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# AMERICAN LEGAL PHILOSOPHY AT MID-CENTURY

A Review of Edwin W. Patterson's *Jurisprudence, Men and Ideas of the Law* *

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IF PATTERSON'S *Jurisprudence* is not as American as blueberry pie, it is at least as American as its author's acknowledged mentors: John Dewey and Roscoe Pound. The book displays many of the best qualities of these two thinkers. It has a canny reserve in the face of easy generalizations that reflects Vermont; an industrious thoroughness, seasoned with common sense, that suggests Nebraska. At the same time the author has imparted to it his own distinctive qualities of judgment and insight. The result is a work of solid merit that can be expected to hold its own, both here and abroad, for many years.

In its basic conceptions the book lies so in the main stream of American thought that an appraisal of it is inevitably an appraisal of the current state of American legal philosophy. It is not true, however (as an early advertisement of the publisher asserted), that Patterson's is the first general treatise on jurisprudence by an American. That honor belongs to Bodenheimer's excellent text,[1] first published in 1940, and now available to a wider audience of Americans, *lato sensu,* through a Spanish translation.

Patterson's philosophy is definitely that of the middle way. It lacks the eloquent promise of affirmations to come that lends a glow to Policy Science, but it does not parch the reader's throat with the dry negations of a Kelsen. Patterson sees American Legal Realism as a useful and necessary step in the evolution of legal philosophy in this country, not

* Brooklyn: The Foundation Press, Inc., 1953. Pp. xiii, 649. $7.50.

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1 JURISPRUDENCE (1940).

as a permanent way of life. He profits from semantic studies of meaning, without converting his philosophy of law into a philosophy of words.

His literary style is simple and direct, though this does not mean that the contents of the book can be absorbed without effort. Though in a sense the book is always easy to read, there are times when it is hard to understand, as in a passage where the author speaks of "a suit in a French court by a woman to enjoin her sister-in-law from excluding the plaintiff from the companionship of her brother, the defendant's husband." [2]

Such liveliness as is to be found in the book lies not in vivid turns of phrase, but in occasional pointed remarks about the author's contemporaries. Two rather sharp barbs are dispatched in my direction. Candor compels the admission that neither was enjoyed, in the one case because the barb struck so squarely in the middle of the target,[3] in the other, because to biased eyes it seemed that the author's strictures were based on a failure to understand the plain meaning of the passage criticized.[4]

I have to confess that I derived a certain *Schadenfreude* out of the following comment on an esteemed former colleague of both of us: "Llewellyn's conception of law (or at least one of his) is a mixture of ideals, institutions, imperative rules, professional techniques, and possibly other things." [5] My capacity for sympathetic malice was, however, overstrained when I encountered what seemed to me a Philistine raillery directed against Llewellyn's conception of the role of the aesthetic impulse in law.[6] Here I thought the common touch—generally so real a merit in Patterson's book—descended to triviality.

On certain issues of legal philosophy—ancient and ever-recurring—I find myself in fundamental disagreement with Patterson. In what follows I shall try to clarify the nature of our differences as I see them. Since I am throughout taking issue with Patterson, it will be hard to avoid conveying the impression that I believe that Patterson would say the opposite of everything I say. This is, of course, not the case. On most particulars I am sure Patterson and I would be in substantial agreement. Where we chiefly disagree is as to the grounding of those particulars. Hence when I speak of cases and specific

[2] P. 394.
[3] P. 132.
[4] P. 25. The notion that "logic" has nothing to do with the selection of premises, but only with the implications of premises, seems to me as untenable in law as it is in the physical sciences. *Cf.* WILLARD VAN ORNAU QUINE, FROM A LOGICAL POINT OF VIEW 20–46 (1953).
[5] P. 82, n. 48.
[6] P. 49.

issues, I do not mean to imply that Patterson would decide them differently than I do; I am saying only that I believe his philosophy does not satisfactorily justify and support the decisions that both of us would probably reach.

## THE IMPERATIVE THEORY OF LAW

Throughout his book Patterson makes reasonably apparent his sympathy for the view that the fundamental reality of law lies in the organized force of the state. Yet his mild partisanship for this theory scarcely prepares the reader for the following statement on page 179:

> Those who attack it [the imperative conception of law] usually profess to have in reserve either some immutable set of ideals, which if revealed turn out to be authoritative religious or ethical doctrines, or else some hunch about the soul of society which seems too ineffable for communication.

A failure to identify the objects of its irony leaves the precise meaning of this passage obscure. But the most puzzling thing about it is that among the "attackers" of the imperative theory, or at least among its critics, must be numbered Patterson himself.

He observes that although probably most people think of law as "dependent upon political authority" they are "commonly unaware of the difficulties of maintaining this position." [7] Even in its best formulations, the imperative theory "is far from perfect." [8] The defects of the Hohfeldian system arise from the fact that it "rests upon the imperative concept of law and has the limitations of that concept." [9] Austin's theory, which Patterson seems to favor over its rivals, avoids the circularity of defining law by law, since its central concept is that of a sovereign enjoying the habit of obedience of the bulk of society.[10] At the same time it is impossible to define the sovereign without introducing law,[11] and in fact when Austin came to apply his theory to complex modern states he failed "to locate a single unified sovereign." [12]

I believe the curiously ambivalent attitude Patterson takes toward the imperative theory results from his not having seen the full force of the criticisms directed at that theory in its usual formulations.

Not much reading between the lines of Austin's famous *Lectures* is needed to see that his basic interest was in promoting the desideratum

[7] P. 148.
[8] P. 179.
[9] P. 28.
[10] P. 87.
[11] *Ibid.*
[12] P. 158.

of social order, and that everything else was for him a means to that end. In his quest for order, Austin was particularly intent on preserving the integrity of the word "law," a word commanding attitudes he wished to see directed toward the proper objects.

Since his basic interest was in social order, Austin could not take as his starting point the notion that law is that which is right and just. Both Hobbes and Bentham, each in his own vivid idiom, had described the "war of all against all" and "the cut-throat scene we should have of it" if the answer to the question, What is law? were left to the individual conscience. Nor could Austin find his anchorage in rules established by custom. Many disputes are left unregulated by customary rules. Furthermore, the "spontaneous adoption" of a rule by an unidentified mass was too indefinite a test for a mind intent on a sharp line of distinction between what is law and what is not.

Accordingly, Austin concluded that the only secure foundation for order lies in power, the power of one man or a group of men to issue commands that society will obey. But this power to command cannot be physical force. Though it may terminate in a physical expression—through the policeman's billy, for example—it is obvious that the organization of government as a whole cannot be built on descending echelons of physical constraint. The source of the power to command must lie therefore not in brute strength, but in a habit of obedience which offers assurance that what is commanded will be carried out and generally obeyed.

Toward what is this habit of obedience directed? Austin's answer was "toward the sovereign one or many," that is, toward people who issue commands. At this point Austin's attempt to maintain his original position began to run into real difficulties. Plainly in a modern state the legislator does not "command" simply as a person. He is no Herod issuing death sentences from the banquet table between sips of wine. Law is made by modern legislators only when they act, as Austin put it, in their sovereign or corporate capacity. A group of men can attain the capacity for corporate action only by adopting rules of procedure that will prescribe the "modes and forms" of their common action. This, however, leads to the conclusion that the starting place for a legal order must lie, not in a man or group of men, but in rules.

The same difficulty becomes even more obvious when we reflect that the modern legislator commands not only others but himself as well, so that he may be arrested for violating the statute he himself drafted. It is quite incorrect to say, as Patterson does, that Austin did not see

this problem.[13] He deals with it explicitly in the Sixth Lecture,[14] and it causes him embarrassment. Indeed before Austin is through with this Lecture, his starting point has been largely abandoned.

