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THE SIGNIFICANCE OF NATURAL LAW IN CONTEMPORARY LEGAL THOUGHT

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INTRODUCTION

The idea of natural law is possibly as old as philosophy itself. The thinking, philosophizing, and writing on substantive justice has been dominated for milleniums in Western civilization by a single theory—that of natural law. Pospisil correctly observes that until the time of Bentham, the basic tenets of natural law theory were consistently accepted as self-evident and widely incorporated into the words of juridical scholars.[1] The pervasiveness of natural law theory is reflected in the tendency of certain contemporary social scientists to refer to it as constituting the folk theory of Western justice. In recent years, however, the theory of natural law has fallen into disrepute in law and the social sciences. Among contemporary sociologists, Philip Selznick's comment reflects the current state of affairs: "The reputation of natural law is not high. The phrase conjures up a world of absolutisms, of theological fiat, of fuzzy, unoperational 'mystical' ideas, of thinking uninformed by history and by [a] variety of human situations."[2]

The typical contemporary lawyer or social scientist knows little about moral or social philosophy, but if legal or sociological knowledge and public policy is no more than a matter of legal or scientific technique, why should they? In a scientific and technocratic era, moral philosophy is an idiosyncracy in the real world of action, a quaint remnant of the nineteenth century.[3] This situation is reflected in the lack of appreciation of the role of values, beliefs, and assumptions in the process of "thinking" and

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[1] L. POSPISIL, ANTHROPOLOGY OF LAW: A COMPARATIVE THEORY 246-47 (1971).

[2] Selznick, *Sociology and Natural Law*, 6 NAT. L.F. 84, 84 (1961).

[3] Black, *The Boundaries of Legal Sociology*, in THE SOCIAL ORGANIZATION OF LAW 46 (D. Black & M. Mileski eds. 1973).

"knowing." A brief review of the pedagogy of contemporary American law schools is illustrative.

The Socratic method, the deduction of legal principles from a tireless comparison of case after case, remains the basic teaching device in contemporary American law schools. As Scott Turow notes: "Going to law school involves learning a lot of legal rules . . .[;] there is quite a premium placed on mastering the rules and knowing how to apply them."[4] Law is at odds with ambiguity and uncertainty, and the institutions of legal education reflect a similar emphasis on sureness and definition. Beyond mere rules and their application, however, the law is a reflection of underlying and often competing values, beliefs, and assumptions. Nevertheless, modern legal education evidences little concern for investigating the values and assumptions that produce the rules in the first place.

As a set of basic values and assumptions, conceptions of natural law have reflected some of man's deepest beliefs about human nature and society. Theories of natural law entail beliefs and assumptions about what is real and desirable and thus have important implications about what can be accomplished and changed in the world. Each of us learns "existential assumptions" about how things presumably are; we also learn "normative assumptions," beliefs about goodness or badness, about how things presumably *ought* to be. Normative and existential assumptions are so intertwined as to be inseparable, except analytically.[5]

Natural law, consisting of both existential and normative assumptions, can either be postulated, explicitly formulated and stated, or remain unpostulated and unlabeled—existing as assumptions embedded in our thought, but in the background of our attention. Although an in-depth review of the history of natural law in Western thought is beyond the scope of this work, a brief overview suggests that conceptions of natural law, containing some of our most fundamental assumptions about man and society, always somewhat inarticulable in nature, have become progressively inarticulated in both law and the social sciences.

Are we to conclude that as explicit reference to natural law diminishes, such conceptions concomitantly decrease in their influence in the modern world—that any investigation of theories of natural law is merely an historical exercise of questionable relevance for the contemporary scene? On the contrary, contemporary lawyers and social scientists do commit themselves to background assumptions, irrespective of whether these beliefs are generally recognized and made explicit or remain largely unrecognized and implicit. Whether social theories and legal pronouncements unavoidably require and must rest logically on some underlying assumption is a problem for philosophers of science and logicians.[6] Lawyers

[4] Turow, *The Trouble with Law School,* 80 HARV. MAGAZINE 1, 62 (1977).
[5] A. GOULDNER, THE COMING CRISIS OF WESTERN SOCIOLOGY 32 (1970).
[6] *Id.* at 31.

and social scientists have used and are influenced by such assumptions. This situation is an empirical issue that can be, and has been, investigated and confirmed.

CORE CONCEPTIONS OF NATURAL LAW

Before reviewing the factors which have been influential in producing such a shift in the perceived relevance of natural law, we shall briefly consider the basic definitions and primary functions of natural law. All ideas of natural law share a basic common belief in the existence of certain fundamental legal principles and institutions which are, in turn, grounded in the general plan of life and inherent in all ordered social existence. These principles enunciate absolute standards of justice.[7]

As a general system of basic assumptions and values, natural law in the Western world has been referred to as a guide to the interpretation of enacted law as well as an ideal where no rule of law has been declared. Although it has functioned as an ideal model for assessing enacted law, natural law nevertheless has exhibited a changing content. Basic premises about legality, including the underlying assumptions and values regarding human nature and society, have shifted. As societies change, new rules and doctrines are needed in order to give effect to natural law principles in the context of new demands, new circumstances, and new opportunities.[8] In viewing the shifting notions of natural law from a Western *weltanschauung,* it becomes evident that, at times, positive law has been reflective of natural law.

