Natural Law and Human Nature

Wilber G. Katz
James Parker Hall Professor of Law

What is it that a teacher of corporation law can bring to a discussion of natural law? Perhaps it is principally his concern with the problem of the criticism of rules of law. I am awed, of course, by the mass of learning which has accumulated around varying concepts of natural law—learning which I have not even systematically sampled. But twenty years of teaching law have so heightened my concern over lawless debates about justice and law as to remove many inhibitions. Without apology, therefore, I may discuss the utility of a concept of natural law as a basis for the criticism of rules and institutions of positive law. But first let me summarize the change which these twenty years have brought about in the law schools in attitudes toward natural law.

I received my professional training in the twenties when natural law was all but eclipsed, except in the Roman Catholic law schools. The dominant legal philosophy was a positivism in which law was merely the word for what the officers of the State would enforce. Criticism of legal rules, except in terms of their internal consistency, was viewed as merely the assertion of the critic's personal opinion. I remember the classmate who insisted on an ethical point in our class in property law. In a withering tone, the instructor advised him to transfer to the divinity school if he was interested in such questions. And when Morris Cohen wrote in defense of natural law philosophy, he said that he expected his effort to have the kind of reception which would be accorded to a defense of belief in witchcraft.

It should not be overlooked that part of the hostility to the concept of natural law was due to its abuse, particularly in the history of the federal due process clause. Mr. Justice Brewer had said in an address that the demands of natural law "prevent that any private property . . . should be subordinated . . . in the interests of public health, morals, or welfare without compensation." And it was on similar grounds that legislation such as workmen's compensation was first held unconstitutional.

By the middle forties the general attitude toward natural law had strikingly changed. Perhaps the turning point was the perversion of the legal order in Nazi Germany. Legal relativism suddenly became ludicrous. Faced with the Aryan laws, one could hardly comment that the National Socialists merely had a different view of justice from ours. Books and articles were published giving new and respectful attention to the natural law tradition. To be sure, one of these was ridiculed by a reviewer as "firing feather barrages" and as "reconciling science and God and calling it law." But the reviewer himself later published his own "brief statement of democratic morals" in terms most of which a natural law philosopher could easily accept.

My own introduction to natural law was largely at the hands of my then colleague Mortimer Adler. In this introduction I confess I was not deeply impressed with the utility of the classic formulations of natural law principles. But I owe to Mr. Adler the clue which has led me to the position taken in this paper. Mr.
Adler gave a course called Law and the Nature of Man, an introduction to philosophical psychology. Participation in this course convinced me that inquiry into the nature of man is the most promising source of useful natural law criteria. Nor was this conviction shaken when a student librettist lampooned the course with the parody: "Law and the Nature of Man, tra la, has nothing to do with the law."

Let me first use the criminal law to illustrate how analysis of legal problems brings one to basic questions as to the nature of man. In my generation it has been fashionable to take the position that criminal responsibility is imposed either to deter (or prevent) further crime or to reform the offender. Emphasis on one or the other of these purposes usually reflects a distinct view of human nature. To speak of reformation presupposes a nature capable of moral development. To speak of deterrence presupposes only a nature capable of conditioning. When advocates of deterrence are faced with evidence that the deterrent effect of punishment on the criminal is very doubtful, they usually shift to the point that others, potential criminals, are more effectively deterred. This is highly probable, but it raises the question of the justice of punishing one man for the purpose of conditioning others. This point would not be serious if it were recognized that punishment is justified as retribution, but retributary theories have generally been rejected in recent decades. They have been dismissed as mere rationalizations of vengeance and as utterly unacceptable in view of evidence as to the extent to which crime is traceable to social and family conditions.

This confusion as to the basis of criminal responsibility is not merely of academic concern. It has led to confusion and vacillation as to the severity and type of penalties imposed and as to the handling of borderline cases of mental incompetence. And it mirrors an unhealthy confusion in the public attitudes toward crime and punishment.

A natural law approach to criminal law would require the facing of questions such as these: Are criminal tendencies unique to a criminal class or are they similar to tendencies common to all men? Have men a freedom of choice and a moral responsibility resting upon such freedom or on some other basis? Are men capable of moral development and under what general conditions does moral development take place? Is it important in this connection that men are treated as responsible for their acts?