Commencing with the notion of force-backed rules, Austin ends by talking about rule-backed force. Instead of men habitually obeying "the sovereign one or many," we have men subjecting themselves to rules—to be sure, rules governing the law-making process, but rules just the same, and rules that are accepted and followed because they are seen to be right or necessary or both. This was, of course, the very thing Austin set out to avoid.

It was this difficulty in theories like Austin's that led Kelsen to substitute for the personified "sovereign one or many" the idea of a "basic norm" by which the capacity to create law within a given legal order is defined. It is misleading to assert, as Patterson does,[15] that Kelsen insists his basic norm is not a "natural-law" concept. On the contrary, he has in effect admitted that it represents the minimum of "natural law" without which any system of positive law is impossible.[16] Kelsen's theory of the "basic norm" asserts essentially that you have to accept or postulate at least one rule governing the law-making process before that process itself can get started, just as a hundred men placed in a room together could not acquire the capacity for "corporate action" without accepting at least one organizational principle, even if it were only, "What Jones says goes." The basic norm, being expressed in the singular, reduces this indispensable starting point to an ideal but fictitious minimum, it being obvious that in any modern state the fundamental law-making process is too complex to be controlled by a single rule.

To my mind it is highly important to see why a theory that sets out to rest law on the power of man over man does and must default. In the passages already quoted Patterson suggests in a vague way some of the difficulties Austin encountered, particularly when he observes that "the exact profile of this thing called 'sovereign' (or 'top dog', if you will) cannot be drawn without reference to something, whatever we may name it, which is law." [17] But throughout Patterson himself seems to retain the notion that the "force" which gives reality to law is a "top-dog" kind of force, and that the habit of obedience, on which

13 P. 86.
14 1 LECTURES ON JURISPRUDENCE 276 (1879).
15 P. 262.
16 "The basic norm is not valid because it has been created in a certain way, but its validity is assumed by virtue of its content. It is valid, then, like a norm of natural law. . . . The idea of a pure positive law, like that of natural law, has its limitation." GENERAL THEORY OF LAW AND STATE 401 (1945).
17 P. 87.

the legal system is dependent for its proper functioning, is directed, not toward a rule-governed way of making law, but toward a human power center.

This appears plainly when instead of criticizing the imperative theory he undertakes to defend it. "One line of objection" to the theory, he says, is "to identify political authority with the exercise of force, to identify force with arbitrariness and violence, and thus to make it appear that the imperative conception of law makes law unjust and evil." [18] Patterson's answer to this argument is to point out (1) that force is only the ultimate sanction and in most situations is not required to secure obedience, and (2) that force can be used for good as well as for evil objects. A better answer, it seems to me, would be to challenge the identification of political authority with physical force, and to point out that the "force" back of political authority derives from the general acceptance of the rules by which the law-making process is conducted. Physical force cannot lift itself by its bootstraps into legitimacy, and where its use is accepted as a proper part of the administration of law it is only because the force employed is regarded as sanctioned by accepted rules.

Patterson's conception of the imperative theory as a theory of the power of man over man appears clearly when he makes the surprising criticism of Kelsen that he "stops" with the basic norm, instead of carrying his analysis through, as Austin does, to the final law-creating agency or sovereign.[19] Surely it is Austin, and not Kelsen, who fails to see the full implications of his own theory. It is true that Austin tried to treat his "sovereign many" as people who enjoy a habit of obedience running toward them, and who thereby gain the power to create law. But they are people powerless to create valid law except when they act according to the "modes and forms" established for the expression of the sovereign will. They can enact law only by following law. That is the fundamental truth underlying Kelsen's basic norm.

I stress these differences not because I am particularly eager to pit the refinements of one "theory" against another, but because I think something fundamental is at stake. Many Americans today accept as a truism the identification of law with force. Not having given serious thought to the matter, they tend to identify this "force" with physical coercion. They resist strongly any suggestion that the power on which law must rest is essentially a moral power, reflecting the persuasive force of accepted rules. Paradoxically, the motive that lies back of

[18] P. 148.
[19] P. 156.

the insistence that law be defined in terms of physical power is itself generally moral in nature. It rests on a fear that if we start with accepted rules, the way is then opened up for fastening on society some all-embracing orthodoxy. Force is at least ideologically colorless. By identifying law with force, we preserve its neutrality. It remains a compliant instrument ready to give sanction to ends that are not, and should not be, imbedded within the legal apparatus of coercion itself. For assurance that these ends will be good we must look beyond the law, to education, adherence to the democratic tradition, etc.

I have a profound sympathy for what might be called the moral motivation underlying the viewpoint I have just described. I share the fear on which it is based. But it is possible to react to a justified fear in morbid and mistaken ways. In my opinion the impulse to keep our law-making process "ideologically neutral" deserts its cause when it embraces the theory that identifies law with organized force. Rather its proper objective should be to discern those minimum principles that must be accepted in order to make law possible and then to protect the integrity of those principles and to promote a general understanding of them. From this point of view, it is possible to discern a number of desiderata.

The sanction back of the fundamental rules of the game, without which the game itself could not go on, is and can only be general acceptance. This general acceptance can be assured only if the rules are kept simple and understandable. In this respect Kelsen's basic norm points in the right direction, though it sets up an impossible ideal. But a rote knowledge of the rules is not of itself sufficient. Understanding must be vitalized by an appreciation of the reasons why these rules are necessary. It is highly important that the fundamental rules which derive their sanction from acceptance should not be unnecessarily intermixed with constraints not essential to the law-making process itself. Where this intermixture occurs, insight is lost into the fundamental procedural structure on which law-making rests and a confusion results that invites the very evils the imperative theory is thought to avert.

In the United States the basic charter of the law-making process is found in a written constitution. If there is validity in the preceding remarks, we should resist the temptation to clutter up that document with amendments relating to substantive matters. In this respect there is little to choose between the proposal made in the late thirties by a branch of the Lawyers Guild to write the Wagner Act into the Constitution and the more recent action of the House of Delegates of the American Bar Association endorsing an amendment that would limit

income taxes to 25 per cent. Both of these measures involve the obvious unwisdom of trying to solve tomorrow's problems today. But their more insidious danger lies in the weakening effect they would have on the moral force of the Constitution itself. They would carry the dissensions and resentments that inevitably surround the making of laws into the charter that makes law-making possible.

The bad-man theory of law—the view that identifies the reality of a rule of law with the quantum and direction of the physical force behind it—is a theory that can be applied without disaster to the periphery of the law. The citizen preparing his income tax may properly ask his attorney how the Revenue Act will be interpreted and enforced, not how he may most effectively cooperate in helping to achieve its purposes. A similar attitude applied to the rules that make government itself possible is poison. This is a truth obvious to anyone who has ever witnessed an attempt to conduct a meeting by Robert's Rules of Order where there was no real and shared desire to reach a decision through parliamentary procedures. (In this connection it is worthy of note that in a bookstore in Boston specializing in communist literature, now closed, the books piled in the highest stacks were not those of Marx, Lenin and Stalin, but the manuals of Cushing and Robert.)

Dependence on whole-hearted and understanding acceptance increases as we approach the basic organizational principles on which government itself depends. Here the letter can only kill; the spirit alone can give life. Here also, perhaps, appears the disadvantage of a written constitution authoritatively interpreted by a Supreme Court. In a country where the constitution is unwritten, it is necessary to ask whether a departure from established practice comports with the demands of decent and orderly government as a whole. The absence of an authoritative formulation keeps alive a sense of purpose, and it is plain to all that the bad-man theory of the meaning of legal restraints must be utterly irrelevant to basic constitutional issues. With us, this is not so clear. Where doubtful procedures emerge, we tend to inquire into their legality, not into their effects. Instead of engaging in an effort to articulate the restraints that must be accepted to insure orderly, fair and decent government, American lawyers are likely to compete with one another in predicting what the Supreme Court will do.

