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NATURAL LAW, JUSTICE AND DEMOCRACY—SOME  
REFLECTIONS ON THREE TYPES OF THINKING  
ABOUT LAW AND JUSTICE

FRIEDRICH KESSLER†

This article deals with the role of a philosophy of natural law in our efforts to overcome the moral crisis of democracy. Only a few years ago such a paper hardly would have found general interest. To be sure, Catholic philosophy of law, successfully resisting the trend of the times, never did abandon its philosophy of natural law. But outside of the ranks of Catholic philosophers of law the theory of natural law was regarded as "an exploded theory, no longer accepted by any scholar of repute."<sup>1</sup> Positivism had won the day. Its victory seemed so complete that many a positivist no longer felt the need for refuting the critique of natural law philosophers, who insisted on the shortcomings of positivism. Positivism and democracy were taken for granted. Questions as to the ultimate meaning of law and justice and their inter-relationship were no longer asked. Such questions, positivists never tire to emphasize, cannot be answered scientifically at all and have, therefore, no place in a science of law. These problems are metalegal problems.<sup>2</sup> The problem of justice, to quote a modern writer, must therefore be withdrawn

from the insecure realm of subjective judgments of value [by establishing it] on the firm ground of a given social order . . . Justice in this sense is a quality which relates not to the content of a positive order, but to its application. "Justice" means the mainte-

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<sup>1</sup>Sherger, *The Evolution of Modern Liberty* (1904) 11.

<sup>2</sup>"*Le fondement de la validité du droit est en dehors du droit,*" Triepel as quoted by Brierly, *Force obligatoire du droit international*, 23 *Recueil des cours* 467, 546 (1929).

nance of a positive order by applying it conscientiously. It is "justice under the law."<sup>3</sup>

From this point of view, natural law is "simply the law of which a person using the phrase approves" (Pareto). At best it is a myth or ideology, a conviction strengthened by the observation that "natural law has never meant the same thing to all its votaries."<sup>4</sup> It is, therefore, impossible to anchor democracy in "first principles" of natural justice. But this is hardly a defect. On the contrary, democracy, it is felt by many, can be put on a much safer ground. It is the inevitable consequence of a technological world and of a constant expansion of the realm of science.<sup>5</sup> This complacent belief in the self-sufficiency and adequacy of the positivistic creed is beginning to wear thin as a result of the events of the last decade. The growth of arbitrary political power, both a cause and a consequence of the decline of the free market system, and particularly the rise of fascism in our industrial world has made us realize that democratic freedom is not inevitable. Industrial man living in a mass society has to choose between democracy and totalitarian dictatorship.<sup>6</sup> No wonder, therefore, that many in their bewilderment turn to natural law in order to find an answer. One can hear quite frequently nowadays that

politics without the natural law as an ethical basis  
finds ultimate expression in the absolute or totali-

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<sup>3</sup>Kelsen, *The Pure Theory of Law and Analytical Jurisprudence*, 55 *Harv. L. Rev.* 44, 49 (1941).

<sup>4</sup>Seagle, *The Quest for Law* (1941) 197; Neumann, *Types of Natural Law*, 8 *Studies in Philosophy and Social Science* (1939); Knight, *The Rights of Man and Natural Law*, 54 *Ethics* 124, 127, 135 *et seq.* (1944).

<sup>5</sup>Dewey, *The Public and its Problems* (1927) 110, 146; Feibleman, *Positive Democracy* (1940); Meiklejohn, *Education Between Two Worlds* (1942) 185.

<sup>6</sup>Simons, *A Positive Program for Laissez Faire* (1934); Horney, *The Neurotic Personality of our Time* (1936); Hayek, *Freedom and the Economic System* (1940); Fromm, *Escape from Freedom* (1941); Carr, *Conditions of Peace* (1942); Mannheim, *Man and Society in an Age of Reconstruction: Studies in Modern Social Structure* (3rd ed. 1942); Laski, *Reflections on the Revolution of our Time* (1943); Mannheim, *Diagnosis of our Time* (1944); Hallowell, *The Decline of Liberalism*, 52 *Ethics* 323 (1942).

tarian state which denies the traditional determinants of morality and makes the fiat of the state the moral law.<sup>7</sup>

Democracy with its institutions—we are told—can only be justified with moral conviction if we regard it as the realization of the natural law postulate of the fundamental equality of man. (On any other ground democracy can at best be defended as the lesser evil, a position which does not carry too much weight in times whose ideal is efficiency.) Justice, “debunked” as a mere bourgeois and intellectualistic conception by the believers in a government of force by the elite, has to be anchored in the first principles of natural law if justice is to be more than an empty word, and so has law, to be not merely the majority of votes.<sup>8</sup>

In times like ours, philosophy is no longer a matter of polite discussion. The claims of natural law philosophy, therefore, should be considered seriously. But no less seriously should be taken the challenge that the renaissance of natural law philosophy is nothing but escapism, one of the many symptoms of “new failure of nerve”<sup>9</sup>—a phenomenon as characteristic for our time as for the centuries preceding the rise of Christianity, so brilliantly described by Jacob Burckhardt and Gilbert Murray.

It goes without saying that an exhaustive discussion of natural law doctrine within the compass of a short article is impossible. The literature on the subject is enormous. To

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<sup>7</sup>Ryan and Boland, *Catholic Principles of Morality* (1940) 1.

<sup>8</sup>Sorel, *Reflections on Violence* (Hulme's tr.) *passim*. See Lenin's famous statement: “Democracy is a mere bourgeois superstition.” Some modern writers try to meet this challenge by proclaiming that the belief in democracy must be just as fanatical as that in authoritarianism. “Democracy requires the same unconscious belief in its rationality as does science. To question the validity of democracy is to disbelieve in it for we must not even be aware of our belief if it is to be profound enough to mean anything.” Feibleman, *op. cit. supra* note 5, at p. 124.

<sup>9</sup>Hook, *The New Failure of Nerve*, 10 *Partisan Review* 1 *et seq.* (1943).

avoid repetition, I should like to take up only one aspect of the whole problem and discuss the contribution natural law philosophy has made towards its solution: the relationship between law, justice and democracy.

To appreciate the achievements of natural law philosophy in our field of investigation, it seems well to contrast its thesis with those of two other ways of thinking about law and justice: objective idealism on the one hand and positivism on the other. This is all the more profitable since natural law philosophy has tried to take an intermediate position between the two other forms of thinking.

#### OBJECTIVE IDEALISM

Plato's presentation of objective idealism is still unsurpassed. I take him, therefore, as its representative. Plato's philosophy of law is the result of his firm belief in the existence of absolute values, or, more accurately, his faith in the reality of ideas, as the cause of true being and true knowledge.<sup>10</sup>

The perfection of the state—according to Plato—depends upon its realization of the idea of the “good,” the central principle of morality and of the ideal state. The “good” is open to man's reason. But since it is the highest knowledge, it is only shared by the “gods” and very few men. These few are the natural rulers of the state. The highest knowledge in matters of state is justice. It is the true guarantee of the harmony of the perfect state. Justice in the perfect state does not mean merely “giving everyone his due.” It is the active duty of each citizen to realize himself in the station of life to which he is called by his abilities. It demands “from each according to his abilities.” Justice, therefore, in contrast to democratic theory praising the happy versatility of the democratic man (Pericles' funeral oration) means divi-

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<sup>10</sup>Its presuppositions are given in *Timaeus* 51 and in a beautiful passage in *10 Laws* 889—which is Plato's answer to the sophist theory about the relationship of nature and convention. See Cassirer, *Die Philosophie der Aufklärung* (1932) 314 *et seq.*

sion of labor as a principle of government.<sup>11</sup> To put an end to irresponsibility parading as freedom, the harmony of the state is to be achieved by establishing a hierarchical order. Justice, therefore, does not mean equality among members of a community who are unequal by nature.<sup>12</sup> The art of government demands an understanding of the reasons for the order imposed, but only on the part of the ruler.<sup>13</sup> Censorship and ideologies are, therefore, proper instruments of government. The state is not based on a social contract in which the individual forsakes his natural right to do injustice in exchange for the state's protection against being acted upon unjustly.