Here let me sketch very briefly the doctrine of man in which Christians find answers to such questions. With this view of the nature of man, I will comment further on the criminal law and then consider some aspects of the law of economic organization. A thumbnail sketch of the nature of man in the Judeo-Christian tradition must include: first, man's capacity for creative life in society; secondly, his tendency toward defensive retreat from the frustrations of his limited creativity; and thirdly, his freedom and responsibility with respect to these tendencies. Inferences may then be drawn as to man's proper good and as to conditions necessary for his development toward this goal, conditions which legal institutions may help to establish and maintain.

We begin thus with the capacities in virtue of which man is said to be created in God's image. I shall only suggest some of the items in the complex: man's power of transcendence, his capacity for objective understanding and appreciation, his critical intelligence, his creative imagination. These powers are developed and exercised in a process of social interaction and in the context of man's need for others and his capacity for creative interpersonal relations.

But these human capacities are finite and their limits involve disappointment and frustration. Men do not readily accept their limitations in trustful dependence on the providence of God. They attempt in varying ways to escape these limitations and the pain incident to them, either in aggressive and pretentious rebellion against the limitations or in weak and slothful withdrawal from the exercise of their powers. At the conscious level and in relation to God these tendencies are called sin, but they are recognized more or less clearly under other categories in secular philosophies and in clinical science. And these reactions become habitual and to a large extent unconscious. In the case of man's creativity, the context for these tendencies is social and man's defensiveness typically appears in patterns of domination and submission.

Has man freedom and responsibility in relation to these tendencies? The answer of moral theology is yes, but what more can be said? Here one approaches the limit of human understanding. How am I to avoid the alternate temptations to prideful assertion of some pseudo-explanation or to slothful avoidance of a necessary point in my paper?

(Continued on page 15)
Katz (Continued from page 2)

Does it help to note that men do three things in relation to evil (i.e., defensiveness) in the world?

1. They do it predominately to transmit it. Equipped with defensive habits largely caused by the self-protectiveness of parents and others who influenced their development, they meet defensiveness (whether of the aggressive or submissive type) with counter defense (again either aggressive or submissive). This is the predominant pattern of human action, and in considering what legal institutions are suitable to man's condition, it is well not to lose sight of this fact. For this chain of defensive reactions man's responsibility is primarily communal; it rests upon the race as a whole.

2. But man not only transmits evil, he increases it. His freedom to do so is a mystery. Its exercise involves responsibility in a different sense. It is individual responsibility, though the presence of Satan in the Genesis story warns against prideful insistence on exclusive guilt.

3. Man need not merely transmit or increase evil; he may decrease it, not, to be sure, by his own power but through the redemptive power of God. He is free to be or not to be the channel of this power and he is responsible for the exercise of this freedom. The cost of accepting this role is the pain of enduring without self-protectiveness his share of the world's evil. And his share includes primarily his own defensive tendencies. To participate in God's redemptive work man must accept painful self-knowledge and assume full and painful responsibility for his own acts regardless of how completely they may have been determined by defensive acts of others.

This view of man's powers suggests that his proper good is the freeing and exercise of his capacity for creative and loving response to the world and its inhabitants. And man's advance to this end ordinarily requires external conditions, conditions in which individuals are enabled to take the painful steps which this advance requires. Certainly a measure of peace and security is required if individuals are to learn to control their defensive impulses. The environment also must have such stability that it does not overtax man's nascent and limited capacity for creative co-operation. Men require also an environment which treats them as persons, persons accorded freedom and held to responsibility. But finally it must be an environment not devoid of forgiveness.

With this rough summary of man's nature and temporal goal, we may return briefly to our consideration of the criminal law. If there is any validity to our view of the natural law of man's present state, it should follow that the law must somehow teach the sober fact of responsibility and that in this sense criminal penalties must be considered as retributory. And if the propriety of retribution is thus granted, criminals are not unjustly used if their punishment serves to promote peace and order primarily by deterring others.

