

THEORETIC BASES OF LAW*

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THE moral and intellectual crisis of our time has not spared the science of law, jurisprudence. It is becoming increasingly fashionable among legal philosophers to comment on the shortcomings of the still prevailing creed: legal positivism. An ungrateful generation is beginning to forget its great achievements. The critics of legal positivism prophesy its doom because, as they claim, it does not furnish us with the moral and intellectual weapons which we need to keep our democratic institutions alive. Some of them see the only salvation in a return to natural law.

To be sure, the shortcomings of an extreme legal positivism have often become painfully apparent, but we should equally be aware of the trouble some of the critics of positivism are inviting. A return to obscurantism of one sort or another is a real danger in a time like the present.

An exhaustive reexamination of the theoretic bases of law is too large an order for a short paper. I therefore propose to discuss the topic in terms of the main philosophies of law which history has produced. The justification for such a procedure lies in the fact that the struggle for existence among the main philosophies of law has helped considerably to clarify its theoretic bases.

The story of legal philosophy has often been told in terms of the eternal struggle between natural law and positivism. The believer in natural law, though admitting that his creed has sometimes been in eclipse, is nevertheless convinced of its ultimate and complete triumph. The positivist is equally sure that final victory is his; natural law is nothing but metaphysics which will be abandoned gradually as we reach intellectual maturity.

In terms of this description both natural law philosophy and positivism have fixed and definite meanings. The former is the belief in an eternal law which claims validity independent of its concretization in positive laws. The latter, on the other hand, regards law as the creation of the ruling power in society in an historical process. Law is only what the ruling power has commanded; and it is law by virtue of this very circumstance.

* The substance of this paper was delivered as a lecture at a Fiftieth Anniversary Symposium of the University of Chicago, September 24, 1941.

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This description of the contrast, though common, is a onesided oversimplification. It overplays the difference between the two ways of thinking which are in a constant process of adaptation to changing climates of opinion; a process often concealed behind the use of the same formula which has altered its meaning. The antitheses which natural law has attempted to resolve have been different during the course of its history: In antiquity they were nature and statute, in the Middle Ages they were divine and human law, and in modern times they are common and individual interest. Natural law theories have often been used to legitimize the established order, but not less frequently to support claims for political and social changes.¹ Positivism similarly has gone through a process of change: Elements of empiricism, of normativism, and of realism have in turn predominated. Each way of thinking about law has deeply influenced the other.

NATURAL LAW

All philosophies of natural law—whether it is regarded as a part of theology or of ethics or as an independent discipline—have one basic belief in common: the belief in the existence of certain fundamental legal principles and institutions deeply grounded in the general plan of life and inherent in all ordered social existence. These principles laying down absolute standards of justice are open to man's cognition. The great natural law systems have expressed this belief in different formulae. Religious (scholastic) natural law—the legal philosophy of the church—teaches that due to God's providence man participates in divine reason and is thus able to distinguish between good and evil and to grasp the fundamental principles of natural law. Natural law is the participation of eternal law in the rational creature (*Lex naturalis est participatio legis aeternae in rationali creatura*).² Reason is the servant of divine providence. Rationalistic natural law maintains that nature has endowed man with the faculty of knowing and acting in accordance with the principles of natural law to enable him to gratify his impelling desire for social life—"not of any and every sort, but peaceful and organized according to the measure of his intelligence, with those who are of his kind." The very nature of man is the mother of the law of nature. No one can deny its fundamental principles "without doing violence to himself." They are in themselves manifest and clear, "almost as evident as are those things which we

¹ Max Weber, *Rechtssoziologie*, in *2 Wirtschaft und Gesellschaft* 496 et seq., *3 Grundriss der Sozialökonomik* (2d ed. 1925); Neumann, *Types of Natural Law*, *8 Studies in Philosophy and Social Science* 338 et seq. (1940).

² Thomas Aquinas, *Summa Theol.* 1a, 2ae q. 91, a. 2.

perceive by the natural senses."³ Under this system reason implicitly has the function of governing man's desires and of enabling him to forsake the satisfaction of individual desires for the good of society. Idealistic philosophy of natural law from Plato to Fries and Nelson anchors natural law in the idea of the Good (practical reason, the *Rechtsidee*) as the ultimate source of self-evident, necessary maxims of conduct.

The natural law philosopher, if he does not live in the clouds, experiences the existence of positive laws (constitutions, statutes, and court decisions), and it is their existence which confronts him with the question of the relation between natural and positive law.