The legitimacy of individual strivings is judged by their contribution to the common weal. The community as a whole gives meaning and content to the life of each individual citizen. The individual is not free to think what he pleases. It is his duty to find out what he should think in order to do his part for the realization of the good. But this does not mean that the interests of the individual are completely subordinated to that of the community. On the contrary, the virtuousness of the citizen depends upon the perfection of the state.<sup>14</sup> The antagonism between individual and community is resolved because individual and general will have become identical. This applies to rulers and subjects alike. In the ideal state, the ruler does not abuse the state to his own ends. Plato is quite explicit in this respect: tyranny is the worst form of government.

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<sup>11</sup>Republic 433.

<sup>12</sup>Aristotle's theory of equality, according to the Fifth Book of the *Nicomachean Ethics*, is based on the same presupposition: only in the field of "corrective" justice equality means arithmetical equality, while in the field of "distributive" justice, it means geometrical equality.

<sup>13</sup>Foster, *The Political Philosophies of Plato and Hegel* (1935) 43. I am greatly indebted to this monograph. See also Barker, *Greek Political Theory, Plato and his Predecessors* (2nd ed. 1925); Stenzel, *Wissenschaft und Staatsgesinnung bei Platon* (1927); 2 Jaeger, *Paideia: The Ideals of Greek Culture* (1943) 198 *et seq.*; Kelsen, *Platonic Justice*, 48 *Ethics* 367 (1938).

<sup>14</sup>Republic 435, 445.

Only the fundamental principles of justice governing the state's life need be laid down in the constitution of the perfect state. The details should remain open. Besides, detailed regulations become more and more unnecessary with the progress of education.<sup>15</sup> Abundance of law is a symptom of ignorance and lack of education. Furthermore, law, because of its generality, makes for rigidity and inflexibility. It behaves like "an obstinate and ignorant tyrant."

The law cannot comprehend exactly what is noblest or most just, or at once ordain what is best, for all. The differences between man and actions, and the endless irregular movements of human things do not admit of any universal or single rule. No art whatsoever can lay down a rule that can last forever—that we must admit.<sup>16</sup>

Therefore, "no law or ordinance whatever has the right to sovereignty over true knowledge."<sup>17</sup>

Law, as far as it is necessary in the perfect state, is just law. It is not merely convention, the sole result of temporary expedience and compromise.<sup>18</sup> The just law of the perfect state flows from the principle of reason (*Logos*) by a process of logic (dialectic) and is therefore open to the speculative mind.<sup>19</sup> By its very nature, the just law owes its validity to the authority of reason and not to the fact that it is expressed as the command of a sovereign power. The tension between will (power) and reason, law and justice, authority and liberty, which constantly threatens the equilibrium of the second-best state is, therefore, resolved in the harmony of the perfect state. Thus the political philosophy of the Republic contains the most challenging criticism of liberalism and democracy.

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<sup>15</sup>*Id.* at p. 425.

<sup>16</sup>Statesman, 294.

<sup>17</sup>9 Laws 875.

<sup>18</sup>In the second-best state, law is the true sovereign. 9 Laws 875.

<sup>19</sup>Foster, *op. cit. supra* note 13, at p. 113 *et seq.*

Though such interpretation hardly does justice to the greatness of the Republic, it has become the fashion to denounce its authoritarian and aristocratic philosophy as disguised fascism and to argue that, shocked by the paralyzing effects of a constant class war within a decadent Athenian democracy, Plato dreamt that "between the dictatorship of the Left and the dictatorship of the Right, there was a third revolutionary alternative, the dictatorship of the 'virtuous right.'"<sup>20</sup> To corroborate this interpretation, evidence is brought forward, not only in the form of Plato's own political activities from which his great treatise on justice can hardly be divorced, but also in the form of the Plato renaissance on the continent, especially among political philosophers preparing the way for fascism and Nazism. On the other hand, there are political philosophers who have used his arguments to defend a dictatorship of the "virtuous left."<sup>21</sup> Thus, the political philosophy of the Republic has come to mean the ideology *katexochen* of totalitarianism, equally useful to defend a dictatorship of the "virtuous right" or of the "virtuous left." In terms of this analysis, the Plato renaissance is not difficult to understand: the two world wars separated by a peace which brought the great depression have made Plato's message intelligible to us. Like Plato—to quote a modern writer—we live "in a transitional period, and it is not surprising to find that once again men's minds have been turned to Plato, philosopher of transition."<sup>22</sup>

<sup>20</sup>Crossman, *Plato Today* (1939) 6. On the political aspects of (objective) idealism, see Kelsen, *Wesen und Wert der Demokratie* (1929) 100 *et seq.*, 118, 119; Knight, *Ethics and Economic Reform, II Idealism and Marxism*, 6 *Economica* (N. S.) 296 (1939).

<sup>21</sup>The political philosophy of Leonard Nelson is an outstanding example. See Nelson, *Politics and Education* (1928). Marxists, to be sure, in general have been extremely hostile to Plato's idealism. See Winspear, *Genesis of Plato's Thought* (1940); Crowther, *Social Relations of Science* (1941) 66, 279, 578. Still, their political goal has many aspects similar to Plato's political philosophy, *e. g.*, Plato's view on the function of the law can be paralleled with Marx's views on the function of the state. On the connection between Plato and the Enlightenment, see Cassirer, *op. cit. supra* note 10, at p. 313 *et seq.*

<sup>22</sup>Crossman, *op. cit. supra* note 20, at p. 10. In justice to Plato, it should be remembered that through the Politics of Aristotle the "con-



Be that as it may, in any case, the philosophy of the Republic is radically opposed to that philosophical creed, already defended by Socrates' great opponent Protagoras, which has come to be known as positivism.

#### POSITIVISM

According to the philosophers of liberalism, positivism is the philosophy *par excellence* of liberal democracy.<sup>23</sup> Positivism is not troubled by the opposition: perfect state *versus* second-best state. The perfect state of justice, envisaged in the Republic as a constant challenge to human aspirations, has completely dropped out of the picture. Law and justice no longer form oppositions. In the words of Hobbes, "no law can be unjust."<sup>24</sup> Because of the dangers inherent in any sort of perfectionism, the quest for the absolutely just law guiding the morality of the citizen in its totality is given up. Therefore, in contrast to the philosophy of the Republic proclaiming that law should be replaced by justice, law has become the measure of just and unjust: "*Mensura boni et mali in omni civitate lex est.*"<sup>25</sup> Consequently, it is just to obey the law. And law in this connection means positive, *i. e.*, enacted law. It derives its validity not from the fact that it is based on right reason but that "it is a word by him that by right has command over others."<sup>26</sup>

For many of its critics, particularly philosophers of natural law relying on the quotations just given, positivism (no less

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stitutionalism" of Plato's Laws has deeply influenced the political thought of the West. Nor should it be forgotten that Protagoras, as Plato presents him, proclaims the faith in the common man with an appeal still unsurpassed. Protagoras, 322.