The notion of natural law has been used by both the conservative and the revolutionary-reform elements of society to either rationalize and justify existing institutional practices or to initiate radical changes. Throughout the centuries, appeals were made to natural law when the political skies were darkened by new currents of thought pressing upon the established order. The natural law idea, as immutable, a priori, normal, spontaneous and universal, ideologically deemphasized the empirical, changing, local and reasoned aspects of social life.

In the domain of jurisprudence, legal philosophy and scholarship, natural law was employed to designate the ethical justification of law as a whole or the a priori element antecedent to all law. Building upon the justification of law, the natural law concept includes such aspects as the ideal source of law, the invariant rule of law, autonomy deriving its validity from its own inherent values, and spontaneity derived from its living and organic properties.[9]

Natural law is not a generalized description of what actually goes on in the natural realm of our experience. It is, in fact, normative in nature, a presciption for and a description of a universe that ought to be. It is an ideal type and, as such, presumes a certain set of ideals or values endemic

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[7] H. KELSEN, GENERAL THEORY OF LAW AND STATE (1946).

[8] Selznick, *supra* note 2, at 85.

[9] Gurvitch, *Natural Law,* in 11 ENCYCLOPEDIA OF THE SOCIAL SCIENCES 284-90 (1933).

to an inquiry directed along these lines.

The origins of the theory of natural law are immersed in the historical myths of early civilization and confused with the doctrines of ancient religions. With Aristotle, the distinction between natural law and human law was systematically formulated. After him, the notion of natural law as a philosophical, juridical and ethical idea was accepted as one of the most fundamental concepts of our civilization.[10] Prior to reviewing the philosophical development of natural law, it is appropriate to consider that aspect of natural law which focuses on the meaning of nature.

Benjamin Wright isolates eight meanings given to the concept of nature in natural law:

1) the meaning of divine law;
2) the rational or the reasonable;
3) in accord with the nature or constitution of man;
4) the just or the equitable;
5) in keeping with established customs or laws, fundamental in their character;
6) the ideal as differentiated from or opposed to the actual;
7) the appropriate or useful; and
8) the original as distinguishable from the conventional.[11]

Although a discussion of each of these meanings and their application is not feasible here, suffice it to say that each clearly demonstrates the purposive use of the concept. Thus, it can indeed be argued that natural law has served as both a controversial weapon and a speculative concept.[12] For illustrative purposes, there is no better place to start than with the embodiment of such in Stoic philosophy.

HISTORICAL OVERVIEW OF NATURAL LAW

Philosophical Conceptions

The Stoics considered the faculty of reason the most human quality, one that is shared by all men. The laws of reason prevail independently of legal and political rule, which is often accepted as a matter of convenience and expediency rather than inherent truth. Stressing what unites men rather than what separates them, the Stoics not only attacked narrow tribalism and chauvinsim but also pleaded for greater equality of women and slaves.[13] The Stoic concept of natural law found practical application in the Roman philosophical idea of *ius naturale* as well as in the Roman legal system, *ius gentium*.

Once the Stoics grasped the unity of mankind, differences in sex, class, social status, and political constitutions seemed relatively insignificant. The unity of man was part of a larger world held together by the law

[10] V. FERM, A HISTORY OF PHILOSOPHICAL SYSTEMS 106-17 (1950).
[11] B. WRIGHT, JR., AMERICAN INTERPRETATIONS OF NATURAL LAW 333-38 (1962).
[12] *Id.* at 334.
[13] W. EBENSTEIN, GREAT POLITICAL THINKERS: FROM PLATO TO THE PRESENT 136-66 (1963).

of nature. Hence, a law's validity rested on its intrinsic rationality rather than the fiats of kings and emperors.

In theory, there was a sharp distinction between the law of nations and natural law. For example, slavery was considered contrary to natural law (in spite of Aristotle, who had thought it quite natural), but a recognized institution of the law of nations. Yet the sharp theoretical distinction between the law of nations as a set of rules of positive law, and the law of nature as a philosophical system of what the law ought to be, was gradually abandoned under the impact of Stoic ideas and the two were increasingly identified. Stoicism stressed what human institutions have in common rather than what separates them—the first being their essence and the second what is accidental, local and arbitrary—natural law and the law of nations became merged into one philosophical conceptualization.

