphere but only accidentally good elsewhere. We can also expect that the amount of required critical evaluation of intermediate moral precepts proffered by the judges will vary heavily from country to country. This is truly the notion of a "gentilial" morality. As the Soviet cloak spreads to more countries, we can even anticipate the problem of conflicts not of law, but of morality.

We must also ask how it is that Cahn expects to find all the categories of moral good dealt with in the rules announced or developed by judges in resolving controversies between people. It would seem very clear from Cahn's statement of purpose, from the title, as well as from his discussion of the good for man, that his book is at least concerned with the moral good in all its scope, and not merely with the narrower problem of justice in the relations between men. In his discussion of the good for man he classifies the philosophical contributions on this subject, either as viewing the good for man as "happiness" or as "righteousness."<sup>23</sup> He rejects these contributions as being too narrow in view and supports the notion of a "mixed government" of the good which combines both notions of the good for man: "happiness" and "righteousness." Whatever Cahn means by "happiness" and by "righteousness"—and he does not define or describe what he means—his joining them together into an amalgam notion of the good for man is indicative that he is concerned with an expansive notion of the moral good and the moral decision concerning which he seeks to illuminate the thinking of others.

Yet can Cahn seriously contend that his reader may expect to find in the decisions of judges, even American judges, moral knowledge bearing upon the primary and intermediate principles concerning love, friendship, charity, humility, temperance, courage, veracity, sobriety, modesty, magnanimity, patience, perseverance, and constancy? We are indeed fortunate if we can obtain just judges who know something about justice and who seek justice in their decisions. We can hope they will in fact be charitable, temperate, courageous, and humble, but we will hardly look to their decisions for guidance in these matters. After all, Cahn has himself stated in his earlier work that the end of the positive law is justice. What we in fact expect to find in the development and application of positive law by judges is an approximation of justice. The principles they develop and apply are intended to be of legal justice. The problem to which positive law is directed is the problem of justice: how the conduct of one man which bears upon another is to be judged. It is not directed to the problem of courage, of moderation, and the other myriad moral problems where the problem relates to how the conduct of one man is to be judged apart from its bearing on another person. Thus, despite Cahn's exposition of the good in general for man, the statement of the purpose of the book, and his title, we must say that he is concerned with the primary and intermediate principles of justice. For this reason, he might better have entitled his book *The Just Decision*.

Now that we know where to go to find our primary and intermediate moral standards, what is to be done when we get there? Do we take just any decided

22. *Id.* 52.

23. *Id.* 12-14.

case as involving the good we seek? No, for there are proper cases and improper cases. In the first place, we are told the case must not involve the vast vistas in the law of the morally neutral. It must concern a moral problem. In the second place, it must be a "prismatic" court case.<sup>24</sup> Each person, it would seem, will require a careful knowledge of the qualities of the "prismatic" case for he must go to the decisions of the courts himself (which should occur quite frequently) when such men as Cahn have not digested and commented on cases bearing upon his particular moral problem. The author himself underlines the importance of this: "It is fundamental to the method of our study that they [the cases] were selected for their *prismatic* qualities."<sup>25</sup> The only definition of the prismatic case provided the reader is the following: "it reveals an entire spectrum of moral forces, personal ambitions, group standards, lusts, sufferings, and ideals."<sup>26</sup>

Near the end of the book, however, Cahn describes the criterion for his own selection of the "prismatic" case as being a very simple one: "Are the data of this specific case—its legal data as well as its factual data, for all combine together to give the case its distinct attributes—are these data likely to make an effective prism which will catch the undifferentiated, white light of the good and disperse it in multiple colors and rays—precise, decisive, and responsible?"<sup>27</sup> Part of this criterion is simple—for a lawyer. That is the part which calls for a determination of the legal data of the case, the facts of the case, and their relationship. That this is not a simple process for others confronts law professors every year as they attempt to teach first-year law students. But even the careful analysis a lawyer can bring to a case is not attuned to making a determination of whether in light of the facts and legal data of the case it is likely to make an "effective prism" which will catch "the undifferentiated, white light of the good" and whether the "rays" it disperses will be "responsible." In the first place this part of the criterion is largely metaphoric in nature and, in the second place, it calls for a careful definition of the terms which are not metaphorically used. We must conclude the criterion as here stated is not even one for experts in the moral good simply because its nature has not been adequately revealed.

But even if its nature is eventually spelled out, it seems clear that its application calls for experts; and experts, in moral matters at any rate, Cahn will not allow. Paradoxically, Cahn has made a moral expert out of judges and their "prismatic" cases. He does, to be sure, give one additional hint for the selection of cases: "... perhaps one is more likely to perceive the prismatic value in a judicial opinion if one agrees with its conclusion,"<sup>28</sup> and, as a matter of fact, Cahn finds that he agrees with most of the decisions reached by the courts in the cases he selected. The same serious practical problem remains for one seeking to apply Cahn's method.

Suppose, however, that we are fortunate enough to find a "prismatic" case decided by an American court. What do we do with it? Even those unlearned

24. *Id.* 4, 245.

25. *Id.* 245.

26. *Id.* 4.

27. *Id.* 245.