<sup>23</sup>Compare Plato's Theaetetus (Cornford tr. 1935) 172A: "But, in that field I am speaking of—in right and wrong and matters of religion—people are ready to affirm that none of these things is natural, with a reality of its own, but rather that the public decision becomes true at the moment when it is made and remains true so long as the decision stands; and those who do not argue altogether as Protagoras does carry on their philosophy on these lines."

<sup>24</sup>Hobbes, Leviathan (1651 ed.) ch. 30, p. 182.

<sup>25</sup>*Id.* ch. 46, p. 369.

<sup>26</sup>*Id.* ch. 15, p. 80.

than Plato's objective idealism) may easily be abused to legitimize the arbitrary rule of a totalitarian dictatorship. But, as they argue, a dictatorship defended in terms of positivistic arguments, is even worse than the tyranny of the intellect envisaged in the Republic. It need not even be tempered by reason: power has swallowed up justice and right; authority, freedom; and the will of the sovereign is law because he has the might to compel obedience and punish disobedience, and for no other reason. To strengthen this interpretation of positivism, its opponents never tire of quoting Hobbes' "authority not wisdom makes a law" or the statement of Bentham, regarded as equally damaging, "whatever persons exercise supreme power, those persons have the right to exercise it."<sup>27</sup>

Liberals are quite ready to concede that totalitarian dictatorships and theocratic forms of government have been defended with positivistic arguments.<sup>28</sup> Still, as they insist, a positivistic philosophy of law is indispensable for liberal democracy, as a matter of fact is *the* philosophy of a democracy which regards freedom as the fundamental social ideal: the postulate that it is "just to obey the law" has to be set against the background of the postulates of a "government of laws and not of men" and of the separation of law and morality, proclaimed by liberalism, without which liberty and the moral freedom and dignity of the individual are impossible.<sup>29</sup> Since, to paraphrase A. D. Lindsay, there is no commonly accepted authority to say what is right, it cannot be argued that we are

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<sup>27</sup>*Id.* (Latin ed. 1652) ch. 26, p. 133; Hobbes, *A Dialogue Between a Philosopher and a Student of the Common Laws of England* (1681) in 6 *English Works* (Molesworth ed. 1840) 5; Bentham, *Fragments on Government*, 100.

<sup>28</sup>Hayek, *The Counter-Revolution of Science*, 8 *Economica* (N. S.) 9 *et seq.*, 119 *et seq.*, 281 *et seq.* (1941). On the positivism of de Maistre, Donoso Cortez and Stahl, see Neumann, *loc. cit. supra* note 4, at p. 349 *et seq.*

<sup>29</sup>"... it is a high and not a low conception of morality which recognizes that the state cannot enforce all men's duties, that its main business is to maintain liberties." Lindsay, *The Modern Democratic State* (1943) 89.

to obey law because the law is morally right.<sup>30</sup> But it is equally true that the law can exercise its security function and protect liberty only if it is obeyed by the members of the polity irrespective of their likes and dislikes. Therefore, "we obey the law not necessarily because we think the law is right, but because we think it right to obey the law."<sup>31</sup> Furthermore, to safeguard moral progress "the interests in which moral values and social institutions are rooted" constantly have to be exposed to the open light of criticism and free discussion.<sup>32</sup> Finally, sovereignty is not mere might, but only supreme authority exercised by the people. Thus, in the context of the philosophy of liberalism, legal positivism has acquired a non-authoritarian meaning. It is the philosophy of the liberal and democratic *Rechtsstaat*, in which the "fiat of the state" is not the moral law, and as such forms a genuine opposition to the philosophy of law of the Republic.

A good deal of the history of positivism since Protagoras, liberals insist, has consisted in efforts to achieve and strengthen the *Rechtsstaat* by means of a positivistic legal philosophy. A tendency in this direction can even be found in the political philosophy of Hobbes, one of the founders of modern positivism. His positivism is less authoritarian than his critics make it out to be, provided his writings are read in the light of their historical context. We have it on good authority that Hobbes' philosophy was quite revolutionary for his time. Charles II said of the Leviathan, "I have never read a book which contained so much sedition, treason, and impiety."<sup>33</sup> It is true, we owe to Hobbes the famous motto of all positivism, "authority not wisdom makes a law," but he also wrote "the

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<sup>30</sup>*Id.* at p. 85.

<sup>31</sup>McIver, *The Modern State* (1926) 154. "*La liberté est le droit de faire tout ce que les lois permettent: et si un citoyen pouvoit faire ce qu'elles défendent, il n'auroit plus de liberté, parce que les autres auroient tout de même ce pouvoir.*" Montesquieu, *De l'Esprit des Lois* XI, ch. 3.

<sup>32</sup>Stocks, *Philosophy of Democracy* (1939); Hook, *The Philosophical Presuppositions of Democracy*, 52 *Ethics* 275, 380 (1942).

<sup>33</sup>Neumann, *loc. cit. supra* note 4, at p. 356.

people rule in all governments."<sup>34</sup> Just as the power of Plato's ruler is controlled by his reason, so is the power of Hobbes' sovereign not an end in itself, but only a means to preserve law and order and to end the *bellum omnium contra omnes* prevailing in the state of nature.

. . . The estate of Man can never be without some incommmodity or other; and . . . the greatest, that in any forme of Government can possibly happen to the people in generall, is scarce sensible, in respect of the miseries, and horrible calamities, that accompany a Civill Warre; or that dissolute condition of masterlesse men, without subjection to Lawes, and a coercive Power to tye their hands from rapine, and revenge: nor considering that the greatest pressure of Sovereign Governours, proceedeth not from any delight, or profit they can expect in the dammage, or weakening of their Subjects, in whose vigor, consisteth their own strength and glory . . .<sup>35</sup>

"The duty of a sovereign," again in Hobbes' words, "consists in the good government of the people."<sup>36</sup> *Civitas enim*

<sup>34</sup>Hobbes, *Philosophical Rudiments*, 2 English Works (Molesworth ed. 1840) 100, 160; see also Hobbes, *De Cive* VII, 5: "*Qui coierunt ad civitatem erigendam pene eo ipso quod coierunt, Democratia sunt.*" His famous statement that "no law can be unjust" ceases to be shocking if read in its context. "The Law is made by the Sovereign Power, and all that is done by such Power, is warranted, and owned by every one of the people; and that which every man will have so, no man can say is unjust . . . For the use of Lawes, (which are but Rules Authorised) is not to bind the People from all Voluntary actions; but to direct and keep them in such a motion, as not to hurt themselves by their own impetuous desires, rashnesse, or indiscretion; as Hedges are set, not to stop Travellers, but to keep them in the way. And therefore a Law that is not Needfull, having not the true End of a Law, is not Good. A Law may be conceived to be Good, when it is for the benefit of the Sovereign; though it be not Necessary for the People; but it is not so. For the good of the Sovereign and People, cannot be separated. It is a weak Sovereign, that has weak Subjects; and a weak People, whose Sovereign wanteth Power to rule them at his will." Hobbes, *op. cit. supra* note 24, ch. 30, p. 182.

