

1-1-1957

Philosophical Issues in Contemporary Law

F. S. C. Northrop

Follow this and additional works at: http://scholarship.law.nd.edu/nd_naturallaw_forum



Part of the [Law Commons](#)

Recommended Citation

Northrop, F. S. C., "Philosophical Issues in Contemporary Law" (1957). *Natural Law Forum*. Paper 18.
http://scholarship.law.nd.edu/nd_naturallaw_forum/18

This Article is brought to you for free and open access by NDLScholarship. It has been accepted for inclusion in Natural Law Forum by an authorized administrator of NDLScholarship. For more information, please contact lawdr@nd.edu.

PHILOSOPHICAL ISSUES IN CONTEMPORARY LAW*

F. S. C. Northrop

PHILOSOPHY is the name for the basic methodological and theoretical assumptions of a subject. Since every science uses some method of investigation and any scientist who reports facts to his colleagues must express these facts in words and, hence, introduce concepts and theory, it follows that any science whatever is also a philosophy. When no facts arise, however, to bring the traditional theory or methods of a subject into question, its problems are not philosophical. Then to be a scientist one need not also be a philosopher. Mathematics and physics were in such a state during the two hundred years following the publication of Newton's *Principia* in 1686. American law thought it was in a similar condition when, following Langdell, it introduced the case method and identified its science with the empirical study of cases. But whenever facts arise in any subject which bring its traditional theory or methods into question, at that moment its problems become philosophical. Then to be an effective scientist one must also be a philosopher. Such has been the state of mathematics and physics since the end of the nineteenth century. Such, as this essay indicates, is the state of law at the present time.

The philosophical problems of contemporary law are in part the consequence of the impact upon it of the new philosophy of mathematics, physics, and language. The late Walter W. Cook, an influential professor during the 1920's, had studied mathematical physics as well as law. If, he reasoned, a science as established as physics, with its relatively simple subject matter, has been forced, not merely to revise its basic assumptions as introduced by the great Newton, but also to re-examine the conception of its method as suggested by Newton, how much more is the need for a similar revision of theory and re-examination of method likely in such a complex subject matter as that of the social sciences and law?¹ Forthwith a new spirit entered American legal thinking, and at least one portion of that new legal philosophy called legal realism was born.

A similar phenomenon has occurred in Great Britain. To understand

* The author is gratefully indebted to the Wenner-Gren Foundation for Anthropological Research for grants which have made this study possible.

1. W. W. Cook, *Scientific Method and Law*, 13 AMERICAN BAR ASSOCIATION JOURNAL 303 (1927); THE LOGICAL AND LEGAL BASIS OF THE CONFLICT OF LAWS (Cambridge, Mass., 1942).

it we must examine one of the factors in the late nineteenth century which turned mathematicians into symbolic logicians and philosophers. Scientists like Dedekind, Cantor, Frege, Russell, and Whitehead discovered that supposedly rigorous proofs in their science are far from rigorous. They found also that part of the trouble centered in the fuzziness of the dx/dy symbol of the infinitesimal calculus, the main symbolic instrument of modern physics. This obscurity in their key symbol forced them to pursue a thorough philosophical inquiry into the nature of symbolic meaning generally. Before their scientific problem was solved even partially, three things had happened. First, every one of the aforementioned mathematicians found that in order to be a mathematician he had to investigate philosophical problems. Second, the technical concepts of mathematics became defined in terms of those of logic; only then did the aforementioned proofs become rigorous. Third, an entirely new logic, called symbolic logic, within which traditional mathematics and traditional logic are but special cases, had to be invented. The present result is that the Chairman of the Department of Mathematics at Dartmouth College and many of the research men engaged in the industrial building of calculating machines and in the military leaders' study of strategy are Ph.D.'s in philosophy and logic rather than in mathematics. These developments remind us that as the problems of a subject become philosophical, thereby turning its experts into philosophers, and as new philosophical solutions of these problems are found, novel practical consequences ensue. The fourth, and perhaps most far-reaching result of these developments in mathematics is the discovery of what Whitehead and Russell have called the "incomplete symbol."²

Such symbols have been described by Lord Russell as those which "have no significance in isolation, but only contribute to the significance of whole sentences."³ This failure to possess a meaning when considered by themselves means that any science containing incomplete symbols cannot be understood if it uses only the method that is appropriate for determining the meaning of its ordinary, or complete, symbols. It is now known that not merely mathematics and mathematical physics, but also common-sense language and, hence, in all likelihood, law, contain many incomplete symbols. This discovery constitutes the major thesis and method of Cambridge and Oxford analytic philosophy today and of the younger generation of American philosophers. It has already been introduced into the study of law in Britain

2. A. N. WHITEHEAD & BERTRAND RUSSELL, *PRINCIPIA MATHEMATICA* c. 3 (Cambridge, 1925); BERTRAND RUSSELL, *INTRODUCTION TO MATHEMATICAL PHILOSOPHY* c. 17 (London, 1920).