28. *Ibid.*

in the law know that judges disagree in the same court, that courts disagree in the same jurisdiction, and that courts of different jurisdictions differ in the handling of the same problem. To "prismatic" cases, therefore, a special mode of analysis must be applied in order to distill the moral knowledge from them. This is termed "prismatic" analysis.<sup>29</sup> Here we reach the heart of Cahn's presentation, as his fellow lawyers will readily recognize. This is true, because our author must now enable us to separate the goats from the sheep, the incorrect views of some American judges from the correct views of other American judges—with regard to their development of rules suitable, even if requiring some "prismatic" processing, for serving as primary and especially intermediate moral standards to an individual human faced with solving an individual moral problem.

"Prismatic" analysis, we are told, is aimed at grasping the moral insight, knowledge, and experience of judges. It involves "looking *critically* at the way American (case) law deals with . . . moral issues."<sup>30</sup> Of course the crucial word in this statement of method is "critical." First of all, we know that to be critical involves a standard of criticism as well as a matter to which it is applicable—in this instance, case law. Since case law is the result of an institutional development and application of positive *legal* principles, it is natural for our author to state that in "prismatic" analysis one must "take the dry abstractions of technical law and transform them into notions that respond to the need of . . ." each person who has to resolve a moral problem.<sup>31</sup> We gather, therefore, that not only will we be given a standard for separating a correct dry legal abstraction from an incorrect one, but in addition a standard for stripping the correct one chosen of its legal trappings and clothing it with a responsiveness to human needs in solving moral problems. But Cahn goes no further in explaining his "prismatic" mode of analysis of case law either before or after his specific consideration of the cases. Although we have not been expecting the "mathematical certainty" in moral principles discovered through his method that our author constantly warns us not to expect, we have a right to expect more definiteness than this in a description of basic method. One does not guide another in reading court opinions by telling him to be "critical" and to "transform" their legal abstractions into something else which is left undefined, especially where the latter is the chief object of the enquiry.

Perhaps, however, Cahn prefers to illustrate in practice rather than to define the "prismatic" method of case analysis. This, of course, would be perfectly understandable in an initial approach, as this one is, to the problem of moral knowledge. In any event, it is our last chance to understand what our author means. Let us then, with him, "consult the law."<sup>31a</sup>

First of all, we meet an over-all criterion drawn from the law which our author indicates we will use for determining what is morally good and right conduct after we have once determined what is morally wrong and evil conduct as a result of having applied "prismatic" analysis to a "prismatic" court case

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29. *Id.* 52.

30. *Id.* 11.

31. *Id.* 4.

31a. *Id.* 5.

involving the relevant moral problem.<sup>32</sup> In American law we have established a typical relationship between decisions of administrative bodies and review of their decisions by courts. The typical judicial review provided for by law in this situation is one in which the court looks to see whether there is a substantial basis in law and fact for the administrative decision. If there is, then despite the judgment the court might have independently and originally reached in the case if it were free to make the decision in that way, it will affirm the administrative decision below. In view of what Cahn considers the good for man, he asserts the existence of an analogy between this rule of judicial review and that good.

We have earlier indicated that Cahn has classified all previous philosophical contributions on the problem as viewing the good for man either as "happiness" or as "righteousness," that he has criticized these views of man's good as inadequate, and that he has asserted man's good to involve both "happiness" and "righteousness." Insofar as the author purports to present adequately what philosophical realists view to be the "happiness" of man, and this is the classical view in our Western culture, he has again worked a major disfiguration of the facts. Since he does not even attempt to spell out what the view of "righteousness" as the good for man is, one can not assess what he means. Putting this major objection aside, however, let us proceed to the author's description of the difference in moral process essential to the obtaining of these two forms of good. He tells us that man's good considered as happiness calls for a moral process resembling the administrative process. This means, he says, that what is needed here is "expertness, adaptability, and a talent for accommodation. To be happy, one must make elastic plans, must know the strength of one's materials, and calculate on the possibility of unexpected future demands."<sup>33</sup> On the other hand, he tells us that man's good considered as his righteousness calls for a moral process resembling the judicial process which acquits or condemns in light of a pre-existing rule.

The lawyer will readily recognize that Cahn has characterized administrative process primarily by the legislative task frequently delegated to it, rather than by the judicial task which is also frequently delegated to it. The typical rule of judicial review applies, however, to both forms of administrative decision. One need only look to the administration of antitrust law by federal courts to see that "judicial process" of courts does not differ substantially from adjudicative administrative process. Despite these difficulties in asserting here an analogy in the law, Cahn asserts that our determinations of man's good as happiness (our administrative process) must be left to stand unless our "conscience can find no acceptable basis whatever for the course we have chosen" (our judicial process). This would seem to indicate that "prismatic" method of case analysis will seek in the main to determine what is wrong human conduct, what is the "unrighteousness" of man. It is the method primarily of "judicial process." We will, says our author, "focus on the notion of wrong."<sup>34</sup> Once we have determined what is the wrong human conduct with regard to a particular moral problem by

32. *Id.* 14-16, 11-12, 19, 27-28.

33. *Id.* 15.