<sup>35</sup>Hobbes, *op. cit. supra* note 24, ch. 18, p. 94.

<sup>36</sup>Hobbes, *De Corpore Politico* (1640) 213. The preceding discussion of Hobbes is greatly indebted to Lamprecht, *Hobbes and Hobbism*, 34

*non sui sed civium causa instituta est.* Since the "end of obedience is protection," the subjects are free when the sovereign can no longer exercise these functions.<sup>37</sup> Hobbes' ideas on freedom of trade are no less outspoken. Governmental interference should be kept at a minimum.<sup>38</sup>

Justice for Hobbes means security, particularly security of the institution of property, created by the sovereign power "in order to preserve the public peace,"<sup>39</sup> and, due to the aggressiveness of human nature, law and authority are its essential and indispensable prerequisites. Their utility is to be regarded as their ground. Law and authority alone make liberty, security of human enterprise and "the commodity of living possible." Justice begins only where law exists.

In view of these utilitarian aspects of Hobbes' political philosophy, it is not altogether warranted to regard him as a philosopher of strict authoritarianism and even less of strict totalitarianism. Rather, it is a good deal more accurate to say that Hobbes' writings—full of contradictions as they are—symbolize the beginning of the bourgeois era.<sup>40</sup> With the philosophy of Hobbes, the long intellectual and political process begins which culminated in the writings and achievements of the great utilitarian philosophers of the nineteenth century, who exercised such a great influence over their century. Hobbes' authoritarianism, despite its flavor of social despotism and its tendency to "reduce ethics to politics or economics" (Lindsay), was not altogether foreign to the way of thinking of the head of the utilitarian school, Bentham.<sup>41</sup>

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Am. Pol. Science Rev. 31 (1940). See also Strauss, *The Political Philosophy of Hobbes* (1936) 108 *et seq.*; Neumann, *loc. cit. supra* note 4, at pp. 346, 355 *et seq.*

<sup>37</sup>Hobbes, *op. cit. supra* note 24, ch. 21, p. 114.

<sup>38</sup>Hobbes, *Elements of Law* (Tonnies ed. 1928) Part II, ch. 9, § 4.

<sup>39</sup>Hobbes, *op. cit. supra* note 24, ch. 18, p. 91.

<sup>40</sup>Duguit, *Traité de Droit constitutionnel* I, p. 31: "*Au xviii<sup>e</sup> siècle Hobbes et Jurien peuvent être considérés comme les représentants types des doctrines démocratiques.*" See further Menzel, *Demokratie und Weltanschauung*, 2 *Zeitschrift für öffentliches Recht* 701, 709 *et seq.* (1921).

<sup>41</sup>On the Utilitarians, see Halévy, *Growth of Philosophical Radicalism* (1928); with regard to the point discussed in the text, see *id.* at p. 488

On the contrary, Bentham took over Hobbes' idea that the political obligation can be based only on the enlightened self-interest of the individual; he also regarded (particularly in his youth) an authoritarian form of government indispensable for the introduction of the many social reforms which he thought necessary. How else could the petty resistance of common law lawyers to even the smallest legal reforms be overcome?

Influenced by Hume, Bentham held Hobbes' political philosophy even compatible with the theories of Adam Smith, to whom he was indebted not merely in his thinking about economics. Consequently, borrowing from both, Bentham tried to reconcile the principle of authority underlying the legal philosophy of Hobbes with the principles of economic liberty forming the basis of the system of Adam Smith—according to whom the existing division of labor and the automatic mechanism of exchanges can better be trusted to bring about a harmony of interests among the members of the community than governmental interference.<sup>42</sup> This "reconciliation" was attempted in the following manner: the final cause or purpose for which government ought to exist, as he and his school argued, is the furtherance of the common weal to the greatest possible extent. To achieve this end, no benevolent and enlightened despotism, as envisaged by Hobbes, is

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*et seq.*; Myrdal, *Das Politische Element in der Nationalökonomischen Doktrinbildung*, Aus dem Schwedischen übersetzt von Mackenroth (1932) 43 *et seq.* As to Hobbes' influence on James Mill, see 2 Stephen, *The English Utilitarians* (1900) 74 *et seq.*; on Austin, see 3 *id.* 321 *et seq.* On the connection between the Utilitarians and natural law philosophy, see further 1 *id.* 303 *et seq.*; Schumpeter, *Epochen der Dogmen- und Methodengeschichte*, 1 *Grundriss der Sozialökonomik* 19, 27 *et seq.* (1914).

<sup>42</sup>Viner, *Adam Smith and Laissez Faire*, 35 *Journal of Political Economy* 198, 208, 214 *et seq.* (1927); Bittermann, *Adam Smith's Empiricism and the Law of Nature*, 48 *Journal of Political Economy* 487, 703 (1940). Hume, who was a liberal in his economic philosophy, but a critic of the natural rights myth, constitutes the connecting link between Hobbes and Bentham as well as between Smith and Bentham. The exact extent to which Smith was influenced by Hume on the one hand and the natural rights theory on the other is still open to controversy. See the articles by Viner and Bittermann mentioned above.

necessary. Since each individual, properly educated, is the best judge of his own interest, the principle of *laissez faire* should form the guide of governmental policy, once the institutions that make liberty effective have been created.<sup>43</sup> Liberty thus means, positively, respect for the moral, intellectual and economic autonomy of the individual; negatively, freedom from arbitrary government interference. Any interference, to quote Mills' Liberty, is arbitrary if it has any other purpose than "the prevention of harm to others." The own good of the citizens, "either physical or moral, is no sufficient warrant." Liberty, according to Bentham, is a

branch of security: personal liberty is security against a certain species of injuries which affect the person: As to what is called political liberty, it is another branch of security—security against injustice from the ministers of government.<sup>44</sup>

Thus, the function of law should be limited to the "care of security" which is the "object of justice" (Adam Smith). In the scale of social values, security rates higher than equality with the Benthamites; due to the insufficiency of the factors of production, as they argued with Malthus, an equal distribution of property would only lead to universal poverty.<sup>45</sup> Law, therefore, is the minimum interference necessary to protect the interests of the individual, particularly his property interests,—the indispensable prerequisite of genuine freedom,—and a means of enabling men to deal securely and efficiently with one another. Coercion, in other words, is only to be used to prevent coercion by individuals and private groups. All re-

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<sup>43</sup>Bentham, *A Manual of Political Economy*, 3 Works of Jeremy Bentham (Bowring ed. 1843) 33, 43; see further Keynes, *The End of Laissez-Faire* (1926).

<sup>44</sup>Bentham, *Principles of the Civil Code*, Theory of Legislation (Hildreth's tr. from French of Etienne Dumont 1896) 97.

<sup>45</sup>Bentham, *op. cit. supra* note 44, at pp. 97 *et seq.*, 119 *et seq.*; Halévy, *op. cit. supra* note 41, at p. 490. See further Hamilton, *Property—According to Locke*, 41 *Yale L. Jour.* 864 (1932); McKeon, *The Development of the Concept of Property in Political Philosophy: A Study of the Background of the Constitution*, 48 *Ethics* 297 (1938).

lations ought to rest on mutual free consent within limits set by formal "rules of the game."<sup>46</sup> Contract is the perfect form of obligation.