This bent toward legality and away from purpose is particularly apparent in current discussions of abuses of the power to compel testimony. Intelligent legislation requires a knowledge of what is going on in society, and this knowledge can at times only be obtained by compulsory processes. Something equivalent to the writ of subpoena is, therefore, essential to orderly government. But the power to compel

testimony (one of the most drastic of governmental powers) will be accepted as just and proper only so long as the need for it is generally perceived and its use related meaningfully to the needs of government. If this power is openly abused for personal ends, the foundations of voluntary acceptance upon which government itself ultimately depends are undermined.

This aspect of the matter receives scant attention in current arguments over abuses of the power of legislative investigation. On the lowest level, the discussion centers on the question whether the things done by legislative investigators are within the law as laid down by the Supreme Court; on the highest level, it is generally directed to the wisdom of the Court's rules and what the Court should do in the future. It is not sufficiently recognized that the Supreme Court can no more insure decency and fairness in the use of governmental power than an able chairman, backed by a written code of procedure and a husky sergeant-at-arms, can compel a meeting of rowdies to conduct a fair and orderly discussion. The prevention of indecencies in the use of governmental power must depend ultimately on the pressures of public opinion, particularly the opinion of the legal profession. This opinion can be effective only if it is informed by a sound philosophy. It cannot be so informed when it accepts a view that treats governmental power as a brute datum and refuses to examine the rational and moral grounds of its justification and acceptance.

The greatest disservice of the imperative theory has been to obscure the true nature of régimes like that of Hitler in Germany. More than any other in history, the Nazi dictatorship came to power through the calculated exploitation of legal forms. So cynically skillful was this abuse of legal procedures that its lessons have been studiously absorbed by every dictator since.

I have just said that the Nazi régime was based on an "exploitation of legal forms." But if the imperative theory is right, what was there to exploit? In terms of that theory, the German people simply traded one "top dog" for another. We may deplore their taste in leadership, but their new leaders were just as "lawful" as their predecessors, since they too met the test of enjoying the habit of obedience of the bulk of society. The painful, faltering agony through which Western Germany passed in attempting after the war to restore lawful and constitutional procedures is, for the imperative theory, simply another transfer of allegiance to still another set of human rulers. By directing attention away from the moral sources of governmental power, the imperative theory encourages the belief (commonly held in this country, I think) that the Nazi revolution was itself an original well spring of

power. Nazism is viewed as the sudden eruption on the European scene of a kind of atavistic savagery, so filled with an evil force of its own that for a while it was able to sweep everything before it.

The facts are, I think, quite otherwise. Most of the alleged "power" of Nazism was derivative, parasitic, and, in the end, self-destructive. Atavistic savagery there was indeed among a small band of adventurers, but they would never have achieved their control over the German people had there not been waiting to be bent to their sinister ends attitudes toward law and government that had been centuries in the building. The German people were notoriously deferential toward authority, but even for them, as Hitler shrewdly saw, the habit of law observance was not a blind conditioned reaction toward orders coming from above, but was associated with a faith in certain fundamental processes of government, in particular with adjudication by disinterested judges and with statutes emerging from deliberative procedures participated in by elected representatives.

Hitler therefore strove to preserve as a screen for his manipulations the familiar outer appearance of due process, realizing that law observance (and consequently the practical efficacy of his régime) was dependent on keeping that appearance as close as possible to reality. Where he could without sacrifice, he conformed to the demands of legality. But he had the advantage of being able to accomplish his will through either of two instruments, the state and the party. Where the result he desired would be embarrassed or compromised by those restraints that even the appearance of due process entails, he acted, not through the state, but through the party "in the streets."

All of this was done with deliberate cunning. As he told Rauschning, "If I were to allow the S.A. a free hand, or if twenty or thirty thousand Germans were to lose their lives in street fighting, the nation would be able to forget it . . . Such things are like the incidents of the open battlefield. But a miscarriage of justice, a cold and considered judgment . . . that is something that the nation will not forget or forgive." [20] If for his own evil ends Hitler had the insight to see that law as a functioning institution must rest on something more than an attitude of deference toward human leaders, certainly we have little excuse to be blinded by a philosophy that treats law simply as an accomplished fact of power.

In making these remarks I hope it is clear that I am not intimating even remotely so absurd a thing as that Patterson personally condones the Nazi régime or abuses of investigatory powers. What I am saying is that in my opinion the imperative theory of law which he expounds,

20 HERMAN RAUSCHNING, HITLER SPEAKS 24–25 (1939).

and whose critics he ridicules, places beyond the pale of legal philosophy the most vital problems of the law itself. For I believe that law is not a datum, but an achievement that needs ever to be renewed, and that it cannot be renewed unless we understand the springs from which its strength derives.

## NATURAL LAW

### Some False Issues

Current disputes about "natural law" in this country generally revolve about certain issues that seem to me to be futile in the sense that a discussion of them leads to no clarification of the essential problems of law and justice. One of these is the notion that adherents of natural law are committed to "absolutes," while those who reject it are "relativists." This is a distinction commonly accepted on both sides.

I have to confess I have no clear idea what an "absolute" is. In philosophic discussions an "absolute" is something that is not related to anything else, but since I cannot think without employing relations I cannot conceive what this unrelated thing would be like. If an "absolute" is taken to mean a moral imperative that yields a clear principle of decision under all circumstances then, again, I know of no "absolute." Human life is in this sense as close to an absolute as anything we have, yet it furnishes little guidance to the hospital that has only enough of a scarce drug to cure one patient when three are dying for lack of it.

So far as I can see, the expressions "absolute" and "relative" as they are employed in current discussions about natural law are simply unanalyzed terms of censure and praise. The believer in absolutes is either an unpleasant dogmatist or a man of firm principles. His opposite number, the relativist, is either a fellow who shows a commendable flexibility in the face of a changing reality, or a spineless creature drifting with the tides of circumstance. Neither term seems to me to present anything like a justiciable issue.

Another diversionary controversy that prevents profitable discussion is aroused by the notion that natural law sets itself above positive law and counsels a disregard of any enactment that violates its precepts. When it is suggested that this attitude toward positive law be adopted, not only by the citizen, but by the judge and state official as well, there is certainly ground for real concern.

But the issue of fidelity to positive law is certainly severable from that of natural law generally. If the matter is examined candidly

it will be found that there is no one who cannot imagine himself, even as a judge, being faced by a law so infamous that he would feel bound to disobey it. For most of us such a situation could only arise in the event of some great dislocation in the ordinary processes of government, such as might be occasioned by a dictatorship or an occupation by enemy forces. Perhaps a certain distaste for the notion of natural law is engendered precisely because it reminds us of such unpleasant and unlikely possibilities.

Most philosophers of natural law have regarded the duty of obeying the positive law as founded on natural law itself and as being subject to exception only in extreme cases. Certainly it is clear that the obligation of fidelity to positive law cannot itself be derived from positive law. Even so great an enemy of natural law as Gray had to desert the positivist position when he came to explain why in modern states judges must consider themselves bound by statutes. "This," he wrote, "may be said to be a necessary consequence from the very conception of an organized community of men." [21]

If in our society a man accepts a judicial post with a commitment to disregard laws duly enacted by the same democratic and constitutional procedures that created the office he assumes, a serious issue is presented. That issue will not be clarified, but obfuscated, if it is converted into a general philosophic discussion of the natural law position.

The great merit of Patterson's discussion of natural law [22] is that it discriminates. He recognizes that in the course of history the term has had different meanings and that these meanings must be appraised separately. In so far as Patterson may be said to have an attitude toward the general direction of thought represented by natural law, it is approximately that of Maine: although intellectually indefensible, the notion has in practice probably done more good than harm.