34. *Id.* 11.

analyzing a court case "prismatically," we can then characterize any other conduct with regard to it as good unless conscience can find no acceptable basis whatever for the course chosen. Now Cahn has essayed to characterize and criticize in this same discussion all prior moral philosophy. He must then have known, he certainly should have known, that he has raised in this discussion two major problems of moral philosophy—those which concern how one goes about establishing certitude of conscience and what is permissible action, if any, when one has a doubtful conscience. It completely overlooks another major problem—that which concerns permissible action when one has a wrong conscience. These problems, insofar as they are philosophical problems, can only be resolved by resort to the philosophical sciences. This is not the place for a rough analogy from the law, particularly when it involves as doubtful an analogy as this one. A philosophical problem calls for philosophical analysis. The failure to see this is one of the chief errors of the positivists whom Cahn has so bitterly criticized.

Further, while Cahn's criterion, if valid, certainly eases the problem of determining what is good or moral human conduct and narrows the area in which "prismatic" analysis of cases will have to be utilized, its simplicity is deceptive, as any lawyer knows. A past judicial decision either under a statute or common law principles that the specific conduct in that case fell afoul of the applicable rule leaves a great margin of doubt as to what is also violative or permissible under that rule. All lawyers know that a mere catalogue of what conduct has been held to violate a given legal rule is a poor basis for prediction that all other conduct is permissible under the same rule. Under Cahn's criterion for determining what is morally good conduct, we might easily have a situation where conduct which is morally good because not prohibited by one court decision which "prismatic" analysis approves becomes morally bad because prohibited by a subsequent court decision which "prismatic" analysis also approves, although the state of one's conscience has not changed between the two cases from its original character of not being offended by what the court now proscribes. The question is thus raised as to what one's conscience has to do with determining what is morally good conduct. Must we say that the court's conscience is to be substituted for one's own conscience?

Moving now to the use of "prismatic" analysis with respect to specific cases, let us see what Cahn in fact does do by way of determining what is wrong human conduct in light of the dry legal abstractions of the case. The first thing we discover is that some of the leading cases have been used by Cahn to spell out not what was "wrong" but what was "right" human conduct. These are cases in which the court either approved or did not apply a sanction to the conduct of persons charged with violating some civil or criminal rule and whose decisions Cahn approves. Consequently, we must say that the criterion for what is good in human conduct extends to some cases where the "prismatic" analysis approves the court's approval or non-sanctioning of the human conduct in question. Apparently in these cases the sense of wrong of the judges is not at work or else Cahn must admit to a sense of right being at work which produces as objective a result as the other sense. If the sense of wrong is not and cannot be operative in the minds of judges deciding cases in which they approve the conduct involved,

we must ask then how Cahn can assert an empirical foundation for the rules the judges rely upon for deciding the case.

When we examine the "prismatic" cases in which the court holds certain conduct to be wrong, we can expect to discover more about "prismatic" method, for it is this type of case for which the book plainly indicates the method is primarily designed, since there is a derivative criterion for determining what is good human conduct.

The first case to which Cahn applies "prismatic" analysis is one in which a sailor was charged and convicted of manslaughter for having thrown a ship's passenger out of a lifeboat into which some of the crew and passengers of a sinking ship had gotten after the ship had struck an iceberg.<sup>35</sup> When the act was done it was highly probable that the boat would have sunk and all would have perished in the sea. In all, fourteen passengers were thrown to a watery death and possibly two additional women passengers, although the latter may have leaped into the water to be with their dying brothers. In his charge to the jury, the judge stated that only those sailors who were indispensable for operating the boat were entitled to remain in it and that if there were surplus passengers upon this basis, those to be thrown over the side must be chosen by lot. Cahn disagrees with the decision. He takes the position that "if none sacrifice themselves of free will to spare the others—they must all wait and die together."<sup>36</sup>

The point here is not so much whether one agrees or disagrees with Cahn's position concerning what is the morally good conduct here. It is rather, for the limited purposes of this reviewer, to determine the nature of the "prismatic" analysis by which he arrives at such a position. How does he determine that the court is wrong in the rule it announced and how does he determine that his position gives the right rule for the moral problem here involved? As a matter of fact his position is one of four positions that have been taken by judges and legal scholars as to what the legal rule should be. The first thing to be noted, then, is that "prismatic" method as applied here involves a situation in which the operative result of the "sense of wrong" varies depending on who is judging the moral problem.

The second thing to be noted is, as Cahn says, that "[t]his question could never be resolved if our appraisal of human life were a strictly *subjective* process."<sup>37</sup> We must, therefore, make an "*objective* examination of the value of being alive."<sup>38</sup> Without defining what an objective examination is, the author then states that such an examination may be found reported in the Babylonian Talmud which had been made by two competing famous schools of rabbis.<sup>39</sup> As the content of the examination to which he refers is not explained in his book, we cannot know the basis upon which it was or could be termed an objective examination. The next hint as to what an "objective examination" is comes when the author states that "[t]he *objective view* does not hold that under every conceivable human set of circumstances each human life has an indestructible

35. *Id.* 61-71.

36. *Id.* 71.

37. *Id.* 63.