The form of government which is best able to realize the greatest happiness principle and at the same time least likely to impose arbitrary restraints on the individual is democracy. The opinion of the majority can be regarded as representative of the interest of the greatest number. And, what is of the utmost importance, since it safeguards the postulate of equality under the law, democracy does not exercise whatever restraint becomes necessary except by known general laws created by the democratic process.<sup>47</sup>

In this way, elements and intentions of the natural law theory of the Enlightenment have been preserved, though in a transmuted form in the philosophy of utilitarianism. This aspect of the utilitarian creed—obscured by the fact that the institution of private property and freedom of contract are vindicated on utilitarian grounds—can hardly be overemphasized. To be sure, Benthamism is free from "higher law" principles and from a theory of "natural rights" in the Lockian sense. But this does not mean that it is without normative and critical elements. On the contrary, the greatest happiness principle constantly inspired Benthamites to test the desirability of existing positive laws in terms of their social utility.<sup>48</sup> Furthermore, the negative role of compulsion assigned to the state is meaningful only if we take into account the basic presupposition of the Benthamite system: the firm belief that in the context of genuine liberal and democratic institutions, the individual serving his enlightened self-interest is also serving the interest of the community. Therefore,

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<sup>46</sup>Knight, *loc. cit. supra* note 20, at p. 17.

<sup>47</sup>On the "rule of law" see Dicey, *Law of the Constitution* (Wade's 9th ed. 1939) 183 *et seq.*

<sup>48</sup>The social ethics of utilitarianism appear clearly, for instance, in Bentham's discussion of equality (*op. cit. supra* note 44, at p. 119 *et seq.*), in Mill's theory that virtue is an essential means to happiness, and his discourse on the Connexion between Justice and Utility (*Utilitarianism*, ch. 5).



individual and cooperative action left unrestrained in family, church and market will not lessen the freedom and dignity of man but will secure the highest possible social justice. Thus, utilitarian positivism could indeed become a non-authoritarian philosophy of law, reflecting the individualistic spirit of liberal bourgeoisie which identifies virtue with enlightened self-interest, and to which Plato's Republic is a horrible nightmare because it subjects all members of the community to the merciless tyranny of a Utopia. To safeguard the moral autonomy of the individual—the "subjective element," as Hegel called it in his critique of Plato's Republic—liberals are willing to pay a heavy price: the liberal state is perpetually falling short of the best, and conflicts between individual and general will are, therefore, inevitable. Still, in the interest of liberty and security, the law that is and the law that ought to be must be rigidly separated.<sup>49</sup> This applies even to "bad" laws:

Known general laws, however bad, interfere less with freedom than decisions based on no previously known rule. Where such decisions are frequent a man can never know what liberty he has, and liberty is only valuable when we know that we have it.<sup>50</sup>

Justice, in this context, means equality under the law, indeed.

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<sup>49</sup>Besides, to quote Adam Smith's famous critique of Quesnai: "If a nation could not prosper without the enjoyment of perfect liberty and perfect justice, there is not in the world a nation which could ever have prospered. In the political body, however, the wisdom of nature has fortunately made ample provision for remedying many of the bad effects of the folly and injustice of man; in the same manner as it has done in the natural body, for remedying those of his sloth and intemperance." *The Wealth of Nations* (Modern Library Ed. 1937) 638. See also Mourant, *The Physiocratic Conception of Natural Law* (Chicago Dissertation 1943).

<sup>50</sup>Maitland, *A Historical Sketch of Liberty and Equality*, 1 *Collected Papers* (Fisher ed. 1911) 81. "*Stare decisis* is usually the wise policy, because in most matters it is more important that the applicable rule of law be settled than that it be settled right . . . This is commonly true even where the error is a matter of serious concern." Brandeis,

It was of untold importance for the ideology of liberal positivism that its assertions were "confirmed" by its political achievements and by the triumph of the capitalistic development. The legal philosophy which regards "security from injury" as the ultimate end of law and justice became the powerful weapon of political reformers in their struggle for democratic institutions. Utilitarianism overcame the ideology, so ably defended by Blackstone, that the traditional English law was identical with the law of nature and, therefore, perfect; in the name of Utilitarianism, the English middle class succeeded in bringing about that change of the law that was necessary to establish a liberal democracy.<sup>51</sup> And with the development of democratic forms of government and the resulting diffusion of power, Hobbes' idea that law is a command of a sovereign lost its unpleasant totalitarian implications. Under the democratic system of government, every citizen is a sovereign. As a matter of fact, power, sovereignty and command gradually ceased to be key words of positivistic philosophy, despite the efforts of Austin to restore their importance.<sup>52</sup> Dewey's attitude is typical in this respect. "Rules

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J. in *Burnet v. Coronado Oil and Gas Co.*, 285 U. S. 393, 406, 52 Sup. Ct. 443, 447, 76 L. Ed. 815 (1932).

<sup>51</sup>"The teacher who could lead England in the path of reform must not talk of the social contract, of natural rights, of rights of man, or of liberty, fraternity, and equality. Bentham and his disciples precisely satisfied this requirement." Dicey, *Law and Public Opinion in England* (1905) 125 *et seq.*, 170; Becker, *Declaration of Independence* (1922) 235-36. Thus, the critical attitude of Bentham as a reformer towards natural law was the result of two factors: Blackstone's use of natural law theory to defend the *status quo*, and the fact that the natural rights theory was discredited by the development of the French revolution.

<sup>52</sup>"Government officials in particular are supposed to have no 'power' (and hardly any existence) as individuals but to act exclusively as agents of the law." Knight, *loc. cit. supra* note 20, at p. 299. Even Austin's theory of sovereignty is not free from the influence of democratic theory. Austin by defining the sovereign as "the person or persons who habitually receive obedience of the bulk of members of society" makes the consent of the governed the ultimate basis of law and sovereignty. Krabbe, *Die Lehre von der Rechtssouveränität* (1906) 74, 150. On Locke, see Neumann, *Der Funktionswandel des Gesetzes im Recht der Buergerlichen Gesellschaft*, 6 *Zeitschrift für Sozialforschung* 542 *et seq.* (1937).

of law are active forces only as are banks which confine the flow of a stream, and are commands only in the sense in which banks command a current."<sup>53</sup>

The achievements of capitalism with its enormous increase in the productivity of labor had a profound influence on the meaning of the two fundamental concepts of the utilitarian philosophy of justice: freedom and security. The meaning of these symbols has undergone many changes, reflecting the various stages of capitalistic development. For the youthful Bentham, the state was not the neutral state of Locke, but an active state vigorously introducing social reforms in the interest of the greatest happiness of the greatest number. If this was ever generally accepted, it was soon forgotten because of the lusty growth of capitalism and its enormous achievements. So long as the capitalistic system was constantly able to expand production and employment, it provided a setting for both freedom and security, and, as a result, the confidence in Locke's theory of natural rights remained unshaken.<sup>54</sup>

The conviction that a continuous advance is the only guarantee of security was reflected in the attitude of the community with regard to the uneven development of the common law, particularly the American common law, which was unable to keep pace with the rapid advance of industrialization. The fact that rule was competing with counter-rule and exception and that a legal science was very slow in developing<sup>55</sup> was hardly regarded as a serious difficulty. On the contrary, business during the process of constant expansion found the

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<sup>53</sup>Dewey, *op. cit. supra* note 5, at p. 52.