This marked a crucial development in the unfolding of natural law philosophy, for it is at this juncture that the Stoic formula reconciled a fundamental rift between the enactment and the ultimate source of law. Positive law is now a product of natural law. The enactment of law is likened to the discovery of a particular aspect, element, or elusive fragment of knowledge about an ideal natural order. A general theme is derived from the supposition that positive law stems from and is also shaped by natural law. Natural law provides the foundation and, in fact, the possibility for, positive law. Without a natural order and principles that describe it, positive law would not exist because it could never be justified. The Greco-Roman and Christian interpretations are legacies of this style of reasoning.

For the Greeks and Romans, natural law provided background assumptions for reality. Cicero spoke of natural law as unchangeable, eternal, diffused among men, and written and promulgated by God.[14] Horace and Quintilian, representatives of the latter period of classical Rome, also accepted the logic of the natural law argument. In fact, so completely was it a part of the intellectual atmosphere of the time that principles of reason were held to be imminent in the universe and natural laws were expressions of these principles.[15]

The Greco-Roman contribution to the development of natural law found an interested audience among the early proponents of Christianity. The concept of natural law was so refined that it could easily be used in a different schema to explain aspects of the world and the universe. The task of transplanting the concept of natural law in Christian thought is attributed to Thomas Aquinas, who viewed the concept as equivalent to the law of God.[16] According to Aquinas, natural law is discovered by man's "divine faculty" of reason; thus, it is God's law as man can know it.

The political climate of thirteenth and fourteenth century Europe was favorable and supportive of Aquinas' contentions. This is evident in the development of canon law, where natural law principles, or the general

[14] Wilson, *The Law of Nature*, in 1 THE WORKS OF JAMES WILSON 225 (J. Andrews ed. 1896).
[15] C. HAINES, THE AMERICAN DOCTRINE OF JUDICIAL SUPREMACY 18-24 (1914).
[16] W. EBENSTEIN, *supra* note 13, at 230-37.

moral principles of God implanted in human nature, became the norm for gauging the justice of civil law.[17] Later, the concept of natural law was expanded to include the regulatory principles of human associations. Extending the Greco-Roman interpretation in such a manner as to include the principles of emotion in group life represents a particular pattern of development that increasingly broadened the applicable domain of the natural law concept.

With the development of the scientific method and the increasing influence of science, the universe was conceived of as a system of interconnected laws and exigencies which included in themselves their own justification. Human nature and pure reason, by themselves, could be the norm of appropriate behavior. Natural law became more identified with "reality" and lost its normative character while God, as legislator, was gradually pushed out of the picture.[18]

During the seventeenth and eighteenth centuries, theories of natural law were freed from theology and became increasingly secularized. Basic changes in social organization, customs, and human allegiances, chronicled by the appearance of Protestantism, were indicative of a more fundamental social transformation from collectivistic integration to a more individualistic society. Natural law was identified with man's state in nature prior to the development of social and governmental constraints. Moreover, it provided a reason for this particular development. Conceptualizations of states of nature were increasingly used to compare current social realities with an hypothesized antecedent order. The influence of Locke and Rousseau stimulated such comparisons and eventually the process culminated in the French Revolution.

Locke differentiated between society in general, as created by the social contract, and the government, to which society delegates the functions of political control. Man, while in the state of nature, was ruled only by natural law. This was an order free of social and legal constraints. The chief and immediate cause of man leaving this hypothesized state of nature was the increase of private property and the desire to acquire and preserve it in safety. The reason for government and the creation of laws is to protect the private property of individuals. Locke maintained that revolution, or the dissolution of government, is justifiable whenever the terms or purposes of this social contract are violated by those in power.

The prophet and inspiration of the French Revolution, Rousseau, believed that "art and the sciences had corrupted men." In the state of nature, man was noble, savage, simple and peaceful.[19] The individual entered into a contract in order to constitute a society from which he was to derive many benefits. In this contract, the individual surrendered some of his rights of freedom, but, at the same time, remained sovereign since the contract was made among equals.

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[17] C. HAINES, *supra* note 15, at 21-22.

[18] A. LOVEJOY, REFLECTIONS ON HUMAN NATURE (1961).

[19] C. BRINTON, IDEAS IN MAN: THE STORY OF WESTERN THOUGHT 293-96 (1960).

Conceptions of natural law, reflecting some of the most general and basic assumptions and beliefs about man and society, are obviously influenced by profound social change. As Ehrlich states: "At the present [time] as well as at any other time, the center of gravity of legal development lies not in legislation, nor in juristic science, nor in juridical decision, but in society itself."[20] Law, including its underlying assumptions, is not fixed or predetermined but is continually being influenced by the socio-historical milieu within which it exists. The increasing emphasis on the individual and, specifically, on individual freedom and liberty, is clearly seen in theories of natural law which emerged in this era.