38. *Ibid.*

39. *Id.* 63-4.

value."<sup>40</sup> He then refers to the fact that everyone knows the law recognizes justifiable homicides, excusable homicides, drafts men into armed forces to face death in wartime, and executes certain convicted criminals. While this is not a definition of what is "objective," it obviously by implication gives some tentative shape to his use of the term. We can now surmise he refers either to the law or to "what everyone knows" as a standard of what is objective. We must, for obvious reasons, reject the idea that law can be a standard for objectiveness in determining what are correct primary and intermediate moral principles and accept the other alternative. That we are not far from the author's actual position is quickly discovered for he refers to a statement by Justice Holmes from another case and says his "appraisal was objective" concerning the value of being alive.<sup>41</sup> The statement of Justice Holmes so approved was the following: "*By common understanding imprisonment for life is a less penalty than death.*"<sup>42</sup> We can now conclude that an appraisal or an examination of the value of being alive, for the purposes of resolving a moral problem in a court case, is "objective" when it is framed to reflect what the "common understanding" is of that value with regard to that moral problem.

To be "objective," then, we must look to what the common understanding is of the value of being alive in the situation presented by the sailor-passenger-sinking-lifeboat case. As we have already said, four different views have been taken as to what the value of being alive (more properly, the value of being allowed to live) is in this situation. This naturally leads us to conclude that this is a case presenting a moral problem in which no objective examination of the moral value involved is possible, for the simple reason that there is no "common understanding" with respect to it. The fact that it is commonly understood that human life does not have "an indestructible value . . . under every conceivable human set of circumstances" does not help us. For this "objective appraisal" does not tell us how to determine what to do under *these* circumstances. The first aspect, then, of Cahn's "prismatic" method of case analysis can not get off the ground in a case where there is no "common understanding" for the courts to expound.

"Prismatic" method, however, does not stop with an analysis of common understanding, for Cahn proceeds to examine the principal case and rejects the court's solution as well as any which has been proffered other than his own. If we consider that his "prismatic" method is still "objective," clearly that notion must take on new contours of meaning. In support of his position, he observes that "of course" the life of any person in the lifeboat is worth as much as the life of anyone else in the boat.<sup>43</sup> Is this self-evident, and if not, why is this proposition true? Cahn does not answer this question directly. His "of course" may in fact mean that he takes it to be self-evident that the proposition is true; but this would be inconsistent with his over-all presentation, for he expresses extreme doubt about what is morally good conduct in this situation. The most that he says in explanation of his position is that this is a situation involving

40. *Id.* 64.

41. *Id.* 65.

42. *Ibid.*

43. *Id.* 68-9.



"morals of the last days"<sup>44</sup>—this we can certainly see, from one point of view, because the last days of the people in the lifeboat have presumably been reached, if all remain in it. We might ask initially how in *any* situation, whether involving the "last days" situation or not, the life of any human person can be worth less than the life of any other, where none has done something to harm or threaten serious harm to another? What is so peculiar about the "last days" in this regard? Is not this principle an ominous one for mankind when we are in the "middle days" situation, for it would seem to indicate life is cheaper then? The "last days" situation, observes Cahn, causes all of the occupants of the boat to be "reduced—to members of the genus."<sup>45</sup> Why, in remaining individual human persons, are they reduced to the genus? Is this not, also, just another way of saying that in this situation the life of each occupant is equal in worth to the life of any other occupant? To say that in a certain situation the human persons involved are to be considered only insofar as they are members of the same genus is the same as saying that insofar as they are essentially men they do not differ in any respect or value.

The crucial answer has not yet been given. We have not been told why they are equal in value, which is the same as to say why they are reduced to the genus. Cahn adds, as if he anticipated the reader's question: "In such a setting and at such a price, he has no moral individuality left to save. Under the terms of the moral constitution, it will be wholly his self that he kills in his vain effort to preserve himself."<sup>46</sup> But again we must ask Cahn: Why is it that the occupant has no moral individuality left to save, and why does this bear upon the problem? How is it that it is wholly his self that he kills if he kills another? Since he remains an individual human person, it would seem he may preserve and even add to his own individual moral goodness by performing in this situation a morally good act. The very question is, What is the morally good act in this situation? Further, if by killing another it is wholly himself that he kills, this would seem to be saying that he acts in a way that is morally wrong. Yet here again we have either a self-evident proposition or an assumption of the very thing that was to be determined through Cahn's analysis. How, too, does the "moral constitution" speak to this problem? The "moral constitution" is just another term for what Cahn has called a "sense of wrong." The latter has not been explained in this book insofar as it commands one result rather than another in a particular case. Cahn has said his last word on the matter. Either what he has said is self-evident or it is not. Cahn has denied by his own analysis that it is self-evident; therefore, from his point of view, there must be a reason or basis for his position. He makes statements for his position but he does not show why they are reasons.

We must conclude that his "prismatic" method as actually applied to the moral problem in the principal case has become inexplicable. Also, since the method was not adequately explicated previously to this case, we must further conclude that Cahn's "prismatic" method has in fact been a method of expressing an opinion about what is the true intermediate moral precept applicable for

44. *Id.* 70.

45. *Id.* 71.