3 BERTRAND RUSSELL, *PORTRAITS FROM MEMORY* 42 (New York, 1956).

by Professors Glanville Williams and Graham B. J. Hughes, and by the newly appointed Regius Professor of Jurisprudence at Oxford, Mr. H. L. A. Hart, who, although he trained as a lawyer and practiced at the bar, was at the time of his appointment Lecturer in Philosophy, undoubtedly on incomplete symbols, at Oxford University.⁴

Why are incomplete symbols likely to become important for lawyers? The answer is simple. Failure to recognize them will result either in the filling of one's subject matter with nonexistent objects or in the erroneous conclusion that because many abstract nouns of legal science, such as "right," "duty," "obligations," and "justice," do not refer in isolation to concrete objects for their meaning, they, therefore, have no scientific meaning whatever. It is the great merit of the American legal realists, in their emphasis upon concrete cases, facts, and the prediction of facts as a necessary criterion of conceptual meaning in law, to have avoided the first of these two errors. It is their weakness, in the opinion of contemporary Scandinavian and British legal scientists, to have fallen into the second of these errors because of their failure to note the existence of incomplete symbols.

Consideration of the aforementioned dx/dy symbol of mathematical physics as it functions in the notation of the differential calculus will show what is meant. Taken in isolation from the other symbols in this notation, it might seem to mean a certain number dx , referring, say, to distance, divided by another number dy , referring to time. As it functions, however, in the notation of the calculus, dx/dy is the symbol by means of which the physicist expresses the velocity of an object at a given instant of time t . Put in more concrete terms, this means that dx/dy is the symbol by means of which the mathematical physicist expresses the velocity of a train as it passes, let us say, the Bridgeport station at the instant 8:00 a.m. sharp. Yet, clearly, there can not be a velocity at an instant since an instant has no temporal extension, and any velocity requires a stretch of time in order to be. The question, therefore, arises, What is the meaning of the symbol dx/dy ? If one treats this question with the scientific method the scientist uses to define the symbol "train," i.e., the method of ostensive definition or denotation in terms of empirically verifiable and, hence, existent objects, one fills the universe, as did the early modern mathematicians, with an infinite number of nonexistent objects called infinitesimals. Clearly, this is nonsense. Yet, equally clearly, the dx/dy symbol has a very precise scientific meaning, for

4. Glanville Williams, *Language and the Law*, 61 LAW QUARTERLY REVIEW 71, 179, 293, 384 (1945); *id.* 62 at 387 (1946). GRAHAM B. J. HUGHES, JURISPRUDENCE c. 1 (London, 1955). H. L. A. Hart, *Definition and Theory in Jurisprudence*, 70 LAW QUARTERLY REVIEW 37 (1954).

without it the state of a physical system at a given time cannot be expressed, and, forthwith, the entire exactness and predictive power of physics collapses.

This problem was resolved by distinguishing between complete symbols such as "train," "station," "case," "court room," and "judge," which do have a meaning in isolation that is determined by ostensive reference to, or by definition in terms of, empirically observable and, hence, existent concrete objects, and incomplete symbols such as dx/dy , which, as their name implies, require their relations to other symbols of the expressions in which they occur to be specified before their precise scientific meaning is made evident. Thus, in his analysis of the notation of the differential calculus, the mathematician G. H. Hardy writes that " dy/dx does not mean 'a certain number dy divided by another number dx ': it means 'the result of a certain operation D_x or d/dx applied to $y = \phi(x)$,' the operation being that of forming the quotient $\{\phi(x+h) - \phi(x)\}/h$ and making $h \rightarrow 0$."⁵ If the Regius Professor of Jurisprudence at Oxford is correct, most of the abstract nouns of law, such as right, obligation, etc., are incomplete symbols, and legal science, consequently, needs a quite different method of analyzing its cases and elucidating its subject matter from that of either the classical British legal positivists or the American legal realists.

In any event, two things are clear: (1) The issue between the American legal realists and Professor Hart's theory of the method appropriate for the determination of the meaning of legal concepts takes one to very technical philosophical distinctions and methods. (2) The impact upon British law of the philosophical solution of the basic problems of mathematics which arose at the end of the nineteenth century has resulted in at least one person, Professor Hart, finding it necessary to become a philosopher in order to understand his own science of law.

Within American legal science other developments enforce a similar conclusion. In a recent lecture Professor Arthur L. Corbin described legal education during the first two decades of this century and his discovery that its conception of the subject matter of law was erroneous. This conception was that of the natural law thinkers such as Blackstone and Simeon Baldwin. According to this philosophy, legal science possessed certain fixed and eternal principles which supposedly could be found and memorized, and the practice of law consisted in bringing any concrete case under these principles. With Langdell at Harvard the case method had been introduced into American legal study. As Professor Corbin made clear, an examination of the cases failed to make them fit the traditional Blackstonian natural law formulae.

5. G. H. HARDY, *PURE MATHEMATICS* 205 (Cambridge, 1928).

Had you been in the legal philosophy seminar just previous to Professor Corbin's lecture, you would have heard Professor Wesley Sturges describe the same phenomenon and his similar reaction to it. Note the questioning of traditional theoretical assumptions and scientific methods, a sure sign that the basic problems of one's subject are becoming philosophical.