<sup>54</sup>Waterman, Thomas Jefferson and Blackstone's Commentaries, 27 Ill. L. Rev. 629, 648 (1933); Palmer, Benthamism in England and America, 35 Am. Political Science Rev. 855 (1941). On early economic theory in this country, see the symposium by Henrich, Handlin, Hartz and Heath, American Laissez Faire, The Tasks of Economic History (supplemental issue to Jour. of Econ. Hist. 1943) 51; Grampp, Mercantilism and Laissez Faire in American Political Discussion, 1787-1829 (Chicago Dissertation 1944) (not yet published).

<sup>55</sup>Cohen, Law and Scientific Method, in Handbook of the Association of American Law Schools, 28 *et seq.* (1927).

lack of rationality and the many gaps in the law rather to its advantage—which seems to prove that capitalism as long as it does not reach maturity does not need a highly rationalized legal system.<sup>56</sup>

But with the gradual slowing up of the process of capitalistic expansion, this attitude began to change. The waste inevitably inherent in the wild growth of the American common law could no longer go unnoticed. Serious attempts to remedy the situation were the result. But, as the feeling prevailed that there was nothing basically wrong with the world a victorious bourgeoisie had created, the legal profession was particularly ill-equipped for its task of bringing the law in line with the social and economic development. All that had to be done—it was felt—was to consolidate the gains and bring the house in order. Certainty and consistency of the law and predictability of decisions became therefore the sole remedies advocated by the emerging new school of thought within the legal profession: the school of analytical jurisprudence. To achieve its aim various devices, such as codification or restatement of the common law, were tried or suggested. Great efforts were made at perfecting the rule of *stare decisis* and at extracting out of the existing case law the basic principles and conceptions applicable in each field. What the analytical jurists failed to realize was their “legalistic” approach, bent as it was upon building up a rational and harmonious legal system (formal rationality), inevitably forced them into higher and higher, and therefore lifeless, abstractions, the more the increasing instability of the underlying social system led to conflicting decisions and theories. “Abstractions and generalizations ran riot.”<sup>57</sup> This change in the prevailing climate of opinion deeply affected the judicial process. In the words of Oliphant, there was a “shift from *stare decisis* to *stare dictis*.” “Courts in their decisions

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<sup>56</sup>Weber, *Gesammelte Aufsätze zur Religionssoziologie I* (1922) 437 *et seq.*; Mannheim, *Man and Society* (1940) 180.

<sup>57</sup>Oliphant, *A Return to Stare Decisis*, in *Handbook of the Association of American Law Schools*, 61, 70 (1927).

began to talk less and less about what prior courts had actually done in ordering men's affairs and more and more about the universals they had promulgated"—a process greatly encouraged by the inflationary output of case law which made it impossible to study precedents with the care previous generations of lawyers had exhibited. This "legalistic" attitude had still another more serious aspect. It prevented many a liberal member of the bench from attaining a real understanding of the constellation of social forces and the struggle for political and economic power. As a result, "conservative" judges had an easy task of writing their political and economic philosophy into the law; "the spirit of the common law" became "too neutral for an effective offensive against practices injurious to the weaker elements of society."<sup>58</sup>

However, it took more than one generation of critics before the shortcomings of the conceptualistic approach were adequately realized and a new school of thought emerged.

At first lawyers who were struck by the discrepancy between the teachings of the school of analytical jurisprudence and the living law merely criticized the analytical jurists for their naïve technique in trying to achieve legal certainty; they suggested the application of a more scientific approach. The next generation of critics went a good deal further. To them inconsistencies and conflicting rules within the legal system are not necessarily the result of a wrong application of fundamental principles, but frequently are expressions of competing tendencies of social justice struggling for recognition. As to many of the "conflicting" decisions—the critics suggested—the difficulty was with the system of classifications proposed by legal theory rather than with the decisions actually reached by the courts.

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<sup>58</sup>Freund, *Standards of American Legislation* (1917) 71. Even Holmes, who is regarded as the father of American legal realism, could not always free himself of a legalistic approach. Boudin, *Justice Holmes and his World*, 3 *Lawy. Guild Rev.* 24, 27 (1943).

With this approach a new sociological school of thought arose. Legal realism, as it called itself, has tremendously influenced the way of thinking of modern lawyers about the role of law in our society. Its criticism of analytical jurisprudence has made us realize that preoccupation with efforts at making the law consistent and predictable (at a high level of abstraction) may afford an easy escape from a more important task: namely, of constantly testing out the desirability, efficiency and fairness of inherited legal rules and institutions in terms of the present needs of society. Legal realism has given us a deeper understanding of the judicial process and of the art of judicial government. This has been put by Holmes in an admirable phrase:

It is the merit of the common law that it decides the case first and determines the principles afterwards. Looking at the forms of logic it might be inferred that when you have a minor premise and a conclusion, there must be a major, which you are also prepared then and there to assert. But in fact lawyers, like other men, frequently see well enough how they ought to decide on a given state of facts without being very clear as to the *ratio decidendi*.<sup>59</sup>

This realistic approach further enabled the critics of analytical jurisprudence to view in its historical perspective the chief tenet of positivism which claims that the function of law is to be limited to "the care of security." This dogma, as they realized, grew up in an historical period when the constellation of economic and social forces was favorable to the development of a free enterprise system. For the founders of liberal positivism, the enemy of free enterprise and liberalism was an all powerful state. A liberal economic system, as they assumed, would maintain and even improve the moral, political and legal institutions of society. The founders of liberalism did not have the vision to foresee that the capi-

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<sup>59</sup>Holmes, Codes, and the Arrangement of the Law, 5 Am. L. Rev. 1 (1870).

talistic system has within itself forces which, if unchecked, will inevitably change a free enterprise system into monopoly capitalism and a liberal democracy into a pluralistic society which knows nothing but divided loyalties. Once liberal democracy ceases to be a living force, positivism, despite its insistence on the strict separation of the moral and the legal and its identification of justice with legality and order, is unable to guarantee liberty. It is not the "rule of law" as such which guarantees liberty but only the rule of law within the larger framework of a liberal democracy full of strength and vitality.<sup>60</sup> *Positivists in identifying justice with legality, without articulating the basic premise of their creed, commit the tragic error of taking a liberal democracy for granted.* In a time of transition like ours, the inherent weakness of this kind of positivism becomes apparent, and the doctrine that it is not wisdom but authority that makes a law becomes a dangerous slogan.

We begin to realize that positivism *as such*, due to its incompleteness, is a neutral and politically ambiguous philosophy of law, which fits equally well into a totalitarian dictatorship. Benthamite positivism was protected against this danger because, as we have seen, it was part of a philosophy whose main tenet was the greatest happiness principle. Bentham and his school could therefore afford to put strong emphasis on the security function of law and justice. On the other hand, overemphasis on the desirability of law and order in times of moral and economic crisis may help to create a climate of opinion favorable to fascism. It is easy to prove this point by calling attention to the fact that Hitler came into power without violating the principles of legality. Positivists who claim that justice means justice under the law

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<sup>60</sup>Clark, *The Function of Law in a Democratic Society*, 9 Univ. Chi. L. Rev. 393 *et seq.* (1942); Lasswell and McDougal, *Legal Education and Public Policy: Professional Training in the Public Interest*, 52 Yale L. Jour. 203 (1943). For a discussion of the rule of law dogma, see Jennings, *The Law and the Constitution* (1943) 285 *et seq.*; Neumann, *loc. cit. supra* note 52; Robson, *Dicey's Law of the Constitution: A Review*, 38 Mich. L. Rev. 205 (1939).

have been quite helpless when confronted with the spectacle of a weak and decadent democracy transforming itself into a totalitarian dictatorship by means of the democratic process. This experience accounts for the widespread feeling that there must be something fundamentally wrong with a legal philosophy which has nothing to say when law turns into unlaw.