46. *Ibid.*

resolving the moral problem presented by the principal case. He has not extracted moral *knowledge* from the case. He has in fact rejected the court's resolution of the moral problem as constitutional knowledge. He has not even accepted guidance from the court, whether its guidance be in the realm of moral knowledge or opinion. He brought to bear no moral knowledge of past courts in resolving the instant moral problem. He referred to standards extrinsic to the law for resolving that problem but he did not explicate those standards.

Let us, however, not judge the nature of "prismatic" method by one case; let us take the case which the author himself has selected because it "may prove the most rewarding in this book" and because "it deserves exceptionally careful rumination."<sup>47</sup> In this case we are presented with an attempt to deport an alien who has been convicted of concealing liquor with intent to defraud the government of whiskey taxes and has been sentenced to more than a year of imprisonment. A federal statute provided that in case of such a sentence the alien could be deported if the conviction was for a crime involving "moral turpitude." The appellate court affirmed the lower court's dismissal of his writ of habeas corpus, thus sustaining the right of the government to deport him.<sup>47a</sup>

Why does the author agree with the legal notion of the case as a guide for resolving the moral problem presented by it? Is it because the court reflects the "common understanding" of the value of paying taxes? No, for the author takes the position that the operative American mores countenance "tax-fraud as a general and usual practice."<sup>48</sup> The basis for his agreement is rather that this is not a case of ordinary but "professional" tax-fraud and that as to the latter the operative American mores are condemnatory. "According to the American estimate, nonchalance stops where professionalism begins. . . . He had lost his amateur status and with it his expectation of indulgence."<sup>49</sup> It is for this reason that he disagrees with the dissent of Judge Learned Hand opposing the deportation. This judge had observed that he wished "it was commonly thought more morally shameful than it is to evade taxes; but . . . we must try to appraise the moral repugnance of the ordinary man towards the conduct in question."<sup>50</sup> Judge Hand "appears to have been in error" because he did not, according to the author, adequately measure what the "common understanding" was as to the value of paying taxes in the instant case.<sup>50a</sup> We must conclude that application of "prismatic" analysis in this case calls for following the "common understanding" of the particular value involved in the case.

Suppose, however, this had been a case of an alien guilty of just ordinary tax-fraud. In such a case, the author would also apparently not oppose the "common understanding," as he sees it to be, of the value of paying taxes. The alien should not be held guilty of moral turpitude. To resolve the specific moral problem in each case, the author would require the court to appeal, then, to the "common understanding" of how the value involved should be handled. Since he

47. *Id.* 165.

47a. *Id.* 164-175.

48. *Id.* 170.

49. *Id.* 168.

50. *Id.* 165.

50a. *Id.* 169.

approves a court's resolving of moral problems by an appeal to "common understanding," does his "prismatic" analysis of the case also require approval of the practice of committing ordinary tax-fraud as being a moral practice? No, for he rejects this position and answers that all should practice honesty in paying taxes.<sup>51</sup> Consequently, there are two "prismatic" methods for a moral problem or else two areas of a moral problem in which one "prismatic" method can reach opposite results. Thus, "prismatic" analysis here, as in the previous case, brings our author to reject the court's disposition of a particular moral problem (in this case, we must refer to its highly probable disposition of it) as a basis for *private* moral decision. In the previous case, however, he rejects its disposition of that moral problem even as a basis for *public* or government moral decision, while in this case he approves of it as a basis for *public* moral decision. In both cases, the rejection of the court's rule as a basis for *private* moral decision is not "common understanding" but some other extrinsic standard. We could not determine what that other standard was in the previous case. Let us look to the asserted standard in this case.

For the purpose of *private* moral decision, Cahn asserts that payment of government taxes is morally obligatory for three reasons drawn from "political, social, and individual morals."<sup>52</sup> The first proposition relied upon to found the moral obligation is the following: "representation gives taxation a claim on political conscience; representation means that the obligation to pay taxes is, in political morals, self-assumed, voluntary, not impersonal, not imposed from without, but as to each citizen binding upon conscience because essentially autonomous."<sup>53</sup> One must first observe that the problem of tax-fraud in the principal case involves an alien, not a citizen. Consequently, if the moral obligation to pay taxes arises only with respect to a citizen in view of the fact that he possesses representation, there was no moral obligation to pay taxes on the part of this alien. Yet the obligation is asserted by the author with respect to him also. If Cahn were to amend his statement of his basic proposition to include resident aliens as being under a moral obligation because they may look eventually to citizenship and thus to representation, we must ask him about the countless thousands who have over the years been declared ineligible to become citizens or those who still remain ineligible. Are the latter under no moral obligation to pay taxes? Further, if representation is the "self-assumed, voluntary, not imposed from without, . . . autonomous" basis for the moral obligation to pay taxes, suppose that the citizen says, as so many in effect do: "I do not care to be represented" or "I will not exercise my right to be represented." Does this affect the citizen's obligation to pay taxes? What about the moral obligation to pay taxes where one is unable to meet a property or other qualification in order to vote?

The second basis for the moral obligation is asserted to be "social morality": "taxes are the price each of us pays for his participating share in civilized society and for enjoying the immeasurable benefits of community existence."<sup>54</sup> Finally,

51. *Id.* 173.