As a new generation arises, committed to somewhat differing background assumptions, previous conceptions often come to be revised or rejected. Generally, such shifts derive not so much from new knowledge or new findings, but rather from new ways of looking at evidence, *i.e.*, from changes in the way the world is viewed. This chronology of the transformation of natural law in Western philosophical thought, which has attempted to identify those forces in Western history which have significantly influenced conceptions of natural law, serves as an introduction to the role of natural law in law and the social sciences.

Social Scientific Conceptions

Out of the secularized world of the "self-made" bourgeoisie which surfaced after the French Revolution in nineteenth century Europe, sociology emerged. Early sociologists focused on problems of social order under the impetus of widespread social change produced by the Revolution. In these efforts, the doctrine of natural law played a crucial role and had a profound influence on the development of the social sciences. Strains of natural law, materialism, determinism, and science, as well as ideas of progress and evolution, all found their way into the intellectual pedigree of the social sciences.[21] Many anthropologists, historians, and sociologists accepted the task of searching for scientific laws of human behavior, which were likened to the invariant laws. These developments marked still another crucial turning point in the conception of natural law. The concept came to figure prominently in the analytical schemes of a number of influential social scientists. In these more relativized and secularized versions, pure human reason slowly replaced God as the origin of natural law.

Much Western social thought can be categorized as either consensus or conflict social thought. Both consensus and conflict theories make reference to a concept of natural order, usually expressed in terms of the concept of natural law.

Consensus sociology, as reflected in the work of Comte, Spencer, Durkheim, and contemporary structural-functionalists, emphasizes the dependence of men on structured group life. References to the "natural

[20] E. EHRLICH, FUNDAMENTAL PRINCIPLES OF THE SOCIOLOGY OF LAW xv (1936).

[21] N. TIMASHEFF, SOCIOLOGICAL THEORY: ITS NATURE AND GROWTH 23 (3d ed. 1967).

order of society" abound. The persistence of existing social institutions and social arrangements is emphasized, as social facts are given ethical sanctions through interpreting them as the result of the unfolding of laws of nature.

In the mid-nineteenth century, for example, Comte maintained that the proper social order established itself according to the laws of nature. Following Comte, Spencer and other early social scientists believed that science was in a position to uncover the good, the beautiful, and the true. Their scholarship often held and reinforced the notion that nature had immutable laws of structure, change, and function which were necessary and just.

According to Comte, each particular social order may contain, at times, certain defects or deficiences, but this situation can be rectified by the rational intervention of human beings. This conception stems from Comte's ideas of the relative flexibility of social laws. Order is possible only with the support of a certain community of ideas; but no complete liberty of opinion can be tolerated nor should it be granted.

Consistent with Comte and Spencer, for Durkheim and others, an empirical science of ethics was held to be possible and necessary. "Of all the various branches of sociology, the science of ethics is the one which attracts us by preference and which will command our attention first of all."[22] In his search for the intrinsic laws which dominated human society, Durkheim concluded that "every society is a moral society" where "altruism will forever be [the] fundamental basis [of social life]."[23]

Structural functionalism, with its emphasis on the existence of recurrent social hierarchies, is a modern example of natural law's influence on consensus sociology. Given the persistent ambiguity of the concept of natural law, consensus sociology has continually identified ethical imperatives with the characteristics of physical laws of nature.

Conflict sociology, on the other hand, with its emphasis on social change and social conflict as fundamental social processes, has persistently invested the physical laws of nature with moral qualities. Rather than focusing on existing social arrangements, conflict sociologists offered an ideal model of man which was perfected through his emancipation of constraining group influences. Contemporary liberal-individualistic American sociology is an example of the sociology of change orientation, as is the collectivistic Marxist version.

Efforts at social engineering are not only justified but called for from a conflict sociology perspective. The natural laws it hopes to discover are to be used in reconstructing the world according to specific ideals. Thus, rather than defining the existing order with ethical sanctions, the ideals

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[22] Durkheim, *Cours de Science Sociale: Lecon d'Ouverture,* in REVUE INTERNATIONALE DE L'ENSEIGNEMENT 45 (1888), *quoted in* D. LACAPRA, EMILE DURKHEIM: SOCIOLOGIST AND PHILOSOPHER 2-3 (1972).

[23] E. DURKHEIM, THE DIVISION OF LABOR IN SOCIETY (1964).

are seen as laws of nature that must be obeyed.[24]

The theory of historical materialism, for example, begins with the hypothesis that natural laws exist in the realm of social phenomena. In the Marxist interpretation of history, these laws are evidenced in society's collective activities and functional interrelationships. Although particular societies vary, a common set of dynamic factors surround and are found throughout all of them. The basic elements are technology and the social organization of production in society, including property and class relations. These provide the grounds for and determine the major forms and content of other phases of society's collective life, particularly its political structure, ideology, and economy.