At the same time the criminal law may aim at reformation which, in the terms I have used, is a matter of voluntary assumption of responsibility. Here, as well as in mediating forgiveness, there are dangers of confusing justice and mercy, but there is clearly room for devices such as probation, parole, and individual and group therapy.

In drawing the line as to mental incompetency, the classical rules in Anglo-American law run in terms of capacity to understand the character of one's act and the distinction between right and wrong. The perennial debate is over expanding the category of irresponsibles to include those who have acted with this understanding but pursuant to so-called "irresistible impulse." One difficulty with this change is that medical experts often disclaim any ability to discriminate in criminal cases between resistible and irresistible impulses and insist that all criminals should be treated as sick and all criminal acts considered as irresistibly impelled.

I will not say that the traditional rules have always reached desirable results, but a natural law approach indicates that the capacity to distinguish right from wrong is not an element which should hastily be abandoned as a criterion of legal responsibility. To say that law is retributive does not mean, of course, that legal retribution should always be imposed where moral responsibility exists. Even the clearly insane may bear in the sight of God a measure of responsibility for their condition and their acts, but only the most primitive law treats them as legally responsible. Similar legal immunity for those with certain types of emotional illness may well be justified without weakening the force of the moral teaching of the law.

The other legal field with which I wish to illustrate the application of natural law criteria is that relating to economic organization. Recent discussions have often invoked the natural law in this area and usually for the condemnation of the legal institutions of free market enterprise. These institutions are based, of course, upon the profit motive and consist of a pattern of markets for goods, services, and capital through which are performed three economic functions. These are the functions of directing the allocation of resources in various lines of productive activity, effecting a distribution of the social product among the suppliers of productive services, and determining the division of total income between consumption and saving.

One of the most eloquent of the natural law criticisms of free enterprise is that of Archbishop Temple in his Christianity and the Social Order (first published in 1942). Among the counts in his indictment was this:

Production by its own natural law exists for consumption. If, then, a system comes into being in which production is regulated more by the profit obtainable for the
producer than by the needs of the consumer, that system is defying the Natural Law or Natural Order.

The same point had been made in the declaration of the Malvern Conference of 1941, drafted by Archbishop Temple and passed without dissenting vote by the group of more than two hundred Churchmen, clerical and lay. The conference also passed by a very large majority a statement that the Church should declare that permitting "ownership of the great resources of our community" to be vested in private hands is a stumbling block "making it harder for the generality of men to lead Christian lives."

As long as these resources can be so owned, men will strive for their ownership. Those who are most successful in this struggle . . . will be regarded as the leaders of our economic life. They will thereby set the whole tone of our society. As a consequence it will remain impossible to abandon a way of life founded upon the supremacy of the economic motive, or to advance nearer to a form of society founded upon a belief in the authority of God's plan for mankind.

Another criticism of free market economy was made by the Rev. Charles W. Lowry in his recent book, Christianity and Communism. He urged that in rejecting communism we should agree with the communist criticism of the buying and selling of labor in an impersonal market. I think it is fair to interpret this also as an appeal to natural law.

Such criticisms of profit-seeking enterprise seem to me one sided. The natural law which is relevant in the practical criticism of positive law is the law of man's present nature. It is not merely the law or structure of the ideal community which is his goal. It includes also the stubborn tendencies which St. Paul recognized as the law in his members. And in the field under consideration, this means that natural law analysis must consider fallen man's typical reaction to economic scarcity (at whatever level of abundance). Here, as elsewhere, some men respond to frustration with pridelful aggression and others in weakness and fear. In the former we see greedy acquisitiveness and display; in the latter, laziness and envy.

The Malvern Declaration, to be sure, did note that the exaltation of economic activity as though the production of material wealth were man's true end is an example of "the pervasiveness of human sin" and the Declaration added that "this is as relevant to schemes of reform to be operated by sinful men as to our judgment of the situation in which we find ourselves." One may question, however, whether more than lip service was given to the point. The majority of the conferences, as already noted, declared for public ownership and thus for government fixing of wages and prices. They had indeed been told that socialism requires "... the conscious realization . . . of a new relationship towards our fellow men. . . . Socialism requires personal conversion. It is nothing less than a religious process."