The solutions of this problem have changed considerably in the course of the history of natural law philosophy. The early Greek philosophers of natural law had no difficulty in finding an answer on the basis of their pantheistic philosophy. They assumed a unity of the whole legal universe, regarding the legal system and institutions of the various states either as gifts of the gods or as a product of a divine world plan. The happy illusion could not last forever. Cool observation forced later generations of Greek philosophers of natural law to differentiate between natural and positive law. Stoic philosophy, because of its belief in a well ordered Cosmos, attempted to revive the original idea of natural law. Still the Stoics had to admit that human laws and institutions are but imperfect and incomplete realizations of the law of Nature. The idea of a dual order has formed the basis of most natural law speculation ever since.

But does not its acceptance practically amount to a betrayal of the great idea that the principles of natural law are universal and immutable? Does not natural law preserve its majesty only by being removed to the clouds while positive laws maintain their independence and are enforced and complied with even if they are unjust? If natural law is a body of self-evident truths, does not its existence dispose of the need for positive laws? In view of these difficulties the temptation to abandon the dualism of natural and positive law was very great indeed. Some philosophers of natural law came pretty close to abandoning the dual system in favor of positive law by maintaining that positive law is needed for the concretization of the necessarily general principles of natural law. The temptation of abandoning the dualism in favor of natural law was equally great for those natural law philosophers who did not confine the codex of natural law to a few general principles but could not resist working out a whole system of minute natural law rules. Yet natural law philosophy on the whole was realistic enough not to forsake the theory of a dual order.

³ Grotius, *De Jure Pacis ac Belli*, proleg. §§ 6, 7, 16, 39.

The constant awareness of this dualism already mirrored in the contrast between Plato's *Republic* and *Laws* explains why natural law philosophy, despite its tendency to idealize, did not neglect the living law with its institutions and did respond to changing climates of opinion. The Thomistic-Aristotelian system of natural law of the Middle Ages incorporated feudalism with its political, social, and economic philosophy.⁴ The natural law system created by the Enlightenment reflected the decay of feudalism; it became the political theology of a bourgeois society which had replaced the former order.

The dualistic theory of law fitted in with the Christian dogma of the Fall of Man and was, therefore, made part of the Christian system of natural law. Scholastic philosophy striving at a synthesis of our Greek heritage and Christian dogma elaborated the dual system of the Greeks into the Church's grandiose scheme of a hierarchical structure of four legal orders: *lex humana positiva*, *lex naturalis*, *lex divina*, *lex aeterna*. Scholasticism culminated in Thomism, whose theory of the interrelationship between *lex naturalis* and *lex humana* is a great advance on the doctrine of earlier Christian philosophers. Reaching a deeper understanding of the theocratic idea than ever before, emphasizing the principle of the common good, and reinterpreting natural law philosophy, Thomism succeeded in constructing a uniform social philosophy, an achievement which early Christian philosophers had been unable to accomplish because they regarded the state and human laws merely as *poena et remedium peccati*. This reinterpretation of natural law led to a new conception of the law of nature, in which, in the words of Troeltsch, "the difference between the absolute Primitive State and the relative state of fallen human nature becomes less important, and in which the more positive emphasis is laid on aspects of healing and progress towards a higher ideal, than on the negative aspects of destruction and punishment."⁵ This transformation of

⁴ 1 Troeltsch, *The Social Teaching of the Christian Churches* 201 et seq., 280 et seq. (1931); Figgis, *Studies in Political Thought from Gerson to Grotius* 12 (1931).

⁵ Troeltsch, *op. cit. supra* note 4, at 282, 283. "Whether the Fall had taken place or not, human beings would still have created social institutions, only this process would have been carried out in the spirit of love and voluntary submission and control, without the resistance of the senses to reason, and therefore without pain and without suffering. But, apart from the fact that their basic ideas would have been different, in reality the institutions which they created would still have appeared very similar to those which have actually come into being. The Law of Nature, therefore, is no longer identical with the Christian Law of Grace and the Golden Age of the Stoics; it is only the natural preparation for, and preparatory form of, the mystical community of grace, which is understood in the sense of the Aristotelian doctrine of evolution, as the working out of the impulse of reason in natural terms." Consult Lottin, *Le Droit Naturel chez Saint Thomas d'Aquin et ses Prédécesseurs* (2d ed. 1931); de Lagarde, *Recherches sur l'Esprit Politique de la Réforme* (1926).

natural law philosophy enabled Christianity to bridge the gulf between Christian and secular ethics. Still Christian natural law (from St. Thomas to Luther) was unable to overcome completely the dogma of the Fall. As a result it did not object to positive laws even if they stabilized social inequality. Liberty, equality, and community of property, it is true, are Christian ideas but they cannot be maintained because of man's sinful nature.