Class conflict, produced by existing property relations and modes of production, furnishes the primary impetus for social change in society, resulting in new social arrangements. The class basis of social change is considered so much the crux of the situation that the theory has been summed up in these brief words: history is a history of class struggles.[25] In historical epoch, there is to be found a class defending the status quo and opposing change, along with a class whose interests and outlook make it the persistent champion of the new social order. The seeds of destruction are inevitably sown in the conditions of the bourgeois social order.[26] Thus, Marx and his followers not only elaborated the fundamental laws inherent in human society, but also provided an analysis of their version of natural laws intrinsic to human history that furnish the impetus for social change.

The emergence of diverse sociological perspectives resulted in the heretofore largely unexamined natural-law doctrines coming under increasingly critical scrutiny. The appearance of the legal realism movement around the turn of the twentieth century supported this trend of reassessment of natural law.

Although the conceptualization and terminology have changed, legacies of classical natural-law doctrine abound in contemporary Western social thought. A plethora of secularistic and humanistic natural law theories have appeared, such as Erich Fromm's attempts to specify the basic qualities of man[27] and the legal historian H.L.A. Hart's efforts to enunciate the basic needs of all societies.[28]

Paradoxically, even some contemporary anthropologists, among the most relativistic of all social scientists, subscribe to a natural law-like model of human nature. In 1966 they voted for a resolution directed at United States military involvement in Vietnam which stated: "These methods of warfare offend human nature."[29] Do we assume that these

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[24] L. BRAMSON, THE POLITICAL CONTEXT OF SOCIOLOGY 22 (1961).

[25] K. MARX & F. ENGELS, MANIFESTO OF THE COMMUNIST PARTY, in BASIC WRITINGS ON POLITICS AND PHILOSOPHY, KARL MARX AND FRIEDRICH ENGELS 6 (L. Feuer ed. 1959).

[26] *Id.* at 26-27.

[27] E. FROMM, THE SANE SOCIETY (1955).

[28] H. HART, THE CONCEPT OF LAW (1961).

[29] American Anthropological Association Res. (1966).

purveyors of cultural relativism have momentarily forgotten their most notable doctrine? No; even here faint traces of natural law are detectable in an unusual paradox reflected in the doctrine of cultural relativism. The basic impulse which motivates these teachings presumes the existence of a morally relevant common humanity. The fundamental objective of this doctrine is to encourage respect for others as human.

It is apparent that, throughout the history of Western social thought, the legacy of classical natural-law doctrine has remained influential.

Legalistic Conceptions of Natural Law

In the realm of legal science, the concept of natural law has proved to be as durable as law and science itself. The concept has been utilized in legal philosophy as well as by several schools of jurisprudence. This section will examine the cases made on behalf of natural law and its current implications for the study of law.

Historically, the concept of natural law has posed questions about some particular aspect of law or legal reality. The concept is of direct juridical interest since it is law or the legal system which is the referent of natural-law inquiry or debate. The concept of natural law implies subjectivity. Positivism in the legal sciences would thus exclude natural law from the proper domain of scientific legal inquiry. However, this is excluding an all too important dimension of law. It has been realized that with every legal scholar, lawyer, judge, legislator—in short, everyone that has anything to do with enactment or operation of law—there is some notion of what the law ought to be, how it should be interpreted, and what constitutes justice in the most abstract and general sense of the term. Positive law exists on this foundation. Withdrawing the concept of natural law from the science of law on this basis does not make this phenomenon any less real. In the insightful words of Vecchio: "What is a source of difficulty for science does not cease to exist in reality; and it is a vain illusion to ignore a need because we cannot satisfy it."[30] In view of this, several of the significant legalistic conceptions of natural law will be noted.

The Stoic and Thomistic influence on conceptualizing law propelled the natural law argument into the limelight of legal and political debate.[31] This particular doctrine emphasized the obligatory nature of law or the duty imposing quality of law that was held to be objectified natural law. After the sixteenth century, this natural law concept became mistakenly identified with enacted law. This development resulted in a general decline in the frequency of references to natural law after the eighteenth century as a consequence of the inroads made by positivism on legal scholarship, jurisprudence and philosophy.

Under the yoke of positivism, natural-law references became unfashionable. Legal positivism, in both legal education and scholarship, af-

[30] G. VECCHIO, THE FORMAL BASES OF LAW 17 (1914).
[31] B. BROWN, THE NATURAL LAW READER 1-3 (1960).

firmed the proposition that there are no rational grounds for building upon a natural-law argument. Positivism, in the legal sciences, asserts that a pure science of law is built from a case by case appraisal of enacted laws and the institutional processes that signal their emergence in the social and political order. These same sentiments are reflected in the words of Dabin, who suggests that a science of natural law stands as a contradiction in terms: "It is contradictory to speak of natural[-law] jurisprudence, because 'jurisprudence' down to its more general rules and their aims—not only the useful but also the good and the just—is a matter of prudence, and prudence is a matter of rational appraisal according to the cases and not a matter of inclination . . . ."[32] Thus, the rigors of positivism as a methodology for scientific legal inquiry would necessarily limit the scope of legal study to concrete cases.