Challenged by this reaction and by the ever-increasing tension between political democracy and capitalism, many of the modern realists have devoted their energies not to efforts at improving analytical theories, but to the task of rebuilding our democracy in accordance with the new social needs. They have joined the New Deal and its agencies, abandoning Locke's idea of the neutral state and returning to Bentham's state of social reforms in the interest of the greatest happiness of the greatest number. Law to them is more than an argumentative technique, as some radical positivists claim. It is a unified attempt at freedom and social justice.

But, philosophers of natural law will insist, this brand of realism is no longer positivism. It draws heavily on the natural law postulate of the natural equality and dignity of man and is in reality a philosophy of natural law. Intellectual honesty should require the advocates of social and political reforms to admit it. Such an admission—we are told—would bring their social philosophy in line with the great moral tradition of western civilization and, therefore, only strengthen its position. Thus, it becomes inevitable to examine the basic tenets of natural law philosophy.

#### NATURAL LAW PHILOSOPHY

The philosophy of natural law takes an intermediate position between the two legal philosophies mentioned before. In contrast to objective idealism and positivism, natural law philosophy gives to the legal order a dualistic and not a monistic structure. All philosophies of natural law teach the belief in the existence of universally valid principles of jus-



tice which are anchored in man's social and moral-rational nature.<sup>61</sup> These principles of justice find their "concretization" in positive laws. Natural law philosophy thus shares with objective idealism the belief in the existence of eternal moral values; still it has been realistic enough—even during the Enlightenment—to forsake a monistic theory of the moral-legal universe, however great the temptation to move in this direction.<sup>62</sup>

By working out a dualistic philosophy of law, natural law philosophy has tried to combine the virtues of objective idealism and the realism of positivism and, since the early Middle Ages, to reach a synthesis of the two main streams of our cultural heritage: of our notions about personal morality, rooted in the Hebrew-Christian religion, and of our notions about politics, going back to the Greco-Roman concept of the state.<sup>63</sup> Justice, therefore, means neither the esoteric wisdom of Plato's philosopher king nor mere legality. As the catalogues of fundamental principles given by all the great representatives of natural law philosophy clearly show, the higher law principles of natural law mirror the evolution of the moral tradition of western civilization. Christianity, in deepening the stoic teaching of a common brotherhood of man, gave enormous strength to the postulate of equality whose revolutionary force, though temporarily checked by the dogma of original sin, has greatly affected and will continue to affect our notions of political, social and economic justice.<sup>64</sup>

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<sup>61</sup>It is true, natural law philosophers concede, that "man himself is subject to continuous evolution and change." But, they insist, so long as these changes do not convert man into an entirely different creature, man's rational and social nature will continue to furnish an objective basis for absolutely binding rules of conduct. Ryan and Boland, *op. cit. supra* note 7, at p. 11.

<sup>62</sup>The tendency towards a monistic theory is closely connected with the changing attitude toward the myth of original sin, which was inaugurated by Humanism, but temporarily retarded by the Reformation. On the connection between natural law philosophy of the Enlightenment and Plato's idealism, see Cassirer, *op. cit. supra* note 21.

<sup>63</sup>1 Jaeger, *op. cit. supra* note 13, at p. 323.

<sup>64</sup>Troeltsch, *Das stoisch-christliche Naturrecht und das moderne profane Naturrecht*, 4 *Gesammelte Schriften* (1925); Troeltsch, *The Ideas*

Natural law philosophy has frequently been criticized for calling these principles of morality law and for claiming that propositions of positive law can be deduced from natural law principles. Still, this way of looking at the legal system—naïve and one-sided as it is—expresses a profound insight with regard to the constant interaction of law and morality.<sup>65</sup> There is no society, to use the words of Knight, in which

its members obey the law from sheer self-interest or purely because of "sanctions." They must be believed to be right in principle and, in the main. And personal rulers are followed or officials obeyed because their position is accepted as first, legal, and secondly, in accord with the law which itself is fundamentally "right." Social institutions must be in harmony with what those who live under them think to be moral—whatever theory one may hold as to the causal relation in history between institutions and moral ideas.<sup>66</sup>

Law, to command obedience, has to live up to the "ethical minimum" of a community. Furthermore, this critique of natural law philosophy is based on the unwarranted assumption that our legal system is closed and complete. In reality, due to the elasticity of the case law system, the courts are given considerable leeway in shaping the law according to their sense of justice, which in turn is influenced by the cul-

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of Natural Law and Humanity in World Politics, in 1 Gierke, *Natural Law and the Theory of Society* (Barker's tr. 1934) 205; Lindsay, *Individualism*, 7 *Encyclopaedia of Social Sciences* (1932 ed.) 674.

<sup>65</sup>Positivists who insist that "it is to law that we owe the conception of justice" have fallen into the opposite extreme, as the author of the phrase seems to admit. Llewellyn, *Bramble Bush* (1930) 121. For the philosophical presuppositions of this point of view, see 2 Jhering, *Der Zweck im Recht* (1883) 108 *et seq.*; Hume, *A Treatise of Human Nature* (Selby-Bigge ed. 1896) 477. See also Brentano, *The Origin of the Knowledge of Right and Wrong* (1902); Cohen, *Ethik des Reinen Willens* (8 Aufl. 1941) 227 *et seq.*

<sup>66</sup>Knight, *Ethics and Economic Reform*, I *The Ethics of Liberalism*, 6 *Economica* (N. S.) 1, 4 (1939); Somló, *Juristische Grundlehre* (2 Aufl. 1927) §§ 33, 38; but see Laski *Grammar of Politics* (2nd ed. 1930) 250.

tural patterns of the community and the moral tradition. Thus, the ideal is constantly becoming the positive. In the light of this phenomenon, the importance of the question whether the principles of higher law are really law, can easily be exaggerated. In the evolution of the common law system the opposition between positive and natural law is constantly overcome.<sup>67</sup>

Natural law philosophy has always been realistic enough to admit that the principles of natural law due to their generality need positive laws for their concretization and as a guarantee of their effective enforcement. But it has always been emphatic in its insistence that positive laws owe their validity to this very fact. This grandiose belief is reflected in the definitions of law given by natural law philosophers. St. Thomas' definition of law is still unsurpassed. He defines law as "nothing else than the ordinance of reason for the common good made by him who has care of the community and promulgated."<sup>68</sup> Positive law, to be just, must meet three requirements: it must serve the common good, its burdens must be distributed according to proportionate equality, and finally, it must be issued by a legislator within the bounds of his authority.<sup>69</sup>

In the light of this theory, positive laws which, due to human error, are unjust in terms of the postulates of the "higher law" present very serious problems. Are they invalid with the result that they need not be obeyed? Has the citizen a right of resistance against unjust laws? Or is it not better as Socrates has argued in Plato's *Crito* to obey laws of a legitimate government than to bring all law into disrepute and open the gate to anarchy? Natural law phi-

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<sup>67</sup>Pound, *The Spirit of the Common Law* (1921) 182 *et seq.*; Gurvitch, *The Problem of Social Law*, 52 *Ethics* 17 (1941). For a discussion of the philosophical problems involved, see Cohen, *Reason and Nature* (1931) 408 *et seq.*; Robinson, *Law and the Lawyers* (1935) 218 *et seq.*

<sup>68</sup>St. Thomas Aquinas, *Summa theologiae*, 1a, 2ae, q. 90 a. 4; *id.* q. 91 a. 1.