Surprisingly, however, or perhaps not so surprisingly, the conclusion at which Professor Sturges arrived in his seminar lecture immediately preceding the public lecture by Professor Corbin was the direct opposite of the conclusion reached by Professor Corbin. For the latter the application of the empirical method to the study of statutes and cases takes one to new principles of law, replacing those of Simeon Baldwin and Blackstone;⁶ for Professor Sturges it results in the conclusion that legal science contains no principles, either new or old, and that the search for principles is merely an emotive hang-over from the past which one should get rid of as quickly as possible. Professor Sturges' work in the field of arbitration⁷ and the late Professor Shulman's recommendation of arbitration rather than litigation under legislative statutes and legal principles in the field of labor law⁸ support this existentialist philosophy of law—the philosophy which affirms that it is of the very nature of any concrete case of ethical or legal judgment that it is particular and unique, and that, hence, one falsifies the very nature of any dispute if one attempts to resolve it by recourse to universal principles, thereby treating it as if it were like other disputes.

Why this radical difference in the results of the application of the empirical scientific method to legal cases upon the part of Professor Corbin and of Professor Sturges? At least three factors enter into the answer to this question: (1) the plurality of empirical scientific methods; (2) the impact of sociology, particularly that of Sumner and Keller, upon Professor Corbin's thinking; and (3) the importation into the United States from Great Britain of Austin's positivistic philosophy of law. Let us consider these three factors in turn.

The method of mathematical physics is certainly empirical. Yet it gives general principles and universal laws. Hence, empirical physical science is not existential, after the manner of Professor Sturges' legal science. No physicist supposes that his scientific task is completed if he merely finds a particular fact in its unique particularity; he must also find the general principle or universally quantified law of which this fact is an instance. These universally quantified theoretical principles are, to be sure, never eternal, abso-

6. ARTHUR L. CORBIN, *CORBIN ON CONTRACTS III-VI* (St. Paul, 1950).

7. WESLEY A. STURGES, *CASES ON ARBITRATION LAW* (Albany, 1953).

8. Harry Shulman, *Reason, Contract, and Law*, 68 *HARVARD LAW REVIEW* 999 (1955).

lute and final with respect either to their content as humanly knowable or to their empirical verification. None the less, there are universal principles, and it is the business of empirical physical science to find them. Professor Corbin's theory of empirical legal science clearly fits this conception of scientific method. The philosophy of law and its method which his procedure rests upon and presupposes is, therefore, essentialism or universalism, rather than existentialism.

In Professor Corbin's lecture there was more than an occasional reference to the *mores* of society. This is the language of sociological jurisprudence and of Professor Corbin's Yale teacher and friend, the sociologists Sumner and Keller. Their word *mores* refers clearly to the normative ordering relations of the individuals in society and is equivalent to what the anthropologists call "the pattern of a culture"⁹ and the Austrian sociologist of law, Ehrlich, termed "the living law."¹⁰ Henceforth, we shall follow Ehrlich's usage, calling Professor Corbin's cases and induced principles "the positive law," and his *mores* of society "the living law."

In any society there are always deviants from the normative ordering relations of its living law; these deviants, however, constitute a minority. As the anthropologist Professor E. A. Hoebel has pointed out recently, the living law of any people is in part a qualitative, and in part a quantitative, or statistical, concept, because a large percentage of the people, but not all, habitually follow common qualitative normative principles for ordering their social relations.¹¹ Otherwise there would be anarchy rather than society or culture. This, again, supports Professor Corbin's thesis that, although it is impossible to find, by an empirical study of legal cases, a single set of principles which will fit every case, none the less at any given time a tentative set of such principles covering the majority of cases can be found. These principles which must be induced afresh in each generation reflect the changing *mores* of the society.

The latter thesis unequivocally connects the positive law with the living law. Nevertheless, Professor Corbin's description of the legal student's subject matter restricted it to the positive law alone. The task of legal science is to take the statutes of the legislature, together with the cases provided by the courts, and to arrive, by inductive generalization from such

9. RUTH BENEDICT, *PATTERNS OF CULTURE* (Boston, 1934); A. L. KROEBER, *CONFIGURATIONS OF CULTURE GROWTH* (Los Angeles, 1944).

10. EUGEN EHRLICH, *FUNDAMENTAL PRINCIPLES OF THE SOCIOLOGY OF LAW* (Moll transl., Cambridge, Mass., 1936).

11. E. A. HOEBEL, *THE LAW OF PRIMITIVE MAN, A STUDY IN COMPARATIVE LEGAL DYNAMICS* (Cambridge, Mass., 1954). F. S. C. NORTHROP, *EUROPEAN UNION AND UNITED STATES FOREIGN POLICY* c. 3 and 6 (New York, 1954).

materials, at tentative general principles which define the law. In short, the living law belongs to social and political science, not to legal science; law is the empirical science of the positive law.