This rationale has influenced legal education in a most dramatic fashion. Legal education supports the building of a science of law through a pedagogical case law system approach. This system emphasizes what the law *is* at the expense of what the law *ought to be.*

Palmer suggests that this approach suffers from "the lack of synthesis and overspecialization that affected the inductive science to which it was akin. It tended to be merely descriptive. It neglected the deeper problems of the law."[33] We shall return to this aspect of legal education in the concluding remarks of this Article.

During the latter half of the nineteenth and the early twentieth centuries, a new strain of legal theory emerged which stood in reaction to the positivistic claims that law constituted a self-contained reality. The comparative and historical school of jurisprudence, along with the sociological school of jurisprudence, emphasized an approach to the study of law in action. According to this view, an adequate understanding of law could not be strictly derived from an hermetically sealed approach—a view that posited law in a closed, self-contained structure of logic. The leading proponents of the latter school, Roscoe Pound in the United States and Rudolph von Jhering in Europe, agreed on the principle that law must be viewed in relation to some standard. This standard was the satisfaction of social wants with law the primary mechanism for achieving them.

From this perspective, law was evaluated according to an ideal, with natural law as the common referent for such comparisons. In Pound's words: "As both a creative ideal and as an ideal basis of criticism, under whatever name it is called and however we arrive at it, a picture of the purpose of the legal order must have a place of real importance in any system of science of law."[34] In 1914, the Italian jurist Vecchio argued that natural law in the legal sciences was refuted primarily on the grounds

[32] Dabin, *Is There a Juridical Natural Law?*, in THE NATURE OF LAW, READINGS IN LEGAL PHILOSOPHY 25, 32 (M. Golding ed. 1966).

[33] Palmer, *Defense Against Leviathan*, 32 A.B.A.J. 328, 332 (1946).

[34] Pound, *Introduction* to G. DEL VECCHIO, GENERAL PRINCIPLES OF LAW ix (1956).

that it was not positive law.[35] The simple affirmation that law is only positive which, as Vecchio adds, cannot be proved or disproved, has been the typical manner of demolishing natural law arguments. This trend has been supported by the dominant religious dogma associated with the use of the term. Natural-law conclusions are pertinent to the science and philosophy of law, however, since these justifications have guided or have been used to legitimate positive law. Natural law does not represent the totality of law. Rather, it is but one system of law.[36]

The legal realism movement in jurisprudence may be thought of as a branch of the sociological school of jurisprudence. The writings of its major proponents echo the sentiments of Oliver Wendell Holmes, who is credited as the founder of the movement. Holmes' remarks in his treatise on common law are an apt description of the parameters of legal realism: "The life of the law has not been logic; it has been experience. The felt necessities of the times, the prevalent moral and political theories, intentions of public policy, avowed or unconscious, even the prejudices which judges share with their fellow men, have had a good deal more to do than the syllogisms in determining the rules by which men should be governed."[37]

Similar to sociological jurisprudence, legal realism is oriented to law in action. Unlike sociological jurisprudence, legal realism specifically focuses on the dilemmas of decisionmaking in law. Jerome Frank's belief in the capriciousness of fact-determining in trial courts led him to the conclusion that legal precision and a science of it is impossible.[38] Thurman Arnold viewed law and, specifically, rules governing the behavior of individuals as ceremonial and ritualistic symbols.[39] Both conclude that there is some discrepancy between what law is held to be and what it actually is. Whereas sociological jurisprudence views the ends of law as subject to a natural-law accountability, the legal realists view the means of law as problematic. For the legal realists, theories of natural law are applicable to the moral dimensions of decisionmaking in the enactment of law and in the design and implementation of a legal system.

Natural-law terminology currently serves as a heuristic device to analyze any discrepancies involved in both the creation and application of law. The arguments advanced by Lon Fuller and Harry W. Jones are indicative of recent attempts to describe the role of natural law in the framework of contemporary legal systems.[40]

Lon Fuller views the basic tenet of natural law as reason, which goes into the making and operation of a legal system. Legal systems, however, can never be totally equipped to handle minute departures from specific laws. Legislative foresight can influence such situations, but never entirely

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[35] G. DEL VECCHIO, *supra* note 30, at 14-20.
[36] *Id.* at 20.
[37] O. HOLMES, THE COMMON LAW 5 (1963).
[38] J. FRANK, LAW AND THE MODERN MIND (1930).
[39] T. ARNOLD, THE SYMBOLS OF GOVERNMENT (1935).
[40] L. FULLER, ANATOMY OF THE LAW 115-19 (1968).

eliminate the matter of discretion in the decisionmaking process. As Fuller succinctly observes:

> Reason can shape the fundamental structure of a legal system; it cannot prepare the law to deal with every twist and turn that human affairs can take. Under any legal system embarrassing and borderline cases will arise that can, with equal rationality or irrationality, be decided either way. To reach some disposition of these cases we must employ a principle of authoritative decision and pass them over to a judge or administrator to decide, not because he will know how to decide them, but simply because somebody must.[41]

The decisionmaking process is a product of discretion which, in turn, involves underlying values and assumptions.