That such an attitude tended to strengthen the authority of secular powers hardly needs elaboration.⁶ But already in the Middle Ages the theocratic idea began its gradual decline and a new philosophy of the state emerged, influenced by the political reality of the Holy Roman Empire and theories of antiquity. It put less emphasis on the divine foundation of the state than on its origin in natural impulses of man. Consequently, the authority of the ruler was anchored in the general will of the ruled, the divine will was regarded only as the *causa remota* of secular governments.⁷ This idea became of ever-increasing importance as the belief in man's sinful nature lost its convincing appeal.

A new, secular type of natural law philosophy emerged. Its ideas succeeded in overcoming not only the theocratic ideology, temporarily revived by the Reformation, but also an even more powerful new political theology which had arisen, the theory of the Leviathan State. In its struggle against these two adversaries natural law theory of Enlightenment developed its own philosophy of the nature and source of law. The source of law is not to be found outside man's reason, in a revelation of a divine will or in the command of a sovereign, but rather within man's reason.⁸ Reason, to be sure, is no longer the servant (*famula et ministra*) of divine providence, but despite its emancipation remains the instrument which enables man to develop absolute standards of justice. This optimism enabled some of the greatest thinkers of the period to deny that

⁶ Thomas Aquinas, *Summa Theol.* 1a, 2ae q. 96 a. 4. But see *ibid.*, at q. 90 a. 4; McIlwain, *The Growth of Political Thought in the West* 153, 326, 364 (1932).

⁷ Gierke, *The Development of Political Theory 171 et seq.* (1939) (translation by Freyd of Gierke, Johannes Althusius).

⁸ Cassirer, *Die Philosophie der Aufklärung* 313 et seq. (1932).

It would be an error to assume that the belief in a higher law has prevented the natural law philosophers of Enlightenment from having a realistic insight into legal problems. This is beautifully illustrated by the working technique of Grotius, the founder of international law. Legal concepts are to him closely tied up with life situations and institutions; they are not the mere result of abstract thinking. The attitude of natural law philosophy towards customary law also testifies to its realism. Though condemning the *consuetudo irrationabilis*, natural law theory regards customary law as the product of the collective reason of society—an idea later elaborated by the historical school of law which propounds a positivistic theory of law.

compulsion is an essential element of the concept of law, thus reviving the profound idea of the Middle Ages that the source of law is not an *actus voluntatis* but rather an *actus intellectus*. The state is not above the law but only its instrument: *princeps legibus tenetur*. Law from this point of view, natural as well as positive, is a modus of man's rational nature. Consequently, the mere empirical fact that the commands of a sovereign are complied with does not make those commands law. To be law, they have to be based on the consent of the ruled, or, as we would say today, anchored in the sense of justice of the community. Law is not a command but a contract.

Natural law philosophy of the Enlightenment did not stop here. It was not satisfied with a study of laws in their historical growth, products of temporary convenience; its emphasis was on law "as it is born with us," the source of Humanity itself.⁹ In working out this point of view the great philosophers of natural law in true humanistic spirit rediscovered Plato's philosophy of law with its profound belief in the interrelationship of logic and ethics. The influence of Plato's philosophy is reflected in those theories of law which compare law with mathematics and claim that the principles of law are as self-evident as mathematical axioms. This analogy—quaint as it sounds—expresses the belief that law and mathematics have one feature in common: they testify to the "autonomy and creative spontaneity" of the human mind. The human mind is able not only to develop the realm of mathematics out of "innate ideas" but also to penetrate to the idea of law. Thus the search for the law of nature had turned into a quest for the nature of law. In establishing this connection with Plato's philosophy the rationalism of natural law philosophy of the Enlightenment changed into an idealistic philosophy, an idealism which has been preserved in the philosophies of Fries, Gierke, and Nelson.¹⁰

This idealism tempted natural law philosophers to develop the optimistic idea of a gradual approximation of the two orders of law. The postulates of natural law have a tendency to become positive, and positive laws have the same tendency to adapt themselves to the postulates of natural justice. This was not mere theoretical speculation. The tremendous influence of the natural law philosophy of the Enlightenment is noticeable in all fields of law. It gave a new and revolutionary meaning to the famous

⁹ See Cassirer, *op. cit.* supra note 8, at 313 et seq., on whose book the following paragraph is largely based.