The majority were willing, however, to go ahead with the legal change confident that the religious conversion would follow. In this Christian Laborite in Britain have been disappointed. I quote from the recent confession of Sir Richard Acland (the man who drafted the socialist resolution for the Malvern Conference). He wrote in 1952:

Too often our speeches (including particularly some of my own) . . . left audiences with the impression, that it would only be necessary to take big industries out of the hands of big owners in order that . . . all our people [should] work together as an enthusiastic and harmonious team of incorruptible saints!

What he had learned was presumably something about the problem of fixing wages by government action. I infer that he learned that fallen man finds it difficult to accept the decisions of other fallen men as to the worth of his contribution to the social product. The stumbling block for government wage and price fixing is the same as that in the path of voluntary agreement and conciliation. So long as it is possible to exert force, we may expect force to be exerted. In the case of government wage and price fixing the force is that of political pressure. We see the same process in operation in relation to government support of farm prices. And when pressures reach the fallen men at top of the government hierarchy, it is not surprising that they resort to giving with one hand and taking away with the other through monetary inflation.
The trouble with socialism, as a matter of natural law (if I may borrow the language of William E. Hocking with reference to communism)—the trouble with socialism is that “it exaggerates the capacity of human nature for community.”

Archbishop Temple’s own resolutions at Malvern did not declare for socialism, but they included:

The status of man as man, independently of the economic framework of industry; the rights of labor must be recognized as in principle equal to those of capital in the control of industry, whatever the means by which this transformation is effected.

One may question whether this involves any less optimism as to human nature than did the socialist resolutions.

I tried to take it seriously. I made it clear to the members of the faculty that it would neither be necessary nor of any use for them to encourage offers from other schools as a means of securing advancement in our community. And I considered it my duty to appraise the contribution of my respective colleagues, their needs, etc., and make salary recommendations accordingly.

Now if I had understood the natural law, I would have known that such an administrative policy is unnatural as well as presumptuous. You will understand that I was preserved from lynching and from insanity solely by the fact that the market did work despite my effort to exclude it. But I did not really get the point until I realized the consequences of my effort to discuss with my superiors the question of my own salary on the basis of worth or function. You will not be surprised to hear that my estimate of the worth of my services was somewhat higher than was theirs, and that I overestimated also my capacity to discuss the matter without corrosive bitterness.

In fairness to Mr. Lowry I should add that while he cast aspersions on impersonal markets, his concrete proposals as to the law were not open to criticism in natural law terms. His legislative program was not one of supplanting impersonal markets but of implementing their freedom by checking of monopoly. The measures suggested included also taxation according to ability to pay and control of money and credit. It is through taxation and relief that the law may properly foster the economic security which I listed among the conditions necessary for man’s moral development. And it is through credit and fiscal policies that the law may check violent fluctuations of business and employment with the same end in view.

But while Mr. Lowry in the end assigned to the law the role which, under conditions of American society, the natural law suggests it should play in relation to economic organization, statements such as that concerning the buying and selling of labor seem to suggest other types of legislative reform. Such statements contribute to the moral bewilderment and political confusion of

My point is that a natural law approach to economic institutions would consider the advantages of impersonal markets in the light of man’s greed and envy. I agree with Mr. Lowry that men are not commodities; but men being what they are, I believe that in a dynamic economy it is good—in the sense of appropriate—to have wages largely determined by the forces of competitive markets. And the same goes for the products through which farmers sell their labor.

I think this has some application even to the academic community. I began to teach corporation law twenty years ago and I was much affected by R. H. Tawney’s The Acquisitive Society. I was attracted by his principle of distribution according to function, which he contrasts with the principle of acquisitiveness. And whatever might be true of the business world, I thought that the academic community could certainly be governed by Tawney’s principle, that academic salaries could be fixed according to contribution or function, measured in some way other than by what a professor could get by going to another school. This, it seemed to me, was the asserted policy of the university and when I became dean

The Honorable Elmer J. Schnackenberg (J.D. ’12), Judge of the United States Court of Appeals for the Seventh Circuit, at an informal evening discussion in Beecher Hall, the Law School Dormitory.