For my own part, I have two major criticisms of Patterson's treatment of the natural law philosophy, which I shall try to express in what follows.

## The Direction-Giving Quality of Purposive Facts

When the question is discussed today, How can ethical judgments be justified?, two propositions are generally accepted as truisms: (1) there is a difference in kind between statements about what ought to be and statements about what actually exists; (2) it is impossible to derive from a statement about what exists any conclusion about what ought to be. Neither of these assertions would have appeared as a

21 JOHN CHIPMAN GRAY, THE NATURE AND SOURCES OF THE LAW § 273 (1909).
22 Chiefly in Chapter 13, pp. 332–375.

truism to Plato or Aristotle, and those philosophers would probably have had difficulty extracting a clear meaning from them. It is only in more recent times, and chiefly through the influence of Kant, that these propositions have reached the status of axioms among philosophers and laymen generally.

In principle, at least, Patterson accepts "the dichotomy of fact and value" and the impossibility of deriving "value judgments" from "facts."[23] In this I differ from him, for I believe that this time-worn dichotomy requires serious modification when applied to purposive human behavior as a simple illustration will show.

A machine is to be sold in a dismounted form and an engineer, skilled in his trade but awkward in English, drafts the instructions for its assembly by the purchaser. A professor of English and a mechanic both buy the machine, and each reads and attempts to apply the instructions. The professor applies them in their literal sense and gets into trouble. The mechanic hardly notices the literal meaning of the words, but looks through to what the engineer was trying to say. He assembles the machine without difficulty. We are interested in the dichotomy of *is* and *ought* as applied to these instructions. Refraining from all "value judgments," who penetrated most truly to the empirical fact of these instructions, the professor of English or the mechanic?

Again, suppose the instructions not only are defective in English, but also contain an error in an electric circuit to be wired by the purchaser. Our mechanic this time has trouble too, though not so much as the professor of English. A third purchaser is an electrician, who sees that the draftsman of the instructions has not wholly thought through his problem, and who therefore corrects the defective circuit. (Conceivably he might do this instinctively so that he would not note the error as he read.) The same words on paper have now produced three different effects. If we were permitted an evaluation we would have no difficulty at all in ranking these three readings in terms of their contribution toward an end shared by all concerned, namely, the proper assembly of the machine.

But which interpretation is closest to "fact"? Is it not true that the only significant standard we have of "fact" here is the same as that

23 "One of the great contributions of the German philosopher, Immanuel Kant, was his separation of 'reality,' the realm of science, from value, the realm of ethics . . . to the great benefit of both intellectual disciplines." P. 42. *Cf.*, "In so far as the author has a coherent theory, it is 'axiological realism,' that legal evaluations should always be determined on the basis of facts." P. vii. (Does this simply mean that you ought to get the facts straight before you decide what ought to be done? If so, "axiological realism" seems a rather pretentious description for so simple an idea.) *Cf.* also, "Professor Dewey's most important contribution to ethical theory is his controversial view that valuation can be an empirical process . . . ." P. 495.

which determines the "value" of the three readings, namely, their conformity to an end shared by all, that of putting the machine together so that it will run properly? However "true" the interpretation of the English professor might be for some purposes, it was not true for the only purpose that he and the draftsman of the instructions had in mind. A purpose is a fact, but it is a fact that sets a target; it is a direction-giving fact. So soon as we recognize this quality of a purpose, it becomes clear that within the limits of its framework a purpose is at once a fact and a standard for judging facts. To such a fact the "logic" that tells us it is impossible to deduce what ought to be from what is becomes inapplicable.

It may be objected that my illustration confounds "oughtness" with "purpose," and that you cannot derive from the fact that a man's mind is purposively directed toward assembling a machine, the proposition that he *ought* to assemble it. But this simply means that his purpose has not as yet been subjected to any criterion external to itself and that it has not been tested for its harmony with other purposes. It does not deny that an accepted purpose within its own compass can give direction, that it can furnish a standard for saying, "This is good. This is bad. This helps. This hurts." Later I shall indicate what the view here advocated has to say about the question how the goodness of a particular purpose should be judged. For the time being our discussion remains within a more modest range.

As for the application of the dichotomy of *is* and *ought* to the law, it is fairly clear that with legal precepts, as with the instructions for assembling a machine, what a direction *is* can be understood only by seeing toward what end result it is aimed. The essential meaning of a legal rule lies in a purpose, or more commonly, in a congeries of purposes. Within the framework of this purpose, or set of related purposes, the sharp dichotomy between fact and evaluation cannot be maintained; the "fact" involved is not a static datum but something that reaches toward an objective and that can be understood only in terms of that reaching.

In criticism of the view just expressed, it has been asserted that it destroys the possibility of defining what the law actually is and prevents the taking of any distinction between what is in fact law and what ought to be law.[24] This criticism would be justified only if the view I am advocating permitted the interpreter of a statute or precedent to read into it any purpose he saw fit. No such abandonment of ordinary principles of interpretation is here proposed or implied. All that is asserted here

[24] Cohen, *Should Legal Thought Abandon Clear Distinctions?* 36 ILL.L.REV. 239 (1941) (being a review of FULLER, THE LAW IN QUEST OF ITSELF (1940)).

is (1) that a law must be interpreted in the light of some purpose; (2) that this purpose should not be subjected to a false "logic" derived from experience in dealing with non-purposive facts.

It may be said that this is all very well, but that it has little or nothing to do with natural law. Indeed, commenting somewhat obscurely on an obscure passage from a book of mine, Patterson seems to say just this.[25] I believe, on the contrary, that the question whether the dichotomy of *is* and *ought* can be applied to purposes goes to the heart of the philosophic issue of natural law *v.* positivism.[26] (I stress the fact that I am speaking of the philosophic issue, because many defenses of the natural law view made in the name of religion seem to me to lack anything resembling philosophic analysis.)

An insistence on attempting to apply the dichotomy of *is* and *ought* to purposes seems to me to permeate the thinking of all those who have explicitly rejected the natural law philosophy. Kelsen's whole system is an elaborate effort to deal with purposive arrangements as if they had no purpose.[27] His attitude comes plainly to the fore in his discussion of "dynamic" and "static" norms. A norm or rule can for Kelsen be "dynamic" only if it is devoid of material content, only if it is simply a procedural rule defining the sources of law. A rule that says something on its own account, as it were, is necessarily "static."[28] On a common sense level, this means that if *A* has attempted to articulate in words a purpose he has in mind, *B* could not possibly help him to improve the statement of his purpose. For Kelsen there can be no meaning in Mansfield's famous phrase to the effect that the common law, proceeding from case to case, gradually "works itself pure." For Kel-

25 "Professor Fuller . . . defines natural law as 'the view which denies the possibility of a rigid separation of the *is* and the *ought* and which tolerates a confusion of them in legal discussion.' However, the teleological or purposive interpretation of statutes or of case law is not dependent upon the acceptance of such a confusion, nor is it an exclusive property of natural law." P. 369. Patterson wants a purposive interpretation, but no "confusion" of *is* and *ought*. Does he mean to assert that he can take any given rule of law and tell just where the rule as it is leaves off and where the rule as people think it ought to be begins? If he cannot effect this separation, then, though he may not like my paradoxical form of expression, he too is compelled to tolerate a "confusion" of *is* and *ought*.

26 Since I have been arguing for this position for a good many years I am encouraged to find that in two recently published works the authors have arrived independently at a substantially similar point of view. JOHN WILD, PLATO'S MODERN ENEMIES AND THE THEORY OF NATURAL LAW (1953); LEO STRAUSS, NATURAL RIGHT AND HISTORY (1953). (Neither of these books is written from a Roman Catholic point of view.)