¹⁰ Fries, *Philosophische Rechtslehre* (1803); Nelson, *Die Rechtswissenschaft ohne Recht* (1917); Nelson, *System der philosophischen Rechtslehre und Politik*, 3 Vorlesungen über die Grundlagen der Ethik (1923); Gierke, 1 *Deutsches Privatrecht* 120 et seq. (1895).

phrase *Jus positivum ad jus naturale reducitur*. It has lent legitimation to the right of resistance against those positive laws which violate the fundamental principles of justice and to the proud theory of inalienable rights, so important in American constitutional law. The theory of the social contract "was used to turn vague generalizations about the natural freedom and equality of man into concrete political demands against governments,"¹¹ thus deeply affecting the political theory of Western Europe. Natural law philosophy influenced economic theory, supporting the belief that man in serving his own interest is serving the interest of the community. It shaped the doctrines of international law, formed the basis of the great codification movements of the eighteenth century in continental Europe, and inspired many a reform in the field of criminal law.

With these great achievements, the vitality of natural law theory became gradually exhausted. The development of the French Revolution discredited it on the continent. Political and economic reality made it increasingly difficult to uphold the optimistic belief in the sanctity of natural rights and in the philosophy of *laissez faire*. The theory of secularized natural law was blamed for justifying "all the dangerous tendencies that aim to subordinate the state to the antagonistic interests of individualist society."¹² The progress of natural science on the basis of a positivistic attitude completed the undermining of the belief in natural law. No wonder that natural law theory was almost dead except for its survival in the legal theory of the Church.

But today a renaissance of natural law is under way.¹³ Once more it begins to permeate political and legal theory. Positivism is on retreat.

A skeptic, though greatly impressed by the vitality, the achievements, and the ethos of the philosophy of natural law, will still not be convinced of the eternal validity of its creed. This thesis, that there are absolute standards of justice open to man's cognition, the skeptic will claim, is only valid for him who believes in natural law and in a metaphysical conception of man. To fortify his argument he will point out that most natural law philosophers have been very careful to limit the codex of natural law to a few very general principles and that all efforts to work out detailed natural law rules have ended in disagreement and failure. The insistence

¹¹ Jones, *Historical Introduction to the Theory of Law* 110 (1940).

¹² Marcuse, *Reason and Revolution* 60 (1941); Hegel, *Über die wissenschaftlichen Behandlungsarten des Naturrechts*, 7 *Hegels Gesammelte Werke* 329 et seq. (Lasson ed. 1913).

¹³ For the development in this country, consult Wright, *American Interpretations of Natural Law* (1931); Haines, *The Revival of Natural Law Concepts* (1930); Fuller, *The Law in Quest of Itself* (1940).

on the indispensability of positive law will nourish his suspicion, and so will the teachings of modern philosophers of natural law, who insist that meditation and education are necessary to unearth the rich treasure of self-evident maxims of conduct hidden in all of us.¹⁴ The skeptic will conclude that agreement on what is just—if it ever existed—does not prove the self-evident character of natural law principles but has been the work of other forces and institutions, for instance, the Church, a common religious conviction, a common culture and tradition. A broad belief in natural law presupposes, according to the skeptic, the background of a harmonious and well integrated culture and a considerable degree of social conformity (conservative natural law) or the enthusiasm of a revolutionary movement (revolutionary natural law).

These arguments will tempt our skeptic to praise the straightforwardness of a philosophy of legal positivism.

POSITIVISM

Positivism has a genealogy almost as noble as natural law philosophy. It is the necessary and indispensable opponent of natural law theory. Positivism finds support in the patristic literature. Tertullian voiced the positivistic creed when he said: "It is our duty to obey a demand of God not because it is just but because it has been issued by God." The nominalists among the great Schoolmen (Occam, Gerson, D'Ailly) who regarded natural law not as a *lex indicativa* but as a *lex praescriptiva*¹⁵ were positivists in a sense. So was Calvin when he claimed that God is *lege solutus, ipse sibi lex*. Modern positivism, traditionally dated back to Hobbes, denies the existence of an eternal legal order based on right reason:

In the state of nature, where every man is his own judge, and differeth from other concerning the names and appellations of things, and from those differences arise quarrels, and breach of peace; it was necessary there should be a common measure of all things that might fall in controversy; as for example: of what is to be called right,

¹⁴ Rousseau, *Discours sur l'Inégalité*. "He (the Natural Law Philosopher) begins by casting about for the rules which, in their own interest, it would be well for man to agree upon; and then, without any further proof than the supposed advantage thus resulting, he proceeds to dignify this body of rules by the name of Natural Law. All the philosophers of his school have followed the same method. The result is that all the definitions of these learned men, in standing contradiction with each other, agree in this conclusion only: that it is impossible to understand, impossible therefore to obey, the law of nature without being a deep reasoner and a very great metaphysician. And that is only another way of saying that, for the establishment of society, man must have made use of the wisdom which is, in fact, only gradually acquired by a small minority of men and that with the utmost difficulty, in the bosom of society itself." (Quoted by Neumann, *op. cit. supra* note 1, at 340 n. 1.)

¹⁵ Gierke, *op. cit. supra* note 8, at 88 n. 44.

what good, what virtue, what much, what little, what *meum* and *tuum*, what a pound, what a quart, &c. For in these things private judgments may differ, and beget controversy. This common measure, some say, is right reason: with whom I should consent, if there were any such thing to be found or known *in rerum natura*. But commonly they that call for right reason to decide any controversy, do mean their own. But this is certain, seeing right reason is not existent, the reason of some man, or men, must supply the place thereof; and that man, or men, is he or they, that have the sovereign power.¹⁶

Positive law is the only legal order. The idea, however, that positive law does not need legitimation by a higher principle developed only gradually. Even Hobbes, to whom we owe the famous motto of all positivism, "*Auctoritas non veritas facit legem*," was still greatly influenced by natural law theories.¹⁷ He anchored, for instance, the authority of the sovereign in an implied contract of submission. For later positivists, positive law no longer needs legitimation by the social contract. It is its own beginning. This basic philosophy explains the attitude of many positivists who are inclined to treat the binding force of law as a problem of mass psychology or to dismiss as metalegal the question as to the ultimate source of law.

It would be an error to assume that justice has no place in a positivistic philosophy of law or that for the positivist justice is nothing else than the interest of the stronger, as Thrasymachus claimed. On the contrary the justice of positive law according to Hobbes lies in the fact that it has abolished chaos and anarchy prevailing among men before its promulgation. Positive law is just because it has created peace and order and brought to an end the *bellum omnium contra omnes*. Consequently the fact that a law has been passed is more important than its contents. This statement made sometimes by positivists ceases to be shocking if we bear the basic belief of positivism in mind. Positivism has undergone many changes. The belief in the virtues of absolutism has given way to a belief in the *nomos basileus*, a government of law and not of man. But its fundamental tenet that the justice of law lies in the security it gives to the individual has remained unchanged. The principal objective of the law is "the

¹⁶ Hobbes, *Elements of Law*, Part II, c. 10, § 8 (Tönnies ed. 1928).

¹⁷ Hobbes, *Leviathan* c. 26, p. 133 (Latin ed. 1678). The corresponding passage in the English edition (1651), at p. 143, is not equally unequivocal. The statement, "It is not wisdom, but authority that makes a law," can, however, be found in Hobbes, *A Dialogue Between a Philosopher and a Student of the Common Laws of England* (1681), in 6 Hobbes, *English Works* 5 (Molesworth ed. 1840). Note that Hobbes, far more careful than his successors, spoke of "a" law, not of "the" law. On Hobbes consult Dilthey, *Weltanschauung und Analyse des Menschen seit Renaissance und Reformation*, 2 *Gesammelte Schriften* 360 et seq. (3d ed. 1923); Cassirer, *op. cit. supra* note 8, at 339 et seq.; Strauss, *The Political Philosophy of Hobbes* (1936).

care of security."¹⁸ "We obey the law not necessarily because we think that the law is right, but we think it right to obey the law."¹⁹ As a matter of fact the predictability of decisions (formal rationality of the law) was raised to the dignity of an ethical value and became increasingly popular during the nineteenth century with the development of the liberal competitive phase of capitalistic expansion.²⁰ Nineteenth century positivism never tired of emphasizing the duty of all those in charge of administering the law not to disappoint the "expectation" (Bentham) of citizens who have acted in reliance on the letter of statutes or the binding force of precedents. To avoid arbitrary interpretation and the sneaking in of personal predilections, statutes should be expressed as clearly as possible, and, as Bentham suggested, case law replaced by codification. Law became a command of the state. Bentham in his fanaticism, and the whole school of analytical jurisprudence, really strove to make the legal system as reliable as a timetable. The fetish of legal certainty and the fear of the subjectivity of notions of justice account for the attempt of many positivists to work out a pure theory of law, to separate rigidly the "is" and the "ought," and to treat all economic, political, and ethical considerations bearing upon legal institutions as metalegal.²¹