For Jones, "every principle of the positive law," which includes "every statute, every constitutional provision, and every case-law rule,"[42] creates zones of both certainty and uncertainty. Zones of certainty refer to the provisions that explicitly state the grounds for entertaining and deciding a particular case. No law or legal generalization completely attains this precision. The task of law, as Jones states, "involves a process far less orderly and far more difficult than the mechanical application of legal generalization to fact-situations."[43] Thus, zones of uncertainty and individual discretion are part and parcel to law and the task of applying legal generalizations. The effort is continually made to limit the range of arbitrary decisionmaking by closing the distance between fact determination and rule application. The pervasiveness of this concern is evidenced in jurisprudence and underlies the very effort of singling out the legal *is* from the legal *ought to be.*

However, such a separation in practice is untenable. The basis for this argument is comparable to Fuller's concern with the fact that law can never completely come to grips with the uniqueness of individual cases. In this vein, Jones points to the need for analyzing the moral dimension of law, which is framed by zones of uncertainty, created by positive law, and found "in the process of responsible decision which pervades the whole of law in life."[44] The highwater mark of natural-law thinking in the United States is the "emergence and survival of the doctrine of judicial supremacy which subjects positive law to the inhibition of the moral order, constitutionally implemented."[45]

In the legal practice, natural-law conceptions abound in codes of professional responsibility. Mayer makes the point that "the law lives not in courts but in law offices; and in law offices the law comes out of books."[46] In keeping with the most rudimentary notions of the adversary system, the

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[41] *Id.* at 116-17.

[42] Jones, *Legal Realism and Natural Law,* in THE NATURE OF LAW, READINGS IN LEGAL PHILOSOPHY 261, 269 (M. Golding ed. 1966).

[43] *Id.* at 268.

[44] *Id.* at 261.

[45] B. BROWN, *supra* note 31, at x.

[46] M. MAYER, THE LAWYERS 418 (1967).

role of the lawyer is one of advocating the interests of a client and the legality of these interests in a court of law. In so doing, the lawyer makes an implicit determination of the legality of these interests. It is at this juncture in the legal enterprise that underlying values and assumptions are clearly influential. To this extent, natural law-like conceptions, in the form of background assumptions, continue to exert a real and significant influence in the realm of law.

Contemporary Legacies of Natural Law

Selznick's contention regarding the contemporary neglect of natural law is probably reflective of mainstream thought in both law and the social sciences. This situation is, in turn, reflective of a larger transformation in Western world thought in light of the burgeoning influence of society and rationality. Law and the social sciences have become increasingly rational, specialized and bureaucratic.

One of the principal characteristics of science and rationality is the stance of value-neutrality. These approaches are designed to keep what counts as truly knowable separated from what is simply felt or desired. Distinctions such as rational-emotive, objective-subjective, and is-ought reflect such efforts. The implication of such distinctions is that values have no legitimate place in institutions, such as law or the social sciences, concerned primarily with knowledge that is acquired through science and/or rationality.

This distinction is seen in the dichotomy between knowledge, facts or evidence, and values assumed by many contemporary lawyers and social scientists. Although philosophers and logicians have continued to argue that such a separation is untenable and all knowledge is ultimately determined by referring to values, this dichotomy nevertheless grows stronger. In this setting, theories of natural law have come to be defined as mere speculation, of limited interest or utility in the analytical world. We have reached a point where the only explicitly recognized function of natural law is, as Wright suggests, to attempt to answer the problems of law and politics "which seemingly cannot be answered in any way capable of objective proof. In other words, natural law, in its essence, is the attempt to solve the unsolveable."[47] In an age where law, the social sciences and many other domains have defined their functions as piling fact upon fact, we find a waning of explicit interest and reference to values, beliefs, and assumptions. In turn, domain assumptions, such as current conceptions of natural law, have indeed become increasingly implicit and have receded into the background of our thoughts.

When large numbers of contemporary lawyers and social scientists believe with little hesitation that empirical evidence or facts alone yield true and adequate knowledge, they are making significant assumptions about the nature of knowledge, man, and society. The roots of current

[47] B. WRIGHT, JR., *supra* note 11, at 345.

positive law and legal policies, for instance, are rarely, if ever, totally derived from legal research and the resulting facts or evidence. The issue is not how we can or cannot keep values and underlying assumptions, such as notions of natural law, from influencing our work, but how we can systematically take them, and their influence, into consideration.