27 A perceptive Soviet legal philosopher (now repudiated) once observed that in Kelsen's system the model of the legal rule must be "thou shalt . . ." and not "thou shalt . . . in order that . . . ." Kelsen's system is incapable of absorbing the second kind of imperative. Pashukanis, *The General Theory of Law and Marxism*, in SOVIET LEGAL PHILOSOPHY 111, 114 (Babb's transl. 1951).

28 GENERAL THEORY OF LAW AND STATE 112–113 (1945).

sen, a substantive rule is "pure" to start with and there is no such thing as a collaborative articulation of shared purposes.

It is no mere accident of the history of ideas that those who can see nothing but fraud or self-delusion in the notion of natural law should be those who are also unable to see the essential inapplicability of the dichotomy of *is* and *ought* to purposes. For one who has seen clearly that this dichotomy loses its validity in the face of a single purpose will be led, I believe, to see that it loses its force before the problem of the justification of ethical judgments generally.

A purpose is, as it were, a segment of a man. The whole man, taken in the round, is an enormously complicated set of interrelated and interacting purposes. This system of purposes constitutes his nature, and it is to this nature that natural law looks in seeking a standard for passing ethical judgments. That is good which advances man's nature; that is bad which keeps him from realizing it. Just as the dichotomy of *is* and *ought* does not apply to the act of reaching toward the realization of a single purpose, so is it equally inapplicable to a whole purposive system. From the reaching that is imbedded within that system, we can learn in what directions it should reach.

When the natural law view is defined in this way the question is not *how much* we can learn from studying man's nature, but whether this is the proper place to look to for guidance in deciding what is right and what is wrong. Viewing the matter in this light, a professed skeptic might accept natural law, saying, "I agree that the only possible source of ethical judgments lies in man's nature, viewing that nature as a striving and not as a fixed datum. But I don't think you will derive much of substance even from that source."

The man who prides himself on his robust skepticism is, however, not likely to go so far in reconciling himself with natural law. He is more likely to attack its starting point as a fraud. He is apt to say, "This talk of deriving ethical judgments from man's nature is nonsense unless you smuggle in some idea equivalent to the 'true' nature of man. A man's nature is what he is. If you say that as he is he is not realizing his 'true' nature you are covertly introducing a standard for ethical judgments which cannot be derived from his present nature and for which you have advanced no justification." This objection, far from demonstrating the logical acumen of the critic, only reveals how deep-seated is the assumption that what is and what ought to be are separated by an unbridgeable chasm.

Let us test the epistemological scruples of our skeptic against a homely example quite removed from the emotions surrounding ethical disputations. A book on gardening contains the following sentence: "In

pruning the fundamental rule is to respect the natural growing habits of the plant being pruned." If our skeptic is consistent he will reject this statement as being utterly absurd. He will say that if you truly respect the growing habits of a plant you will not prune it at all. Pruning is an interference with nature; it cannot therefore be guided by nature. I doubt that our skeptic would in fact take this view. I think he would keep his epistemology out of the garden. He would hold his "logic" on a sufficiently short leash so that he could absorb whatever wisdom is contained in the innocent sentence quoted. If he were a serious gardener he would set about observing trees under various growing conditions so that he would learn how to help a tree be what it is.

For my part I am quite willing to apply the same common sense to men as to trees. I cannot see what standard there can be for passing ethical judgments if it is not that which is in keeping with man's nature as it would be if it were able to resolve its disharmonies and to surmount its imperfections.

Indeed, this point of view seems to me to be tacitly contained in every ethical theory that attempts anything approaching an affirmation. Take, for example, psychoanalysis. This theory originated in a context of thought that certainly seems remote from the philosophy of natural law. Yet it assumes that the purpose-forming system called a man may be in need of being "straightened out," and at the same time contains within itself the sign posts that will direct the straightening-out process. This is the essence of the natural law position. If the psychoanalyst does not do something roughly equivalent to helping his patient realize his "true nature" then his whole profession loses intelligible meaning.

So far as I can see it is only an ethics founded on the natural law theory that stands any chance to profit from advances in the scientific knowledge of human nature. It is, furthermore, an ethics that not only permits but demands freedom in the search for a true understanding of man. In this sense it stands at the opposite pole from any theory that attempts to lay down in advance an eternal, unchanging "code of nature."

## Eunomics—A Neglected Branch of Jurisprudence

Even if the reader is inclined to reject all that has been said here so far about natural law, I should like to solicit sympathetic attention for another aspect of the natural law problem that is passed over in silence by Patterson. What I have in mind can best be approached by quoting a hypothetical assertion: "There are natural laws of social order."

Does the reader accept or reject this statement? If he rejects it, what does his rejection imply? Does he mean to embrace what might be

called the doctrine of the infinite pliability of social arrangements, the view that, given a sufficient agreement on ends or a dictator strong enough to impose his own ends, society can be so arranged as to effectuate (within the limits of its resources) any conceivable combination or hierarchy of ends?

As a tacit and unexamined premise such a doctrine is, I think, very much alive today in some of the social sciences, including law. I believe the doctrine is wholly without foundation, and that it is working great damage by drawing attention away from the most vital problems of social order and welfare. The untenability of the doctrine can best be seen by passing in review three fields of study that have remained relatively untouched by it: business administration, economics, and political science.

The accepted end of a factory is to produce goods. If automatic machines (such as looms) are employed these machines can ordinarily accomplish their work only if assisted by a variety of human interventions: cleaning, oiling, repairing, insertion of materials, removal of finished products, piecing up of materials that break en route through the machine, etc. These operations may be allocated among workers in many ways. A single worker may be given the responsibility for all of them with respect to each machine. At the other extreme, there may be a specialist for each operation. More commonly the duties are assigned in bundles, as it were, so that one man is responsible for three operations, another for another set of five, etc.

Obviously the rate of output of the factory will be affected by the manner in which these operations are allocated. The task of management is to select out of the countless ways of making this allocation the one that will produce the best results. Many factors must be reckoned with, involving individual and social psychology, the construction and operation of the human body, avoidance of interference between different workers, etc. But no one would doubt that the task is here that of searching out the compulsions and opportunities contained in a particular domain of objective reality. In this sense, management is concerned with the "natural laws" underlying the organization of machine-tending duties.

The same attitude is taken toward problems of business organization generally. It is assumed that the management of a corporation, for example, may be given different structures, or may be conducted according to different basic plans. The task of business administration is to appraise the effects of these various ways of organizing and run-

ning a corporation. It is being increasingly assisted in this task by a developing theoretical literature.[29]

In Soviet Russia it was once declared (by a school of thought long-since liquidated) that under socialism there is no such thing as an "economic law." [30] In this country, under the spell of the "institutional" movement, there was at one time a tendency to believe that in economics anything goes, and that it is all a question of where you sit, what you want, and what you are used to.

Today, however, economics has returned to the view that the forms through which economic objectives can be achieved are limited in number, and that for certain objectives certain forms (with their attendant costs) must be employed. In particular it is now realized that the maximum satisfaction of diverse wants out of scarce resources can only be achieved through something equivalent to a market mechanism.[31] This is a proposition accepted by thoughtful socialist and even communist scholars.[32]

The branch of economic study called "welfare economics" sets as its task discovering and analyzing the ways in which a reorganization of the forms of economic life might conduce to a greater degree of economic satisfaction.[33]

In the course of its history political science has made detours paralleling the institutional movement in economics. But political science has throughout retained its concern with the effects that flow from the adoption of different forms of political order. When proportional representation is urged as an improvement on existing ways of conducting elections, political science has no choice but to set about ascertaining what the adoption of this form of voting entails.[34]

In all the instances just reviewed it is assumed (1) that men can choose to adopt one form of social order or another, (2) that the achievement of particular ends may require the choice of particular forms of order, the available forms being limited in number. All of

29 An outstanding work in this field is C. I. BARNARD, THE FUNCTIONS OF THE EXECUTIVE (1942). A lively account of current studies in the implications of the various forms of business organization will be found in W. H. WHYTE, IS ANYBODY LISTENING? (1952). One important conclusion is stated in these terms: "the way people behave in an organization is influenced as much by its social structure as by their own personalities." P. 123.