There can be no doubt that positivism has made a great contribution to philosophy of law. Its critique of natural law has often been healthy and frequently has forced natural law philosophy to abandon theories or to improve upon them. Its emphasis on the security function of law shows real insight. Most of all, positivism deserves credit for the great improvement of our system of legal concepts. Positivists, instead of spending their intellectual energies in endless speculation about the nature of law and its ultimate basis, catalogued and classified decisions, chiseled out concepts, and improved upon the tools of the legal trade.

But, the natural law philosopher will insist, the shortcomings of positivism should not be overlooked either. Positivism does not furnish us with a criterion which enables us to differentiate between a rule of law and

¹⁸ Bentham, *Principles of the Civil Code*, 1 Works 297, 307, 311, 322 et seq. (Bowring's ed. 1843).

¹⁹ MacIver, *The Modern State* 154 (1926).

²⁰ Mannheim, *Man and Society* 180 (1940); as to formal and material rationality, consult Max Weber, *op. cit. supra* note 1, at 468 et seq.

²¹ Kelsen, *The Function of the Pure Theory of Law*, in *Law a Century of Progress* 231, 241 (1937). On Kelsen's theory of law, see Lauterpacht, *Kelsen's Pure Science of Law*, in *Modern Theories of Law* 105 et seq. (1933); Wilson, *The Basis of Kelsen's Theory of Law*, 1 *Politica* 54 (1934); for a more general discussion consult Brecht, *The Myth of Is and Ought*, 54 *Harv. L. Rev.* 811 (1941).

the arbitrary command of a despot, a distinction of great moment today. It is superficial normativism since its only criterion of a rule of law is promulgation by the proper authority and actual compliance. Whether a rule is complied with because of fear or because it is the expression of the sense of justice of the community is irrelevant. Experience, a critic of positivism will continue, "can only tell what has been enforced, or obeyed, or laid down as law, and not what gives rules and institutions their specifically legal character."²² Nor can legal history be resorted to in order to explain the mysterious nature of law; the legal historian in selecting his material uses an a priori concept of law and it is this concept which positivism cannot explain. The positivist will not be greatly impressed by this line of reasoning. Can you deny—he will ask his opponent—that even your system cannot prevent unjust rules which are actually enforced, and that the right of resistance is quite often a rather empty right? Are you not merely quibbling when you refuse to call an unjust command a rule of law as long as you have to admit that it will be enforced? Still the natural law philosopher will not admit defeat. He will remind the positivist of the sad fact that the ideal of legal certainty cannot be realized under positivism; it is a mere ideology just as is natural justice. The harmony of the legal system enjoyed during part of the nineteenth century was not the result of the victory of positivism but rather of an unparalleled stability of the economic system. The expectation of citizens will always be disappointed since statutes as a practical matter are subject to different interpretations and cannot possibly take care of all contingencies. The rule of *stare decisis* has to remain flexible. To illustrate his point the natural law philosopher will refer to the efforts of positivists like Langdell and his school who tried in vain to build up a harmonious body of case law on a conceptualistic basis. They had the rather naive belief that case law could be reduced to a relatively small number of "fundamental" legal rules and that decisions could be called correct or false in terms of legal concepts.²³ They seldom admitted that many a legal rule has an exception or a counter-rule and that the middle terms used in the lawyers' syllogism are of necessity "weasel" words. A court, therefore, in rendering a decision cannot act like a robot but has to make a choice on the basis of what it regards a just result. It is no wonder, the natural law philosopher will notice rather gleefully, that this brand of positivism has given way to *legal realism*.

²² Jones, *op. cit.* supra note 11, at 210, 211.

²³ Langdell, *Cases on Contracts*, Preface (1871). "Law is a science, and all the available materials of that science are contained in printed books." 3 *L. Q. Rev.* 123, 124 (1887).