<sup>69</sup>*Id.* q. 90 a. 4; *id.* q. 96 a. 4.

losophy by the dialectics of its own dogma of a higher law was forced to affirm a right of resistance against unjust laws and to proclaim that the just character of positive laws is not conclusively settled by the fact that they have been enacted by the proper authorities and complied with by the citizens. The principles of natural law bind rulers and subjects alike.

And yet this teaching has largely remained a programme, and this fact has done much to discredit natural law philosophy. History has recorded many instances where the validity of laws violating the moral tradition of western civilization has remained unchallenged because—as the argument ran—the exercise of a right of resistance might be more injurious to the common good than the abuse to be removed.<sup>70</sup> Furthermore, the attitude of the Catholic Church, which claims to be the repository of natural law, with respect to fascism has been quite ambiguous.<sup>71</sup> To be sure, the belief in absolute principles of justice and inalienable human rights did form a most powerful ideological weapon in the hands of the political philosophers of the middle class struggling for political freedom. But as soon as the fight was won, natural law in the form of a theory of natural rights tended to become an instrument for the protection of vested interests against progressive social legislation. No wonder that the reaction against natural law philosophy set in. In many quarters the conviction began to grow that the philosophy of a higher law had exhausted its usefulness once its postulates had found their institutionalization in a bill of rights and other democratic institutions. Dissatisfaction with existing positive laws, liberals began to insist, should be voiced only through the legitimate channels provided for by the democratic system and not by appeal to higher law principles. In taking this position, liberals do not overlook the possibility of a majority

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<sup>70</sup>St. Thomas' conservative position is to be found in *Summa Theologiae*, 1a, 2ae, q. 96 a. 4; see also Bodenheimer, *Jurisprudence* (1940) 123.

<sup>71</sup>Ryan and Boland, *op. cit. supra* note 7, at p. 120 *et seq.*

tyrannizing a minority, but they are convinced that the give and take of free discussion guaranteed by civil liberties will furnish the best protection of minority rights.<sup>72</sup>

Natural law theory, it must be said on the basis of its history, has been used not only to strengthen "new historical rights in the struggle of their becoming" (Croce), but also to defend vested interests. In this respect its record is hardly better than that of positivism. Serfdom, indeed the whole feudal order, for instance, was accepted by St. Thomas, while political equality was postulated by Bentham on utilitarian grounds. The very fact that history has produced different systems of natural law, all supposedly anchored in man's nature, and frequently the same institutions have been both defended and attacked in the name of natural law and of man's reason, proves how little natural law philosophers have really examined man's nature. To be sure, natural law philosophy has shown real psychological insight in developing a dualistic philosophy of law. The theory of the dual structure of the legal system is an effort to reconcile idea and reality: our external experience according to which all law is positive law, and our inner experience which demands that all law be anchored in the idea of justice.<sup>73</sup> It is this very aspect of natural law philosophy which will keep it alive in our imperfect world. The emotional appeal enjoyed by natural law philosophy today shows how desperate the need for a belief in absolutes has become even with people who do not set their hopes in totalitarianism, and this belief will grow in intensity the more people will feel that their own world has failed them.

The rise of the totalitarian systems has made it clear that democracy is not necessarily a security for that liberty which

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<sup>72</sup>Wertheimer, *On the Concept of Democracy*, in Ascoli and Lehmann, *Political and Economic Democracy* (1937) 271; Knight, *Ethics and Economic Reform*, III *Christianity*, 6 *Economica* (N. S.) 398, 408 (1939); Knight, *The Meaning of Democracy: Its Politics, Economic Structure and Ideals*, *Journal of Negro Education* (1941) 318, 323.

<sup>73</sup>Gierke, *Deutsches Privatrecht* I (1895) 120.

man rightly desires; to overcome the deep sense of frustration which has taken hold of so many people and to combat the resulting regressions to immature attitudes which threaten our civilization, political democracy, as we feel, has to be supplemented by an economic and social democracy. But this is hardly enough. All great social reforms, heretofore, have been impeded or have even miserably failed because of the lack of a science of man. To bring the basic values of our civilization nearer to realization, more than a magical belief in natural law and in man's rational nature is necessary. To be sure, man is a "rational animal," but it is also true that he is constantly rationalizing irrational conduct, particularly aggressions. Pascal's profound insight is still true:

*L'homme n'est ni ange ni bête et le malheur veut  
que qui veut faire l'ange fait la bête.*<sup>74</sup>

To accept reason naïvely is to invite the advocates of totalitarianism to deny it blindly and to contend that the "driving force not only in man but in all things is a blind will, an *élan vital*."<sup>75</sup>

The spheres of our life are still divided and always will be divided into realms of "logical" and "non-logical conduct" (Pareto). The advocates of totalitarianism, making use of this insight, appeal to the irrational forces in man, to man's immaturity and longing for security, and they try to convince him that he is unable to work out his own salvation but has to be guided by authority:

*La foi et le patriotisme sont les deux grands thaumaturges de ce monde. L'un et l'autre sont divins: toutes leurs actions sont des prodiges; n'allez pas leur parler d'examen, de choix, de discussion: ils diront que vous blasphémez; ils ne savent que deux mots: soumission et croyance: avec ces deux leviers*

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<sup>74</sup>Pascal, *Pensées*, n° 358.

<sup>75</sup>Morrow, *The Philosophical Presuppositions of Democracy*, 52 *Ethics* 297, 306 (1942).

*ils soulèvent l'univers; leurs erreurs mêmes sont sublimes.*<sup>76</sup>

To meet this challenge, we have to push the rationality of scientific method further and further, though with patience, into areas of individual and social life, until recently neglected; many of the obstacles to progress will be found there. The advances of sociology, anthropology and psychoanalysis towards a science of human nature entitle us to be more hopeful as to the future. The psychoanalytical theory of Freud, in particular, and its clinical findings, though constantly liable to be maligned, have enormously deepened man's understanding of himself, his anxieties, the aggressiveness and ambivalence of human nature. It has taught us not to overestimate conscious at the expense of unconscious processes. The insights gradually obtained will equip modern educators and social workers for doing their part in the liberation and sublimation of psychological energies which are wastefully locked up in the "repressive mechanism of the unconscious."<sup>77</sup>

In this way, we may be able to overcome the impasse created by

the pessimism of the revolutionaries who think that things are so bad that nothing can save us but violent change, and the pessimism of the reactionaries who regard the balance of our economic and social life so precarious that we must risk no experiments.<sup>78</sup>

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<sup>76</sup>De Maistre, *Étude sur la Souveraineté, Oeuvres Complètes I* (1884) 377.

<sup>77</sup>Julian Huxley, in Waddington, *Science and Ethics* (1942) 35.

<sup>78</sup>Keynes, *Essays in Persuasion* (1932) 359, 360.