30 HAROLD J. BERMAN, JUSTICE IN RUSSIA 31–32 (1950).

31 Perhaps the best demonstration is contained in the chapter on "Profits and Polycentricity" in MICHAEL POLANYI, THE LOGIC OF LIBERTY 138–153 (1951).

32 See the essay "On the Economic Theory of Socialism" by Oskar Lange in the book by that title edited by B. E. Lippincott, 1938, pp. 55–143.

33 See TIBOR SCITOVSKY, WELFARE AND COMPETITION (1951); M. W. REDER, STUDIES IN THE THEORY OF WELFARE ECONOMICS (1947).

34 An analytical study of different "machineries for making social choices" will be found in KENNETH J. ARROW, SOCIAL CHOICE AND INDIVIDUAL VALUES (1951).

these studies are directed toward discovering and utilizing what may be called the "laws" of social order. These "laws" are in turn "natural" in the sense that they represent compulsions necessarily contained in certain ways of organizing men's relations with one another.

Let us turn now to two subjects (sociology and law) where one might expect a similar line of inquiry to be systematically pursued, but where it is not—for somewhat different, and even opposed, reasons. The reason sociology has not generally directed itself toward problems of the type just reviewed is fairly plain. Most of its practitioners have their hearts set on establishing themselves as "empirical scientists." A scientist is a man who deals with the phenomena he studies as being controlled, not by human choice, but by deterministic laws. A "social scientist" must therefore regard man as an animal whose behavior is determined. But if this is so, it follows that he cannot choose the forms of social order under which he is to live. A study of the implications of any such alleged "choice" among forms of order would therefore be unscientific.

A similar inhibition would appear as an absurdity in the physical sciences. If a student were to ask his professor of physics, "What would happen if we should put a capacitor in this circuit at this point?" he would hardly expect the answer, "Your question implies that we are free to put the capacitor there or not. As deterministic scientists we cannot accept this premise of freedom. Therefore, your question is out of order." The difference between sociology and physics lies, of course, in the fact that the object studied by sociology is man himself. To understand the sociologist's attitude we have to suppose that the question addressed to the professor of physics ran something like this: "What would happen if this circuit chose to insert in itself a capacitor at this point?"

Yet disconcerting as it may be for the sociologist to treat man as being at once determined and as making choices, this is precisely what he must do if he is to furnish any guidance to those compelled to choose what forms of order to impose on themselves. By and large that guidance has not been forthcoming from professional sociologists.

Of all those involved in the functioning of society, the lawyer is most actively engaged in solving problems of what Michael Polanyi calls "the institutional implementation" of social and individual ends. The lawyer drafts constitutions, treaties, charters, by-laws, statutes, contracts, wills, and deeds. All of these serve to impose forms on men's relations with one another. The lawyer is constantly studying these forms and discovering, by reflective analysis and practical experience, what results flow

from particular forms of order. This is, indeed, the most creative side of his work.

One might expect that the major effort of legal philosophy would be directed toward this department of the lawyer's activities. Instead we find it almost entirely neglected. The favorite themes of jurisprudence are: theories about state-made law, the judicial process, the interpretation of statutes, the interaction of state-made law and custom, the latter consisting of rules that are by definition not the result of any deliberate act of creation. Supplemented by some excursions into ethics and epistemology, these are the staples of Patterson's concern. His book is essentially litigation-oriented, just as American legal philosophy has generally been litigation-oriented for many decades.

This preoccupation of legal philosophy with litigational issues does not mean, of course, that lawyers are not individually and in their separate fields interested in analyzing the implications that flow from the adoption of particular forms of social order. On the contrary, perceptive comments are written, for example, in criticism of the draftsmanship of treaties, constitutions, and statutes. It is often pointed out how particular provisions have been so framed that they will fail of their purpose or will entail unwanted and unintended results, etc. But by and large this activity is deemed to fall outside the scope of legal philosophy. No attempt is made to bring its scattered manifestations into a common focus, or to search out general principles that will guide choice among the available forms of order.

What is the reason for this neglect? I can only explain it as an exaggerated reaction against the theory of natural law. Natural law is an unpleasant, discredited, out-moded doctrine; let us, therefore, embrace its opposite. Its opposite teaches that there is no such thing as a "natural law of social order." Society is just what we choose to make it, and the way we shape its inertly pliant forms is guided, not by "laws," but either by "intangible values" or by selfish or class interests. In following this line of reasoning we have, I think, definitely thrown the baby out with the bath.

Because of the confusions invited by the term "natural law," I believe we need a new name for the field of study I am here recommending. I suggest the term "eunomics," which may be defined as the science, theory or study of good order and workable arrangements. Eunomics involves no commitment to "ultimate ends." To be sure, it may reject particular ends as presenting what Michael Polanyi calls "unmanageable social tasks." [35] It may, in other words, reveal that there are ends which seem

[35] See the chapter on the "Manageability of Social Tasks" in THE LOGIC OF LIBERTY 154–200 (1951).

in the abstract desirable, but for the attainment of which no social form can be devised that will not involve an obviously disproportionate cost. But the primary concern of eunomics is with the means aspect of the means-end relation, and its contribution to the clarification of ends will lie in its analysis of the available means for achieving particular ends.

As an example of a problem in eunomics I may refer to an exercise I have assigned to my classes in jurisprudence. A boundary dispute arises between two countries and feelings are sufficiently high so that some mobilization of troops has occurred on both sides. The parties are contemplating submitting the dispute to arbitration. The merits of the controversy are such that the boundary as determined by an arbitrator might take different courses, each with distinct and complex ethnologic and economic implications. It has been suggested that the dispute be arbitrated either before a single arbitrator, chosen by some procedure designed to guarantee his impartiality, or before a "tri-partite" board, two members of which would be designated directly by the interested parties.

The task assigned is to advise one of the countries on the implications of these two forms of arbitration. In general my students seem to find at first that this problem presents no "handles." But with some Socratic drawing-out I have found it possible to spend as much as two class periods in profitable discussion of it, the discussion not only embracing the two forms of arbitration but possible modifications that might be introduced into each of them to achieve some of the advantages of the other without its dangers and disadvantages. The whole problem turns out to be filled with unexpected complexities, and to require hard thinking before an adequate response to it is possible.

It may be said that such a problem has little to do with legal philosophy. On the contrary, I believe there are involved in this exercise two fundamental and pervasive principles of social order, *adjudication* and *contract*. By examining how the arbitration between these two countries ought to be arranged, we are discovering the principles that underlie adjudication generally, we are gaining an insight into the limits of the effectiveness of adjudication. In the tri-partite board we have an attempt to combine in one procedure the advantages of two different forms of order: contract and adjudication. By studying them in this uneasy and somewhat hazardous mixture, we can learn something about their social functions generally.

There is a common impression that the now unread treatises on natural law that were so much in vogue a hundred and fifty years ago were given over to drawing up immutable codes of moral absolutes. In fact much of their content had to do with what I have here defined as eunomics. This is true, for example, of Ahrens' once enormously popular *Cour de*

*droit naturel*.[36] The great mistake of the natural law school was, however, not to keep the problem of ends in a sufficiently intimate contact with the problem of means. Instead of holding means and ends open for a reciprocal adjustment with respect to each problem, the writer on natural law was apt to reach abstract resolutions on ends and then to trace out the implications of those resolutions for the various branches of the law.