II

But why, if the law is so essentially connected to the *mores* of society, is not its study as much concerned with the living law as with the legislative statutes and the judicial decisions of the positive law? This question brings us to a third legal philosophy within recent American law: legal positivism. It derives by way of Thayer of the Harvard Law School from Austin in England. Professor Corbin and the Yale Law School of Dean Swan's regime were profoundly influenced by it, as were Judge Learned Hand and Justice Frankfurter. According to Austin, the subject matter of legal science is the positive law alone.

In his law-journal articles on Justice Stone and Judge Swan,¹² Judge Learned Hand describes (a) how Thayer of the Harvard Law School had become, in the early decades of this century, "the prophet of a new approach" to the judge's concept of his role in interpreting the Bill of Rights and (b) how this new approach captured "young Stone" as a law student, dominated Dean and Judge Swan's thinking, and after spreading from the Harvard of Thayer's time throughout the United States, finally became the opinion of the majority on the Supreme Court. According to this new legal philosophy, as described by Judge Hand, "the Bill of Rights could not be treated like ordinary law; its directions were to be understood rather as admonitions to forbearance" to the electorate and the legislators. Dominated by this Austinian legal positivism of Thayer, which equates the legally just with the will of the legislature, the majority of the new Court found it not merely possible but also necessary in principle, if they were to be jurists of scientific integrity, to depart from the older Court's precedents in which majority-approved social legislation was declared to be unconstitutional because it conflicted with "the due process clause" of the Bill of Rights; thereby the new social legislation became law. Justice Douglas, who participated officially in these events, refers also to Thayer in support of his and the majority of the Court's action.¹³

These historical events, explicitly mentioned and described by Judge Hand

12. Learned Hand, *Chief Justice Stone's Concept of the Judicial Function*, 46 COLUMBIA LAW REVIEW 696 (1946); *Thomas Walter Swan*, 57 YALE LAW JOURNAL 167 (1947), republished in *THE SPIRIT OF LIBERTY* 201-219 (Dilliard ed., New York, 1953).

13. WILLIAM O. DOUGLAS, *WE THE JUDGES, STUDIES IN AMERICAN AND INDIAN CONSTITUTIONAL LAW FROM MARSHALL TO MUKHERJEA* 430, n. 2 (New York, 1956).

and Justice Douglas, demonstrate that a shift in the basic philosophy of law—in this instance the shift from the natural law philosophy of Blackstone, Simeon Baldwin, and the Old Court to the positivistic philosophy of law of Austin, Thayer, Judges Hand and Swan, and the majority of Justices of the New Court—results in an epoch-making difference in the way a concrete case is decided. Clearly, cases alone, or even cases, the Bill of Rights, and the legislative statutes together, are not enough; the philosophy of law which the judge or the legal scientist brings to the cases, the Constitution, the Bill of Rights, and the legislative statutes is equally important. In fact, it is all-important since it determines the interpretation that is put upon the Bill of Rights, the legislative statute, and the case.

Why does the positivistic philosophy of law have such an effect? To answer this question we must go back beyond Thayer to Austin.

Law, according to Austin, is identified with the commands or will of the sovereign,¹⁴ where this will is indivisible and legally unlimited.¹⁵ It follows that legal sovereignty cannot be divided between the executive, legislative, and judicial branches of government, but must be located completely in one of them. In a society, therefore, whose living law is monarchical, this definition of law requires the placing of the whole of the government's sovereignty in the executive branch, i.e., an absolute monarch. In a society where living law is democratic, it necessitates similarly that the whole of political sovereignty must be placed in the legislative branch. From this, three things follow: (1) The executive becomes merely the spokesman for, and executive officer of, the majority in the legislature. This is the case in Great Britain and in Free India. (2) The judiciary becomes merely the instrument for taking the will of the legislature as expressed in its statutes as the sole meaning of law and for applying this purely statutory positive law to the settling of disputes; all previous judicial decisions, if scientifically correct, being such applications of the legislature's absolute and legally unlimited will. Hence, the epoch-making effect upon recent American politics and United States Supreme Court decisions of the British positivistic philosophy of law which came into this country through Thayer.

Austin's legal positivism has one other consequence. Since it equates the whole of law with a sovereign will which is legally unlimited, thereby restricting, in a democratic society, the tasks of advocates and judges to the application of the legislative statutes to concrete cases, it follows that (3)

14. JOHN AUSTIN, *THE PROVINCE OF JURISPRUDENCE DETERMINED AND THE USES OF THE STUDY OF JURISPRUDENCE* (new edition, with an Introduction by H. L. A. Hart) 1-33, 123, 132-133, 193-194, 253-254 (London, 1954).

15. *Id.* at 254. See also HUGHES, *op. cit.* at 4 *supra*, 71.

the subject matter of legal science is nothing but the positive law. In all probability, it is the influence of legal positivism upon Professor Corbin and the Yale Law School of Dean Swan's era which led Professor Corbin in his recent lecture to equate the study of law with the inducing of general principles from the positive statutes and cases, notwithstanding his explicit recognition of the essential connection between the positive law and the living law.