Mrs. Rita Nadler discussing her academic schedule with Dean of Students Lucas.
our time. The same is true of statements such as that of an Episcopal chaplain, lecturing in a university course on the modern cultural crisis, who referred to institutions of profit-seeking enterprise as "examples of the well-nigh criminal irrationalities that result from confusion of means and ends." Such statements invite responsible re-examination in terms of the law of man's nature.

Let me close with a general comment as to the limited role of the positive law. The law can do little directly to correct the major heresy of our culture: the exaltation of economic over other values. Furthermore, we should not look to the law to define the basic principles of our community or directly to promote it. As Emil Brunner has said, "Justice may be able to remove strife, but it cannot create community." The principal reason is that man's voluntary advance toward community—his moral advance—requires economizing of his limited capacity for co-operative decision. Man needs an environment in which most things are settled by custom or impersonal forces in order that he may grow in capacity for objectivity in personal relations.

One thing the law can do is keep inviolate (in the words of one of the Malvern speakers) the principle of "the maximum freedom of the voluntary association outside the pattern of the ubiquitous State." This suggests, of course, that natural law has something to say about civil liberties and the freedom of association and expression. But that would be another paper.

(The foregoing paper was presented at a meeting of the Guild of Scholars in the Episcopal Church.)

'29 in Review (continued from page 4)

Marian Amschler, U. of C. Ph.B., 1930; children, Linda Despres, eighteen; Robert Despres, thirteen, student at University of Chicago Laboratory School. Address: Home—1220 E. Fifty-sixth St., Chicago 37; Office—77 W. Washington St., Chicago 2.

Diamond, Leo A. Engaged in practice of law with offices at 165 Broadway, New York. 1929-31, practiced law in Gary, Ind.; 1931-32, practiced in Chicago; 1932-34, Cook County Assessor's Office, Chicago; 1934-43, Office of Chief Counsel, Bureau of Internal Revenue, Washington, D.C.; 1943 to date, engaged in practice of law in New York, specialty, taxation. Special assistant to Chief Counsel, Bureau of Internal Revenue, 1940-43; lecturer, Practicing Law Institute (N.Y.) since 1943; lecturer on taxation, New York University Law School and associate professor of law, Rutgers University; contributor to various legal journals and professional periodicals; lecturer in many tax institutes throughout the country. Also engaged in bar association activities in field of taxation. Married, his wife being graduate of Ohio State University. Children: Diane, twenty-one, who attended Vassar College; Joseph, eighteen, freshman at Columbia (N.Y.); Gail, seventeen, freshman at Vassar. Address: Home—498 West End Ave., New York 24, N.Y.; Office—165 Broadway, New York 6, N.Y.

Professor Bernard Melzer addressing a meeting of the Student Wives Club in the Beecher Lounge.


Driscoll, Claire T. Member, firm of Driscoll & O'Brien, Chicago. Married to Ethel Clerihan in 1931. Two children: Thomas, twenty, junior at Notre Dame, who is considering enrolling in the Law School of the University of Chicago, potential military commitments permitting; and John, nine years of age. Address: Home—10557 S. Hoyne Ave., Chicago 43; Office—38 S. Dearborn St., Chicago 3.


Edwards, Thomas J. Member, firm of Baker, Hostetler & Patterson, Cleveland, Ohio, since January 1, 1939, and associated with said firm since April 19, 1929. Has done considerable trial work, then spent a large portion of time on labor work, and since 1947 has spent majority of time as general counsel of Scripps-Howard Newspapers and United Press Associations. Married to Alice Abernethy. Four children, Thomas J. Edwards, III, twenty-four years of age; Carol Edwards, nineteen; Alice Anne Edwards, fifteen; William J. Edwards, fourteen. Address: Home—22699 Shaker Blvd., Shaker Heights 22, Ohio; Office—1956 Union Commerce Bldg., Cleveland 14, Ohio.

Ellis, Mark H. Engaged in general practice of law, Chicago. Member of Chicago Bar Association and Law Institute. Married. One daughter. Address: Home—815 Bruce