This mistake of the older natural law school is being repeated, I believe, by Professors McDougal and Lasswell.[37] Their philosophy is "value-oriented," which means preference-oriented, since a "value" is defined as being a "preferred event." With the aid of a table of eight fundamental "values" (which include, incidentally, neither freedom nor security) the philosopher or legal reformer is supposed to determine what values are to be effectuated—in other words, what he wants. The rest is a mere matter of technical implementation with which Professors McDougal and Lasswell have no direct concern and for which they assume no responsibility.

The unwisdom—even the absurdity—of this mode of procedure can be seen if we attempt to apply it to devising rules for a game. Suppose we said, "Let us first decide what kind of enjoyment we seek from our projected game. Then let us draw up rules for a game that will yield this form of enjoyment." If we went about the project in this way, we should quickly discover that it is impossible to define the pleasure that might be derived from an uninvented game. The pleasures derived from any form of play are always complex, and the enjoyment yielded by any particular game is the unique product of its own peculiar nature. If we are to invent a game, we shall have to start with ends vaguely perceived and held in suspension while we explore the problem of devising a workable system of play.

I do not think it is otherwise with social arrangements generally. Can I decide euthanasia should be legalized without first considering the social manageability of the task of selecting the right people to put to death? Can I opt for equality of income without asking myself how manpower will be allocated when the inducement of wage differentials is removed? If I seriously explore the problem of means in connection with the problem of equality I may discover that the end of equality contains within itself a latent contradiction. Equality of purchasing power requires that

[36] 5th ed., 1860. The first French edition was published in 1839. At the time of the fifth edition there were translations in Italian, Spanish, German, Portuguese and Magyar.

[37] McDougal, *The Comparative Study of Law for Policy Purposes: Value Clarification as an Instrument of Democratic World Order*, 61 YALE L.J. 915 (1952). A generous bibliography of previous writings by Professors McDougal and Lasswell will be found in the notes to this article.

goods be priced in a way that reflects truly the relative productive efficacy of the resources (including manpower) employed in their creation. Since it is obvious that man hours are not equally productive, any pricing system which assumes that they are contains a hidden subsidy for the consumer who happens to spend his money for goods brought into existence by the more productive portion of the working force. Until this pricing problem is solved, the end of strict equality remains a task that is not socially manageable.

In attempting to define a branch of social study that might be called eunomics, I stated that an acceptance of this subject as worthy of pursuit implies no commitment to "ultimate ends." I was careful not to say that eunomics is indifferent to ends. In view of the interaction of means and ends any sharp distinction between a science of means and an ethics of ends is impossible. In leaving the problem of "ultimates" unresolved I meant merely to acknowledge that after a careful study of the interaction of means and ends with respect to a particular problem, men may still differ as to what ought to be done and that eunomics cannot promise to resolve all such differences.

I believe, however, that if the social sciences were to turn more diligently toward problems of eunomics, the area of workable agreement would be greatly expanded.[38] There is nothing more divisive than a discussion of ends in abstraction from means, and the wrangling schools among professional philosophers may be attributed chiefly, I think, to this circumstance. On the other hand, a concentration on means to the exclusion of ends, such as is often affected in economics and sociology, leads to a situation in which each "social discipline" talks past all the others and no effective communication takes place at all. For these reasons I believe that a study that will consider means and ends in interaction furnishes the only basis for a fruitful collaboration among the social sciences.

In stating the case for eunomics I have tried to keep it distinct from the natural law problem first discussed, that is, whether "the nature of man" can furnish a meaningful standard for ethical judgments. One may emphatically reject this standard and yet accept eunomics. This is, indeed, the course taken by Karl Popper, a staunch enemy of the idea of "natural law" or at least of that verbal slogan. Popper acknowledges that there are "important natural laws of social life" and that measures of social reform require "some knowledge of social regularities which

38 This point is well made in ROBERT A. DAHL AND C. E. LINDBLOM, POLITICS, ECONOMICS AND WELFARE 16 (1953). This book might itself be considered as a pioneering essay in eunomics. It is interesting that political science and economics seem to be moving toward common ground, elections and markets being seen as specific techniques by which individual choice is given social effect.

impose limitations upon what can be achieved by institutions." [39] At the same time, he sticks faithfully by the dichotomy of *is* and *ought* and declares that it is only because they wish to escape responsibility for their own ethical decisions that men find attractive the notion that these decisions are grounded in "nature." [40]

Popper makes no attempt to explore the possible sources that may give rise to the "natural laws of social life" or to explain why there are in fact significant "social regularities." If the caricature of man sometimes presented by the extreme school of cultural relativism were true it is hard to see how any such laws or regularities could exist except in a wholly static society. If man's "nature" is shaped entirely by the "cultural matrix" then when that matrix is disturbed or broken it would seem that man would disintegrate and there would be no telling which way the pieces would fall. If there are constancies and regularities that persist through a change in social forms these must reflect some constancy in the nature of man himself. It is at this point that the subject I have called eunomics reaches common ground with the natural law theory of the source of ethical judgments.

## THE LEGAL PHILOSOPHY OF GUSTAV RADBRUCH

Gustav Radbruch was one of the great legal philosophers of recent times. His principal work was his *Rechtsphilosophie,* of which the last edition to appear during his lifetime was that published in 1932 just before the Nazi revolution. An English translation of this edition was published in 1950.[41] Professor Patterson assisted in preparing this translation and wrote an introduction to it.

One of the outstanding developments of legal philosophy in Germany in the postwar period was the announcement by Radbruch of a substantial change in his point of view. This change Radbruch himself attributed to his having experienced the Nazi dictatorship and the defeat and occupation of Germany.[42]

As one who had been prominent in the Social Democratic Party he was dismissed from his position as a professor at Heidelberg in the spring of 1933 on the ground that he was politically unreliable, more precisely because, "On the basis of his whole character and his political activity to date he does not offer a sufficient guaranty that he will without reservation now support the national government." Radbruch remained

39 1 THE OPEN SOCIETY AND ITS ENEMIES 56 (1945).
40 *Id.* at 62.
41 THE LEGAL PHILOSOPHIES OF LASK, RADBRUCH, AND DABIN 45–224 (Wilk's transl. 1950).
42 See the foreword to RADBRUCH, RECHTSPHILOSOPHIE 11 (4th (posthumous) ed. 1950).

in Germany during the period of the Nazi regime, and continued to publish articles, chiefly abroad. As soon as the war was over, he was restored to his position and made dean of the law faculty at Heidelberg. He died on November 23, 1949.

In his first pronouncement after he began again to teach a profound modification of his former position was apparent.[43] In a series of articles published from 1945 to 1949 the reworking of his thought continued, and his new views began to take on definiteness. One of his chief concerns during this final period of his life was with the dilemma faced by Western Germany and the occupying powers in having, on the one hand, to restore lawful procedures and a respect for law, and being forced, on the other, to declare retroactively void some of the more outrageous "laws" of the Nazi regime.

In a letter written just a week after his death Radbruch's widow stated that it was her husband's desire that his Legal Philosophy be published without revision, but "with an extensive appendix that will contain his changed point of view and his new ideas." [44] Shortly before his death, Radbruch had himself requested that the English translation then being prepared in this country include such an appendix. It was apparently not possible to accede to his request.

The consequence is that the English translation of his principal work contains no word of Radbruch's to indicate any change in his views since 1932. What is more disturbing is that there is no indication in Professor Patterson's introduction that any such change took place, and in the short bibliography attached to the translation there is no listing of Radbruch's postwar writings, so that the reader is not even put on notice of their existence.

It is therefore for me a matter of profound regret that Professor Patterson has seen fit in his new book to present Radbruch's philosophy as it stood in 1932, with no hint of the development that occurred during the last seventeen years of his life. This lapse seems particularly lacking in justification since for at least two years before Patterson's book went to press, the fourth (posthumous) edition of Radbruch's work had, in accordance with his own request, made available in an appendix his principal postwar philosophic writings. [45] These are the writings he had asked to have included in the English translation.