52. *Ibid.*

53. *Id.* 174.

54. *Ibid.*

the basis for this moral obligation is said to be "the voice of individual honor" or one's integrity.<sup>54a</sup> Our main concern, however, is not so much with the correctness of Cahn's answers as with the nature of the standard to which we see he ultimately appeals in his "prismatic" method of case analysis, when utilized for the purpose of guidance in *private* moral decision. Since what he has done is to refer to "morality," we must ask what he meant by this. Does he mean "mores"? It is clear that he rejects identification, for the purposes of *private* moral decision at least, of "mores" and "morality." Does he mean moral, political, and legal philosophy as a distinct branch of science or knowledge or some subordinate normative science? If so, then "prismatic" analysis of cases is not a method of drawing or distilling moral knowledge of judges from cases decided by them but a method of judging whether their rules are correct as a basis for (1) *public* moral decision from the extrinsic standpoint of "common understanding" of values and (2) *private* moral decision from the extrinsic standpoint of an independent body of moral knowledge, presumably at least the field of the practical philosophical sciences and perhaps some subordinate normative sciences.

If this is the sum and total of "prismatic" analysis, we see the necessity not so much for a study of legal cases but, first and foremost, to have recourse to the chief extrinsic standard, namely, the moral knowledge developed by the practical philosophical sciences and subordinate normative sciences. Since Cahn has been most critical of practical philosophy as it has heretofore been constituted, presumably he means practical philosophy when it is *properly* constituted. Since, however, Cahn does not purport in this book to be developing the proper content of the practical philosophical sciences or a subordinate normative science, we have to conclude that we are most unsure of what the extrinsic standard consists to which "prismatic" analysis makes appeal. As a matter of fact, the appeal to "common understanding," as the chief extrinsic standard of "prismatic" analysis when used in judging the rules of the two principal cases for the purpose of *public* moral decision, is abandoned in a case discussed by the author toward the end of his book. Here Judge Learned Hand, who was criticized in the second case discussed above for *not* adequately reflecting the common understanding of the value in question, is criticized for even attempting to measure the common understanding of another value.

Let me quote the author, who forgot what he himself had previously practiced with his "prismatic" method in the two cases previously discussed: "Beginning in 1929, Judge Learned Hand's opinions have maintained persistently that moral right and wrong must be determined only by the 'common conscience,' 'moral feelings now prevalent generally in this country,' or 'the common conscience' prevalent at the time. . . . But again and again . . . Judge Hand has reported with dismay that, if the case presents the slightest tinge of difficulty, he can never find a way to identify the community's moral feelings on the subject. For example, he wrote in a recent opinion, 'Our duty in such cases, as we understand it, is to divine what the "common conscience" prevalent at the time demands; and it is impossible in practice to ascertain what in a given instance it does demand.' Rarely does one observe a judge clinging with such tenacity to a rule of decision

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54a. *Ibid.*

while he himself repeatedly demonstrates its worthlessness."<sup>55</sup> In light of this clear statement, we must conclude that what seemed to be the clearest part of the author's "prismatic" method, as he practiced it in two of his principal cases, is rejected even by him just before the end of his book.

In the name of a "prismatic" analysis which the author neither expressly nor in his practice explicates, he advances several "responsible moral standards." With regard to the value of the family, he observes that "living together as a family is a precarious social expedient at best, justified mainly by the lack of any more acceptable alternative. . . ."<sup>56</sup> As maxims for moral administration of the family he purportedly draws the following from one principal case: (1) "A demand seriously asserted should be seriously evaluated; (2) what is not forbidden is not necessarily permitted" (compare this criterion with his earlier one for determining what is good human conduct); (3) "in personal relations, the only things that are valuable enough to justify compulsion will generally be destroyed if we resort to it."<sup>57</sup> With regard to sexual relationships, he purports to draw or process from a criminal case the following "responsible" moral standard: "Accordingly, an enlightened moral classification—the kind we are seeking here—will not run along the traditional boundary line fixed by legal marriage, separating the permissible intercourse within the borders of wedlock from all the outside, presumably vile types of sexual connection."<sup>57a</sup> With respect to divorce he takes the position that divorce is morally justified, that one spouse may obtain a divorce from the other even though the latter is guilty of no misconduct or even when the one seeking a divorce is guilty of misconduct. With respect to suicide, he observes that "[a]ccepting the proposition that, in order to save himself, a person may warrantably kill an assailant bent on murder, we can deduce when suicide should be considered morally justifiable. . . . that is to save the intrinsic self from destruction when no less extreme action will suffice."<sup>58</sup>

Where these standards have been drawn from the legal principles of the principal cases, there has been little of the "prismatic" processing illustrated in the other cases discussed previously. In the case of the principle concerning suicide, for example, we see the gross assumption that there is no disparity of problem between the situation in which one acts to preserve one's life and that in which one takes his life in order to avoid some evil about to be visited upon him. Here "prismatic" method involves proceeding deductively from a legal principle on the basis of an assumption of the crucial point to be decided—can the two situations be morally analogized? There is little testing of the legal rule by an extrinsic standard, if any, when the author agrees that "the law is able to provide us with moral guidance on this subject. . . ."<sup>59</sup> We have seen that when he does not agree with the legal rule, he does submit it extensively to the test of a purported extrinsic standard. Yet it would seem a parity of method should require extensive testing in both instances.