As stated, irrespective of how implicit values and underlying assumptions have become, lawyers and social scientists continue to be influenced by natural law-like conceptions in their thoughts and actions. These background assumptions become influential as they become part of our personal realities and often personal commitments. As these assumptions are internalized in our consciousnesses, they come to function as general orientations or overarching frameworks to which the larger world is assimilated and by which it is shaped.[48]

Historically, various theories of natural law have been cited to legitimate a wide variety of thoughts and actions—ranging from doctrines supportive of the state to those supportive of individual rights and the sanctity of the individual, to functioning as the ideological and ethical basis for socialist as well as democratic revolutions. Often normative in nature, background assumptions usually define the world as it ought to be. As such, following Wright, we find background assumptions becoming especially significant and influential in those instances where objective, or generally agreed upon, facts or evidence is limited.

Efforts at explicitly specifying the nature, causes, and consequences of these underlying values and assumptions are confounded since these subjective influences are usually internalized in us long before "the intellectual age of consent."

To a significant extent, background assumptions, conceptions of what is "real and desirable," come to us from others. They are based upon what we have heard, seen, or read, in both our personal and professional activities. Conceptions of similar natural law-like assumptions and values are personally real and meaningful to lawyers, social scientists, and others; not because they are unique but because they are collectively true. To varying degrees, we all live within communities of assumptions which are shaped by, and shared with, the larger society and culture. This general pervasiveness of fundamental background assumptions contributes to their largely unexamined, "taken for granted character."

Our task is to recognize differing and often competing interests and assumptions as a matter of fact, without trying to ignore them, wish them away, or consider them unreal or devious. In considering the background assumptions upon which the everyday world operates, it is apparent that neither law, the social sciences nor any discipline can objectively or scientifically determine which set of attributes ought to be regarded as the essential nature of man and, accordingly, which characteristics can be made the basis of natural law. It is nevertheless possible to analyze the

[48] A. GOULDNER, *supra* note 5, at 32.

causes and consequences of such efforts.

Any meaningful investigation of the influence of background assumptions on human thought must be predicated on a recognition of the socio-historical nature of all human thinking. Unfortunately, intellectuals have done much throughout history to obscure the relationship between thought and human existence. Although it may seem obvious to some to interpret mental activity as reflecting the thinkers' socio-historical milieu, there has been a pronounced preference in Western thought to claim or to assume some "higher reality" as the source of, legitimated by, or correlated with, human thought. In succession, these assumed "higher realities" have been conceptualized as guardian deities, immutable essences, the heavenly kingdom, natural law, supreme reason, national destiny, scientific progress, and corporate benevolence.[49] Through this process human thought is severed from its socio-historical context; subsequently, the resulting conceptualizations, such as notions of natural law, assume the appearance of entities capable of independent existence. Abstractions do not think or act; they exist only as a result of human thought.

For example, if the sole determinant of natural law was a reality beyond society and history, one could adduce no ground for the great diversity of these conceptions. Why should these conceptualizations differ from time to time and place to place? These differences result from differences in the socio-historical situations. Fundamental drives do not change. If they are expressed differently under different conditions, we are indirectly admitting that thought is determined by socio-historical factors.

By shifting attention to the socio-historical origins of human thought, as illustrated in our review of conceptions of natural law, as well as to the assumed dichotomy between facts and values, we can highlight the failure to consider the influence of subjective factors, such as values, beliefs and background assumptions on contemporary thought. As lawyers, social scientists, and others have come to either largely ignore values and background assumptions or insist they are not to be attended to in the same manner that facts and evidence are, these assumptions have slowly sunk into subsidiary awareness. Nevertheless, background assumptions do exist and are influential in the contemporary setting.

Recent efforts at strengthening legal ethics and ensuring human rights are clearly guided by natural-law doctrine. The recent United Nations declaration of human rights as well as President Carter's recent pronouncements regarding the protection of inalienable human rights and American foreign policy illustrate this influence. No matter how scientific, rational or value neutral we have attempted to become, no discipline, including law and the social sciences, has been able to obliterate completely the role of values and assumptions in the decisionmaking process. The reaction of a law student to contemporary legal education substantiates this conclusion:

[49] G. REMMLING, TOWARDS THE SOCIOLOGY OF KNOWLEDGE: ORIGIN AND DEVELOPMENT OF A SOCIOLOGICAL THOUGHT STYLE 3 (1973).

"I don't care if Bertram Mann [professor of criminal law] doesn't want to know how I *feel* about prostitution, . . . I *feel* a lot of things about prostitution and they have everything to do with the way I think about prostitution. I don't want to become the kind of person who tries to pretend that my feelings have nothing to do with my opinions."[50]

The adequacy of contemporary legal and social-scientific education has often been judged according to its ability to foster the conceptualization of facts and values as independent entities and to maintain values and beliefs in the role of implicit, background assumptions. Possibly, the adequacy of legal and social scientific training ought to be viewed in light of the ability of contemporary lawyers and social scientists to more fully appreciate the place of values and assumptions in the decisionmaking process of their respective disciplines.

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[50] Turow, *supra* note 4, at 63.