43 *Fünf Minuten Rechtsphilosophie* (1945), reprinted in RECHTSPHILOSOPHIE 335–337 (4th ed.).

44 RECHTSPHILOSOPHIE 7 (4th ed.).

45 *Id.* at 335–357. The articles here reproduced had of course appeared previously in various journals from 1945 on. Furthermore, a transcription of notes taken from his lectures was authorized by Radbruch and published in 1948 under the title, Vorschule der Rechtsphilosophie.

According to Patterson, Radbruch was an adherent of "relativism in legal philosophy," [46] who believed that "from a statement concerning existence (fact) one cannot *logically* derive any statement concerning what ought to be, a statement of value." [47] Radbruch further discerned three antinomic elements in the idea of law: justice, expediency,[48] and certainty. Of these, "Legal certainty is the most important in the sense of being indispensable to the existence of a legal order," for, "The existence of a legal order is more important than its justice and expediency, which constitute the second great task of the law, while the first, equally approved by all, is legal certainty, that is, order or peace." [49]

When we compare this summary of Radbruch's views in 1932 with those of the postwar period, we find Radbruch himself writing in 1945 that he had come to apply to law the concept of "the nature of things" and that he had sought in some degree to bridge "the harsh dualism between value and reality, between what is and what ought to be." [50] We find him endorsing, with cautions and qualifications, the concept of natural law in his first publication after he became again free to speak his mind.[51]

Finally these passages from two of his postwar essays may serve to summarize his new point of view:

> The first need is to restore respect for law. The National Socialist government itself repeatedly broke the law in an utterly shameless manner. The most hallowed rights of man—life, freedom and honor—were violated on numberless occasions without even the pretense of legality. Everything and anything was deemed permissible that according to the conceptions or professions of those in power served the welfare of society. Now the task is to restore the security of legal rights, to renew the state's obligation toward its own enactments, to reestablish the rule of law . . .
>
> And yet, beside the restoration of respect for law, the German lawyer has a second task that seems to stand toward the first almost in contradiction. The rulers of the twelve-year dictatorship often gave to injustice, to crime itself, the form of law. Even the mass murders in concentration camps are said to have had a statutory basis—to be sure, in the monstrous form of an unpublished "secret law." The inherited conception of law, the legal positivism that ruled unchallenged among German legal scholars for decades and

46 P. 399.

47 P. 400.

48 The word *Zweckmässigkeit*, which Patterson translates as "expediency," I have preferred to translate as "utility" in quotations from Radbruch to be given later. The latter term seems to me more suited to the context in which Radbruch uses a word that literally means "conformity to purpose."

49 P. 403.

50 RADBRUCH, DER INNERE WEG 188 (1951). (The preface states that the contents of this autobiographical sketch were dictated in 1945.)

51 See note 43 *supra*.

taught that "law is law,"—this view was helpless when confronted with lawlessness in a statutory form. For the adherents of this view any statute, however unjust, had to be treated as law.

Legal philosophy must restore to consciousness a wisdom that is centuries old and that was common to antiquity, the Christian Middle Ages and the Enlightenment. During these periods men believed that there was a law higher than mere enactment, which they called the law of Nature, the law of God, or the law of Reason. Measured by this higher law, lawlessness remains lawlessness when accomplished through legal forms; wrong remains wrong though enacted in a statute . . . .[52]

Legal positivism has been unable out of its own resources to construct any justification or explanation for the obligatory force of law. Adherents of the positivistic philosophy believe they can prove the obligatory force of law simply by showing that it is backed by a power sufficient to enforce it. But though compulsion can be based on power, the obligatory quality of law cannot be. This must be founded rather on a value that inheres in law.

To be sure, *one* value is contained in a positive rule of law without reference to its content. It is always better than no rule at all in the sense that it at least creates legal security and certainty. But legal security is not the only value that law must effectuate, nor is it the determinative value. By the side of legal security there are two other values: utility and justice. In ranking these values we must put utility, in the sense of serving the common welfare, in the last place. By no means is the law simply that which "serves the people." Rather in the end that which serves the people is only that which is right, that which creates legal security and strives toward justice.

Legal security (which is characteristic of every positive rule of law simply because it has the quality of being established) occupies a curious middle ground between the values of utility and justice, being demanded on the one side by utility or the common welfare and on the other by justice. Justice itself demands that the law be certain and sure, that it should not be interpreted and applied one way here and today, another there and tomorrow. Where there arises a conflict between legal security and justice, between an objectionable but duly enacted law, on the one hand, and a just rule that has not received legal form, on the other, there is in reality a conflict of justice with itself, of immediate with eventual justice. This conflict finds magnificent expression in the New Testament which, on the one hand, commands, "Obey them that have rule over you. and submit yourselves," and on the other declares, "We ought to obey God rather than man." Probably the resolution of the conflict between justice and legal security should be found in some such formula as this: Preference should be given to the rule of positive law, supported as it is by due enactment and state power, even when the rule is unjust and contrary to the general welfare, unless the violation of justice reaches so intolerable a degree that the rule becomes in effect "lawless law" and must therefore yield to justice.

[52] *Die Erneuerung des Rechts* (1947), in 2 DIE WANDLUNG 9.

It is impossible to draw a sharper line between the cases where enactment must give way to justice and those where a law must be recognized as valid despite its hurtful and unjust contents. There is, however, one line of distinction that can be drawn with complete clarity. Where there is not even an attempt at justice, where equality, which is the core of justice, is deliberately repudiated in the establishment of a rule of positive law, then the rule is not merely wrong but lacks the very nature of law. For law, including "positive" law, cannot be otherwise defined than as an institution or ordering of human relations the meaning and purpose of which is to serve justice. Measured by this standard whole portions of the National Socialist legislation never attained the rank of valid law. The outstanding characteristic of Hitler's personality, which through his influence became the pervading spirit of the whole National Socialistic "law," was a total lack of any sense of right or truth. Because he had no sense of truth he could, without shame or scruple, give the accent of truth to whatever seemed at the time oratorically effective. Because he lacked any sense of right he had no hesitancy in giving statutory form to the crudest expressions of caprice and arbitrary power. . . .

We must not conceal from ourselves—especially not in the light of our experiences during the twelve-year dictatorship—what frightful dangers for the rule of law can be contained in the notion of "statutory lawlessness" and in refusing the quality of law to duly enacted statutes. We must hope that the denial of the fundamentals of law and justice that occurred under Hitler will remain an isolated and not-to-be-repeated aberration of the German people in a state of temporary derangement. Yet to be prepared for every eventuality we must arm ourselves against the return of such a state of affairs. To do this we must thoroughly overcome the positivistic legal philosophy that rendered impotent every possible defense against the abuses of the National Socialist legislation.[53]

Whatever one may think of these views of Radbruch's last years (and I would myself want to append some qualifications to the endorsement of the traditional natural law theory) they are, I think, worthy of study. For as a German lawyer said to me after the war, "I know we Germans have an enormous burden of guilt, which all of us share, regardless of our politics. But I think we also have something to teach the world. We have gone through an experience no other civilized people has had to the same degree. We have seen disappear almost overnight all the elementary decencies of law and government that you take for granted. In the process we have learned, as you have not had a chance to learn, what is fundamental in law and government." If this is true of German lawyers generally, it is especially true of Radbruch, whose ways of thought were so close to those of the common law, and who understood so well the Anglo-American system.

53 *Gesetzliches Unrecht und Übergesetzliches Recht* (1946) reprinted in RECHTSPHILOSOPHIE 347, 352–355 (4th ed. 1950).