LEGAL REALISM

American legal realism in its early phase was an extreme form of legal positivism. Its theory of law was an expression of its struggle against the conceptualism of analytical jurisprudence. Realism introduced a sharp distinction between what courts say and what they actually do.²⁴ Only the latter counts. This attitude found its classic expression in Holmes' famous definition of law as "the prophecies of what courts will do in fact." Law became the behavior pattern of judges and similar officials. Fortunately legal realism did not stop at this kind of empiricism. It developed and perfected the functional approach.²⁵ Decisions were no longer praised or criticized because of their neat or incorrect manipulation of abstract theories and concepts. Realists focused their attention on whether a decision had given due weight to considerations of public policy. These considerations—realists assert—are closely tied up with the economic, social, and cultural function of legal institutions and with the ideals of justice of society.²⁶ It is only a natural consequence of this point of view that a rigid separation of the "is" and the "ought" is regarded as impossible. Realists only protest against the application of "ossified ethics," but they are all eager to "improve the judicial system, to make it more efficient, more responsive to social needs, more 'just' if you like that word."²⁷

²⁴ For a bibliography on legal realism and its critics consult Garlan, *Legal Realism and Justice* 135 et seq. (1941); see further Fuller, *The Law in Quest of Itself* (1940); McDougal, *Fuller v. The American Legal Realists: An Intervention*, 50 *Yale L. J.* 827 (1941).

²⁵ F. Cohen, *The Problems of a Functional Jurisprudence*, 1 *Modern L. Rev.* 5 (1937).

²⁶ This insight has never been more trenchantly formulated than in the famous passage of Holmes, *The Path of the Law* (1897), in *Collected Legal Papers* 181, 184 (1920):

"The language of judicial decision is mainly the language of logic. And the logical method and form flatter that longing for certainty and for repose which is in every human mind. But certainty generally is illusion, and repose is not the destiny of man. Behind the logical form lies a judgment as to the relative worth and importance of competing legislative grounds, often an inarticulate and unconscious judgment, it is true, and yet the very root and nerve of the whole proceeding. You can give any conclusion a logical form. You always can imply a condition in a contract. But why do you imply it? It is because of some belief as to the practice of the community, or of a class, or because of some opinion as to the policy, or, in short, because of some attitude of yours upon a matter not capable of exact quantitative measurement, and therefore not capable of founding exact logical conclusions. . . .

"I think that the judges themselves have failed adequately to recognize their duty of weighing considerations of social advantage. The duty is inevitable, and the result of the often proclaimed judicial aversion to deal with such considerations is simply to leave the very ground and foundation of judgments inarticulate, and often unconscious, as I have said. . . . I cannot but believe that if the training of lawyers led them habitually to consider more definitely and explicitly the social advantage on which the rule they lay down must be justified, they sometimes would hesitate where now they are confident, and see that they were taking sides upon debatable and often burning questions."

²⁷ Frank, *Mr. Justice Holmes and Non-Euclidian Legal Thinking*, 17 *Corn. L. Q.* 568, 586 (1932).

Legal realism thus became an institutional approach, a natural development in view of the paramount importance of problems of constitutional law in this country. The institutional approach is the technique par excellence of the public lawyer.²⁸ The shortcomings of a conceptualistic kind of positivism may not always be painfully apparent in technical issues of purely private law but the working technique of the conceptualist leaves the lawyer quite helpless in all legal problems involving public law. The institutional method will gain in influence as public law predominates over private law and public control of business supersedes *laissez faire*. The modern legal realist thinks of law no longer in terms of a behavior pattern of judges but in terms of legal institutions which are part of a cultural system. Each legal institution is serving a purpose and has its place in a given culture. It cannot be fully understood as an item in itself but only in its function in the whole structure. Law, if we carry the theory of the realists further, is a teleological system rooted in the sense of justice of the members of the community and influencing their sense of justice in turn. Unlike science and art it is a social phenomenon "in which a cultural system and its external organization are still united." Consequently each legal concept including the concept "law" shows of necessity the marks of the external organization of the society in which it came to life.²⁹ Even the concept "law" (for instance its relation to ethics, to custom) changes with the various cultural systems and their development. All efforts, therefore, to develop a general and universal concept of law covering all legal systems and every legal system in all phases of its development must necessarily fail. The belief in an a priori concept of law is bad philosophy. Justice also is no longer a system of universal and unchangeable standards of value. The notions as to what is just vary with the different systems of culture and with its institutions past and present. An unchanging justice in a changing world does not exist. "The Platonic ideal of justice," in the words of Tillich, "was the concrete harmony of the city-state, . . . in medieval feudalism [justice was] the forms of mutual responsibility of all degrees of the hierarchy to each other, in liberalism the laws abolishing formal privileges and introducing legal equality."³⁰

Legal realism thus interpreted enables us to arrive at a better understanding of the contribution natural law philosophy and positivism have made to the theory of law. The eternal struggle between the two ways of

²⁸ Jennings, *The Institutional Theory*, in *Modern Theories of Law* 68 (1933).