55. *Id.* 303-4; 305-6; 310.

56. *Id.* 81.

57. *Id.* 85-6.

57a. *Id.* 93.

58. *Id.* 240.

59. *Id.* 239.

In sum, one must conclude that this book does not accomplish what its author set out to do. His stated object was to draw moral knowledge from "prismatic" cases decided by courts by use of a method adapted to accomplishing this object. Neither the method of selecting "prismatic" cases nor the method for analyzing such cases, termed "prismatic" analysis, is ever really explicated by the author. To the extent that a method could be discerned in his actual examination of cases it involved internal contradiction from one case to another. It also involved in some cases testing the legal rule by standards extrinsic to the law which were called "morality." In still other cases the legal rule was adopted without referring to such a standard. In spelling out a method, the author distinguished but did not always maintain a clarity of treatment when he moved between the problem of the proper basis for the *public* moral decision and that of the *private* moral decision. Insofar as "morality" is invoked as the ultimate extrinsic standard for the objective determination of what is moral conduct, the author seems to point to that body of moral knowledge which is moral, political, and legal philosophy. If he does not refer to this body of moral knowledge, he apparently has in mind some normative science subordinate to practical philosophy, for he rejects the relativism of positivism. In any event, since he questions all prior work in the field of practical philosophy and does not identify what other body of normative knowledge he refers to, we are left in doubt as to just what he has in mind by an extrinsic standard for "prismatic" analysis.

This book is in fact a venture into the field of practical philosophy insofar as it raises philosophical questions. It is a venture also into the field of normative knowledge below the level of practical philosophy insofar as it aims at a knowledge which will serve as the proximate basis for the prudential judgment. One must indeed sympathize with Cahn in his denunciation of the positivism which pervades so much of our thinking today. Yet he does not show that the positivist position is a false one. More basic, however, is the conclusion which this review justifies: that he takes a position which does not substantially differ from and may be reduced to the basic positivist position. This is true because he neither shows the legal cases to be productive of moral knowledge nor does he identify in any discernible manner the extrinsic standard of "morality" by which he purports to test the validity of the norms he meets in those cases. The position of one who refers to but does not or cannot identify an objective standard for moral judgment is hardly to be preferred or distinguished from one who asserts, as does the positivist, that there is no objective standard for moral judgment. Finally, by failing to examine carefully the classical realist thesis of natural law and disfiguring some of the essential facts about it, he violates the time-tested procedure for bringing about genuine progress in the two areas of knowledge referred to at the outset of this paragraph. Contrary to Plato, Aristotle, Aquinas, and the other great philosophers of our Jewish, Greek, Christian cultural tradition, he has failed "to call into council the views of . . . our predecessors . . . in order that we might profit by whatever is sound in their thought and avoid their errors."<sup>60</sup> He has failed to observe that while "no one is able to attain the truth adequately . . . on the other hand, we do not collectively fail, but everyone

60. ARISTOTLE, *De Anima*, 3 WORKS bk. I. n 403b22-25 (Ross ed. 1931).

says something true about the nature of things, and while we contribute little or nothing to the truth, by the union of all a considerable amount is amassed."<sup>61</sup>

JOSEPH P. WITHERSPOON

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**GROSSE RECHTSDENKER DER DEUTSCHEN GEISTESGESCHICHTE.** *Third enlarged Edition.* By Erik Wolf. Tübingen, J.C.B. Mohr, 1951. Pp. 739. 29.60 Dm.

The series of biographies of great German jurists which Erik Wolf published in 1939 under this title, and which appeared in two subsequent editions, was from the outset recognized as a fundamental contribution to the history of juridical philosophy and of natural law. In its present form, augmented and enlarged, it introduces us in impressive fashion to what in the opinion of the author constitutes the essence of German juridical thought. At the same time, it does not fail to reveal the common ties with European thought.

The reference to a specifically German conception of law is susceptible to different interpretations. It is evident that it should not be understood in the sense of a merely causal dependency, with respect to an irreducible national temper which determines it in inexorable manner; rather it refers to a peculiarity arising from historical and spiritual factors, and is understood better by immediate intuition than by an intellectual process. In any event, the author leads us to perceive a basic current of continuity in thought from the Middle Ages to the present. At the same time, of course, the wide variety and multiplicity of facets, under the influence of the vicissitudes of European culture and their repercussions on the German mind, are adequately presented.