In a society such as that of Great Britain or the United States where the positive law has arisen out of its own living law, such a training of future advocates and judges will result perhaps in but minor errors and inadequacies. Today, however, British and American law schools contain a large number of students from non-Anglo-American societies. Also, British and American lawyers are being constantly called upon to advise the political and legal leaders of such countries upon the effective introduction of modern Western positive law. The living law of these non-Western societies is not that of Great Britain or the United States. The task, therefore, confronting both these foreign law students when they return to their native people and the American and British legal advisers to such people is that of applying modern Western liberal democratic positive law to peoples with a quite different living law. For such legal demands, a philosophy of law and a legal education which equates the whole of legal science with nothing but the positive law is quite inadequate. It appears, therefore, that a law school which provides its students with the legal skills for meeting the legal demands that are likely to be placed upon them in today's world must have a richer and more complex philosophy of law and its scientific methods than legal positivism provides. More specifically, three things must be taught: (1) the method of legal positivism for determining the positive law; (2) the method of sociological jurisprudence for determining the living law of any society; and (3) the method or art, yet to be specified, for making (1) effective in (2) when the norms of (1) and (2) differ.¹⁶

What is the method of sociological jurisprudence for determining the living law? A reading of the works of Dean Emeritus Roscoe Pound, who was the first to introduce this sociological philosophy of law into the United States, and of Ehrlich, who following upon Savigny, pioneered in this philosophy of legal science in Europe, will show that they threw very little light upon the scientific method which the sociologically trained lawyer is to use to determine the living law.

It is the great merit of Underhill Moore that he saw this weakness in the traditional sociological jurisprudence and made the first constructive

16. For a discussion of the latter problem, see the writer's *THE TAMING OF THE NATIONS* c. 7 and 9 (New York, 1952).

attempt to remove it.¹⁷ Like Walter Wheeler Cook, he was aware that modern scientific method is a very much more philosophically subtle and complicated thing than many social scientists and lawyers realize. This led Moore to study the method of modern physics in its complexity and to bring philosophers of natural science into his seminar on legal theory and method to help him in this task.

Modern physicists had found it necessary to do the same thing. When the Michelson-Morley experiment of 1885 revealed an indubitable fact which simply should not exist on the theoretical assumptions concerning space and time of Maxwell's and Newton's physics, and Einstein became convinced that those assumptions must be modified in a fundamental manner, he was confronted with a methodological difficulty. Newton, when he suggested that he made no hypotheses and that he had deduced the concepts of his physics from the experimental data, left the impression that a proper conception of scientific method was one in which there were no theoretical assumptions which the experimental facts did not give or logically necessitate. On this conception of scientific method, Newton's basic theoretical assumptions simply could not be wrong. Thus, Einstein found himself forced to carry through a philosophical analysis of the relation between the data of experimental physics and the concepts of its theory.

Einstein once told me that it was his reading of the philosopher Hume which convinced him that Newton's conception of scientific method was false, and which, therefore, gave him the courage to suggest an alteration in Newton's basic assumptions. What Hume made clear to Einstein, and what Hume makes clear to anybody who reads him with care, is the restricted meaning of causality, different from that of physics, and the limited set of notions with which one would be left if one based scientific knowledge on nothing but the directly sensed facts themselves and what they logically imply. This reading of Hume convinced Einstein that modern physics is impossible unless certain concepts going beyond the observed facts are introduced speculatively and constructively and tested only indirectly by way of their deductive consequences.¹⁸ Then it was not merely possible, but also methodologically proper, to replace Newton's theoretical assumptions with a different set from which Newton's theory derives logically as a special case, applying to certain of the experimental facts but not to all of them.

17. Underhill Moore & Charles C. Callahan, *Law and Learning Theory: A Study in Legal Control*, 53 *YALE LAW JOURNAL* 1-136 (1943).

18. See ALBERT EINSTEIN, *THE WORLD AS I SEE IT* 35-36 (New York, 1935); also the writer's *Einstein's Conception of Science in Albert Einstein: Philosopher-Scientist*, 8 *LIBRARY OF LIVING PHILOSOPHERS* c. 14 (1949).

In short, before Einstein had cleared up the problems raised by the Michelson-Morley experiment of 1885, the modern physicist not only found himself with a new philosophical theory of time and of space and of their relations to one another and to matter, but also with a new philosophical analysis of the complex nature of scientific method and the relation between its theoretical concepts and the observed data.