²⁹ Dilthey, *Einleitung in die Geisteswissenschaften* 54 et seq. (2d ed. 1923).

³⁰ Tillich, *Ethics in a Changing World*, in *Religion and the Modern World* 51, 61 (University of Pennsylvania Bicentennial Conference, 1941).

thinking brings out clearly that the relation between law and justice is the central problem of all speculation about law. Each philosophy of law has deeply influenced the other. Positivism has prevented natural law from engaging solely in lofty speculation. The influence of natural law tradition even at times when natural law was in eclipse was so strong as to make it impossible for positivism to deteriorate into an apology for the might-makes-right principle or to become superficial empiricism. It is, therefore, not surprising that in general the representatives of natural law as well as positivism have been quite anxious to leave a window open to the other mode of thinking. Natural law theory as we have seen has certain positivistic aspects, while not all positivism is free from elements which are the product of natural law theories.

The realist does not share the point of view of the positivist that natural law is only a collection of purely subjective ideals of justice, morals masquerading as law, while positivism is an objective theory. From the realist's point of view positivism uses only a different mythology than natural law theory, but a mythology it is nevertheless. The positivism of the school of analytical jurisprudence is based on the magical belief that the correct application of logic makes for a legal system endowed with the quality of completeness and freedom from contradictions. The pure theory of law uses a mathematical mythology. The positivism of the great Hobbes is even founded on a natural-law basis. To be sure, the idea of a higher law is an ideology from the point of view of the realist. But can it be dispensed with? Does it not express deep-rooted human needs and high human aspirations? Is not the belief in natural law and the fact that the idea of a natural law lives in the real attitudes and actions of men of tremendous importance for the preservation of our moral tradition and for the survival of our culture? Natural law philosophy has shown profound insight into human nature and into the interrelationship of law and ethics. The theory of the dual structure of the legal system is an effort to reconcile idea and reality, our external experience according to which all law is positive law and our inner experience which tells us that all law derives its vitality and strength from the idea of justice born with us. Despite all deviations from notions of justice we are convinced that only just laws are worth preserving and unjust laws have to be changed. The idea of justice is immanent in the concept of law.³¹

This attitude enables the realist to achieve a synthesis of natural law philosophy and positivism. He can make use of the contribution of both.

³¹ Gierke, Johannes Althusius 366 (4th ed. 1929); 1 Gierke, *Deutsches Privatrecht* 120 (1895).

Though not sharing the belief of the natural law philosopher in a dual structure of law the legal realist believes with the former in the intimate connection between law and notions of justice, a connection which is reflected in almost any language. It is no accident that the judge is called "justice" and that *jus* and *justitia*, *Recht* and *Gerechtigkeit*, have the same etymological root. It is in the sense of justice of the community, the ultimate basis of law, that law and justice flow together. "Ethical views as to what is fair and just are, and always have been, streaming into the law through all human agencies that are connected with it, judges and jurists as well as legislatures and public opinion."³² Possibly the founder of modern positivism already had this insight when he based the authority of his sovereign on a social contract and emphasized the security function of law. The same can be said with more confidence for the pure theory of law. It is true, the pure theory of law anchors all positive law in a basic legal norm, but this basic norm is so flexible as to take account of the sense of justice of the community.

All law has the task of reconciling the ideal of certainty with the need for flexibility. Only the idea of law remains permanent. Its actual concretization is in an eternal process of adaptation to changing social needs. The revival of the idea of natural law in our present crisis shows that the principle of the common good inherent in the moral tradition of Western Civilization has not exhausted its vitality and is still guiding our sense of justice. It will enable us to keep democracy alive by adapting our inherited institutions through the democratic process to the practical and psychological realities of our time. "Democracy," in the words of Tawney, "is a kingdom to be won, not a possession to be enjoyed."

³² M. Cohen, *Jus Naturale Redivivus*, 25 *Philosophical Rev.* 761, 766 (1916).