To the fourteen jurists in the original edition, which proceeded from the author of *The Mirror of Saxony*, Eike von Repgow, to Otto von Gierke, the author in the second edition added two more: Lupold von Bebenburg and C. G. Svarez. The doctrinal trajectory of German juridical thought is then unfolded before us in a chronological order which also retains a continuity of development. Eike von Repgow and Lupold von Bebenburg belong completely to the Middle Ages; Zasius and Schwarzenberg move also, to a certain extent, in this orbit, while Oldendorp and Althusius represent the spirit of the Reformation (the first was Lutheran, the second Calvinist), and Grotius initiates the transition towards rationalistic natural law. This movement became more precise with Samuel Pufendorf and culminated with Christian Thomasius, one of the leading exponents of the *Aufklärung*, followed by Svarez. With Anselm Feuerbach and Savigny we pass to the nineteenth century, which witnessed the prodigious work of Windscheid, Ihering, and Gierke. All these authors, characteristic of certain epochs and trends, are studied in ample historical-cultural perspective by Wolf, who succeeds in breathing life and spirit into them, and who in no few instances gives us often a new or at least a suggestive picture.

This is the case, for example, with Althusius, considered generally as one more

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61. ARISTOTLE, *Metaphysica*, 8 WORKS bk. a. 1 993a32-993b3 (Ross ed. 1928).

opponent of monarchism, but who was a systematic thinker of marked personality. If Gierke in his famous monograph tended to interpret him in the light of later developments in natural law, as a rationalist, Wolf relates him more closely to Calvinism, from which actually flowed his juridical and political thought, and to the spirit of the free cities of Switzerland and Netherlands. To this connection with the form of city-states may undoubtedly be traced the oblivion into which his work was destined to fall in the following era of centralizing absolutism. Wolf also emphasizes the connection of Grotius with the Scholastic and humanistic traditions, minimizing the aspect of the *Aufklärung* often exclusively stressed. Perhaps of some help in explaining these conclusions is the attention Wolf lends to religious thought and the whole of the spiritual life. In this sense, it would be useful to compare his portrait of the distinguished polygraph of Delft with other recent expositions of his doctrines which also insert his juridical work into the context of his speculative labor in the fields of theology and philosophy and his attitudes in regard to the current trends of his time.<sup>1</sup>

Along with Grotius, Pufendorf and Thomasius benefit especially from being considered in the light of their total cultural backgrounds. One does not without reservations agree with the author in his desire to minimize the individualism of Pufendorf, although one cannot ignore the fact that the activity of Pufendorf as a historian necessarily extended his influence to a wide degree, as Meinecke has already made clear in his history of the principle of the State. Cabral de Moncada has underlined the importance of the theory of moral entities advanced by Pufendorf, and has not hesitated to call him "an inconsequential, self-contradicting individualist."<sup>2</sup> Wolf could have discovered likewise in Paulo Merêa an interesting and similar point of reference.<sup>3</sup>

Anselm Feuerbach and Savigny, as well as Windscheid, Ihering, and Gierke, are well known as prototypes of a juridical thought with a universal irradiation. Here they appear neatly sketched in the framework of their times. Romanticism and positivism project their shadows behind them. The transition from conceptualistic jurisprudence to the jurisprudence of interests propounded by Ihering prepares the way for the decline of formalistic legal positivism. Ihering is, in general, presented as a protean jurist, whose influence is found in almost all later developments, particularly in the sociological consideration of law.

Among the other authors studied by Wolf, those who offer the greatest interest outside the national orbit of Germany are Lupold von Bebenburg, belonging to the lineage of other German theorists of the Empire (Jordan von Osna-brück, Alexander von Roes, Engelbert von Admont) whose thinking, compared with the Romanism of a Dante or a Bartolus, is characterized by a more ethical-religious sense of Empire, with strong eschatological elements. Lupold, who wrote towards the middle of the fourteenth century, already sees the necessity of distinguishing (in a manner recalling the distinction of Bartolus between the universal *de jure* dominion and the limited *de facto* dominion) between the German coun-

1. See, for example, among other works, the books of A. Corsano, *Ugo Grozio: l'Umanista, il Teologo, il Giurista* (Bari 1948) and G. Ambrosetti, *I Presupposti Teologici e Speculativi delle Concezioni Giuridiche di Grozio* (Bologna 1955).

2. *1 FILOSOFIA DO DIREITO E DO ESTADO* 193 (1947).

3. "O Problema da Origem do Poder Civil em Suárez e Pufendorf," in *19 BOLETIM DA FACULDADE DE DIREITO DE COIMBRA* (1943).



tries under the direct jurisdiction of the emperor, and those countries simply under mediate or indirect jurisdiction. This distinction clearly evidences the force of the already emerging reality of the incipient national state, the theory of which had been developed at the beginning of the century by Jean Quidort of Paris.

There follow, finally, brief sketches of Carl Gottlieb Svarez (a name derived from Schwarz), whom some erroneously believe to have been of Spanish origin. His importance lies mainly in the field of legislation, but Wolf sees in him the typical German incarnation of the last phase of the natural law of the *Aufklärung*, characterized by the penetration of natural law thinking into specifically juridical fields, or, in short, the "juridification" of natural law.

There is not space in this review to discuss at greater length all the points which so fully merit broader consideration. Nor is it possible to reflect in the limits of a few pages the book's richness of detail. A critique of this work cannot fail, however, to note the coherence of the global interpretation, even in regard to divergent conceptions, based upon the author's spiritual and national perspective. Still less can it ignore the magnitude of the work achieved by the professor of Freiburg im Breisgau.

ANTONIO TRUYOL

(Translated by FREDRICK PIKE)