It was this enriched conception of scientific method which Underhill Moore introduced into sociological jurisprudence in order to provide not only the lawyer but also the sociologist with a trustworthy method for determining the living law of any culture. His use of this method was not born merely of the desire to ape physicists. There were reasons for it within the very nature of sociological jurisprudence itself. He reasoned that if the claim of sociological jurisprudence is correct it should provide a specific scientific method for determining what the living law is in an objective manner which is quite independent of the private preferences and enthusiasm for reform of the observer, and equally independent of the method used to determine the positive law. If it is to be of any practical use, it must also be applicable to the norms of social behavior beside the Yale Law School on the streets of New Haven. Furthermore, if the living law has any relevance to the positive law, it ought to be possible, for example, by going out into the banks of New Haven, New York, Pennsylvania, and South Carolina, to determine the high frequency order of the transactions between the people in these social institutions and then to compare this normative order of the living law with that based upon the norms of the positive law to find out what this relevance is. In his earlier, "institutional" studies he used the common-sense terms of a merely inductive natural-history scientist.¹⁹ The results were sufficient to convince him in a rough way that the thesis of sociological jurisprudence was confirmed. He found, for example, in judicial disputes of three factually similar cases in commercial law appearing in the state courts of Pennsylvania, New York, and South Carolina that the norms of the living law supported the judicial decisions of the three cases, in which two of the state courts gave the verdict one way and the third court gave it the opposite way. He became convinced, nevertheless, that the empirical method he had used involved too many intuitive judgments to be adequate as a method for sociological jurisprudence.

He then shifted his studies to car-parking habits of people on the streets of New Haven. He soon found that, when he allowed observers to use

19. Underhill Moore, *Institutional Studies*, 38 *YALE LAW JOURNAL* 703 (1929); 40 *YALE LAW JOURNAL* 381, 555, 752, 928, 1055, 1219 (1931); 42 *YALE LAW JOURNAL* 817, 1198 (1933); 45 *YALE LAW JOURNAL* 1, 260 (1935).

ordinary extemporized prose to describe such an apparently objective phenomenon, different observers failed to give similar descriptions of what occurred. This convinced Moore that extemporized prose will not do in sociological jurisprudence. By such means, in the name of the objective living law, a sociological jurist can smuggle in his own particular arbitrary normative preferences and prejudices. However human this may be, this clearly is not science, either social or legal. Thus, sociological jurisprudence itself called for the more philosophically subtle and conceptually precise scientific method which mathematical physics might provide.

A second consideration suggested the same conclusion. It has been noted that legal positivism identifies the legally just with the positive law. To say that anything is just is to say that it is either a statute of the legislature or a judicial decision or act which is in accordance with such a statute. From this it follows that there is no meaning in legal science for saying that the positive law is illegal or unjust.²⁰ Sociological jurisprudence has the merit of providing a criterion for judging the justice of the positive law. This is possible because of its extension of the subject matter of legal science from the positive law to the living law. This permits the sociological jurist to define good or just positive law as that positive law whose norms conform to the empirically determined objective norms of the living law. Positive law is bad when, with changes in the living law, the positive law, due to its principle of *stare decisis*, lags behind the evolving new norms of the living law.

Suppose, however, as was probably the case in Germany immediately before World War II, that the empirical study of its living law would reveal it to embody, with high statistical frequency, the norms of Hitler and his cohorts. Consider also the unanimous United States Supreme Court decision on segregation in education. The latter decision passed legal judgment not merely on the positive legislation, but also on the living law, of the Southern States. These considerations make it clear that an adequate legal science must provide a meaningful criterion for judging the legality of the living, as well as the positive, law. Can sociological jurisprudence do this?

Clearly, one cannot identify the criterion for judging today's living law with the "is" of today's living law itself. Such a procedure would make the "is" of the living law of Hitler's Germany or of the Southern States just.

Nevertheless, a sociological jurisprudential criterion suggests itself. This criterion is to identify the standard for measuring today's living law with the "is" of what tomorrow's living law is going to be. But if this criterion is to be scientifically specifiable, legal science must have a scientific method such

20. See Austin, *op. cit.* at 14 *supra*, 184, 260-261.

that, given the objective determination of today's living law, this method enables one to deduce today what tomorrow's living law will be. This is precisely what the method of modern physics accomplishes. In Newton's physics, for example, given the positions and momenta of the masses of an isolated system today, the method and theory enable one to deduce what their positions and momenta will be tomorrow. This is the second consideration within sociological jurisprudence itself which led Moore to turn to the method of mathematical physics.

This method requires not merely inductive observation, experimentation and concrete operational definitions, but also abstract, axiomatically constructed, deductively formulated and indirectly verified theory. Moore went at least part way toward achieving a legal science with such a method by basing his sociological jurisprudence on the behavioristic psychology of Clark Hull,²¹ which had been given a rigorous axiomatized deductive formulation.²²

When Underhill Moore's observers of car parking in New Haven described what they saw in terms of the concepts of this theory, they brought back similar reports of the situations which they observed. Thus, the first of the difficulties in traditional sociological jurisprudence—that of keeping the observer's subjective preference and normative prejudices out of his description of the living law—was removed. When, however, using the assumptions of this method and theory, Moore and his colleague Professor Charles C. Callahan attempted to find a mathematical formula connecting the present living law to the future living law, even for such a simple social phenomenon as car parking on the streets of New Haven, the theory did not give such a formula as a postulate or deduced theorem. Nor did Moore and Callahan succeed in finding even an empirically satisfactory formula.

It is one of the greatest tributes to Underhill Moore that he never fooled himself about what he did, confusing claims for sociological jurisprudence with its methodological achievements. He was one of the most honest men who ever lived, and, because of this honesty with respect to what he did achieve and what he did not achieve, he provides the touchstone for judging contemporary legal theory. His work showed that sociological jurisprudence did not have a method for judging the living law.

Since, as previously noted, most of the societies in the world today, including even the United States in the segregation case, are requiring their lawyers and judges to advise and pass legal judgment on both the positive

21. C. L. HULL, *PRINCIPLES OF BEHAVIOR* (New York, 1943).

22. C. L. HULL, C. I. HOVLAND, R. T. ROSS, M. HALL, D. T. PERKINS & F. B. FITCH, *MATHEMATICO-DEDUCTIVE THEORY OF ROTE LEARNING* (New Haven, 1940).

and the living law, it appears, therefore, that contemporary legal science must embrace more than even legal positivism and sociological jurisprudence. One can no more get the criterion of the "ought" for judging the "is" of the living law out of the "is" of the living law of sociological jurisprudence than one can get the criterion of the "ought" for judging the "is" of the positive law out of the "is" of the positive law of legal positivism. In fact, there is a logical, as well as a methodological, block in the way. The logical difficulty is that the "ought" for judging the "is" of a particular subject matter cannot be found in the "is" of that subject matter itself. Sociological jurisprudence falls short when lawyers and judges are forced, as is the case today, to pass judgment on the "is" of the living law. Put positively, this means that legal science must affirm certain propositions to be true independently of and logically antecedent to both the positive law and the living law.

The problem, however, is to give methodological and objectively verifiable content to this thesis. The only factor in human experience and scientific knowledge fulfilling this condition is nature and natural man, i.e., those facts in human experience, present in any society or culture, which are not the result of the beliefs of man and their deeds as directed by these beliefs. The thesis that there are scientifically verifiable theories of such facts and that such theory provides a criterion for measuring both the positive and the living law is the distinguishing mark of natural law jurisprudence.

The doctrine of natural rights of the Declaration of Independence and of the Bill of Rights as interpreted by the courts before the advent of Thayer's legal positivism is one example of such a philosophy of natural law—the philosophy, namely, of Jefferson, who wrote the Declaration of Independence and who, because he was as fearful of tyranny of the legislature as he was of a tyranny of the executive or the judiciary, insisted on a mixed form of government and upon adding a Bill of Rights to the Constitution.²³ To Jefferson's natural law jurisprudence we shall return in the sequel.

The limitations of the sociological jurisprudence of Underhill Moore showed in one other way. His grounding of it in the deductively formulated behavioristic psychology of Hull required a spatio-temporal description of the objective movements of every individual in a given social system in order to determine a living law of that system at a given moment. This was practical for the car parkings in a few blocks on the streets of New Haven. It is quite impractical for specifying the living law of 350,000,000 people in

23. *THE PAPERS OF THOMAS JEFFERSON* 34, 189, 440 (Boyd ed., Princeton, 1955). Cf. Claude G. Bowers, *Jefferson and the Bill of Rights*, 41 *VIRGINIA LAW REVIEW* 709, 720 (1955).

contemporary India. Thus, even for determining the "is" of the living law, to say nothing about providing a criterion for judging its justice and for reforming it, his method for sociological jurisprudence is inadequate.

None the less, even with the method of natural law jurisprudence, a more adequate method for determining the living law of sociological jurisprudence is required. Otherwise the lawyer does not appreciate the living habits and customs of the people which must be reckoned with in an effective application of new positive law, or new natural law principles of reform, to a given people. There are reasons for believing that contemporary cultural anthropology and the philosophy of culture have found the required method for determining the living law of sociological jurisprudence.

Ehrlich defined the living law as "the inner order of the associations" of people in a society. Put more concretely, this means that the social norms with which law is dealing are not determined by any particular fact or factor in human experience, such as man's economic needs, his sexual desires, or his physical power, but with the way in which all these and other facts are related and put together. It is not any particular fact, but the "inner order" of all the facts, that constitutes the living law. Ehrlich's "inner order," let it be recalled, is equivalent to what anthropologists call the "pattern" of a culture. Professor A. L. Kroeber, speaking for anthropologists generally, notes also that "Values . . . are intimately associated with the most basic and implicit patterning of the phenomena of culture."²⁴

The words "pattern" and "inner order" are, however, metaphors; they do not refer to concrete facts, nor are they scientific concepts with a literal meaning in isolation. The pattern of a culture is hardly something concrete which one can observe after the manner in which one sees the terrain of a river valley from an airplane. At best, the words "pattern" and "inner order" are incomplete symbols. Hence, the scientific method of determining the inner order or the pattern of a culture must be complex; it cannot be that of direct observation, even though empirical observation of a people and their culture is obviously required. What is this complex method? Anthropological science provides the answer to this question, as does independent work in the comparative philosophy of the world's cultures.

Anthropologists first thought, after the manner of those legal realists who rejected theory for the empirical study of cases, that the method of anthropological science consisted merely in going into the field to live with a particular people or tribe and to observe what one sees and hears. After many years of such observing and the writing of scientific reports, a few

24. AN APPRAISAL OF ANTHROPOLOGY TODAY 373 (ed. by Sol Tax, Loren C. Eiseley, Irving Rouse, & Carl F. Voegelin, Chicago, 1953).

anthropologists suddenly awoke to the fact that they had been misunderstanding the facts which they observed and described. They discovered, moreover, that this occurred because they had been describing and conceiving of what they saw the native people doing in concepts brought to the observed facts by the anthropologist himself, instead of in the way these facts were thought of and, hence, understood and ordered by the native people. Paul Radin among the first and Professor Clyde Kluckhohn later discovered that in order to specify objectively the living norms and customs of a people, empirical anthropology has to determine their basic mentality. When Professor Kluckhohn did this for his Navaho, he found himself confronted with a complete Navaho philosophy.²⁵ The anthropologist Professor Cornelius Osgood found also that he had to attend even to the epistemology of the native people's way of knowing anything.²⁶ It is any people's sharing of their particular philosophical way of describing, ordering, integrating, and anticipating the raw facts of their experience which makes their culture and its living and positive law what it is. Professor Hoebel comes to a similar conclusion in his study of seven different primitive peoples and their significantly different living laws. Methodologically he finds also that anthropological science and comparative sociological jurisprudence, in determining the pattern or living law of a given people or culture, must combine inductive observation of their features, ceremonies, and behavior with a deductive specification of their common philosophical assumptions, these common assumptions differing from culture to culture and from tribe to tribe.²⁷ Studies in the comparative philosophy of the world's cultures lead to the same conclusion.²⁸ It appears, therefore, that not only are the basic and most pressing problems of contemporary law philosophical as well as scientific in character, but even the scientific method of sociological and anthropological jurisprudence is itself philosophical, being that, in part at least, of the philosophy of culture.

25. Clyde Kluckhohn, *The Philosophy of the Navaho Indians*, in *IDEOLOGICAL DIFFERENCES AND WORLD ORDER* c. 17 (Northrop ed., New Haven, 1949).

26. Cornelius Osgood, *Culture: Its Empirical and Non-empirical Character*, 7 *SOUTHWESTERN JOURNAL OF ANTHROPOLOGY* 202-214 (1951).

27. See note 11, *supra*.

28. F. S. C. NORTHROP, *THE MEETING OF EAST AND WEST* (New York, 1947); *The Importance of Deductively Formulated Theory in Ethics and Social and Legal Science*, in *STRUCTURE, METHOD, AND MEANING, ESSAYS IN HONOR OF HENRY M. SHEFFER* 99-114 (New York, 1951).

III

It is not merely with respect to the general theoretical and methodological assumptions of its science that contemporary law faces inescapable philosophical problems and tasks. Philosophical issues appear also in technical portions of the positive law itself. Brief consideration of some recent decisions of the Supreme Court of the United States will make this clear.

It has been noted that the government of the United States is a mixed government and that the theory of law of its founding fathers was that of a natural rights and a natural law philosophy. According to this theory, certain things are true before the legislature, the courts, or the executive come into existence. Hence, these truths, expressed in the Declaration of Independence and the Bill of Rights, provide principles for the courts to use in judging legislative statutes as to their justice or injustice and even for judging the living law from which these positive legislative statutes derive.

Jefferson tells us that his three gods were Bacon, Newton, and Locke.²⁹ The presence of Newton in this trinity indicates that Jefferson drew from the theory of the natural philosopher as well as that of the social scientist and humanist for the criterion of his legal, moral, political, and even religious thinking. The philosophy of nature and natural men as well as the philosophy of society and cultural man is functioning in his criterion of the morally good and the legally just.

For our present purposes, the most significant person in Jefferson's trinity is Locke. It was Locke who gave the natural law philosophy of Jefferson and our founding fathers its particular modern content. In his classic treatise *Of Civil Government*, Locke affirms that the sole justification of the existence of government is the preservation of the property of the individual.³⁰ In reading this statement today we must remember that he meant by property man's own body and person as well as what man has achieved by applying his labor to the God-given materials of nature. In short, Locke's concept of property includes personal rights, as well as property rights in the narrower sense. From this theory of government, Locke draws the conclusion that it would be a contradiction in terms for the government to take any property away from the individual, since the sole justification for the existence of government is the preservation of the property of the individual.³¹

29. *THE LIFE AND SELECTED WRITINGS OF THOMAS JEFFERSON* 609 (Koch & Peden ed., Modern Library, New York, 1944).

30. *JOHN LOCKE, OF CIVIL GOVERNMENT* 183 (Everyman's Library, London, 1940).

31. *Id.* at 187.

Here we have a philosophy of government and law which provides a basis for judicial review of legislative statutes and for the interpretation of the Bill of Rights, not, after the manner of Judge Hand and the legal positivists, as "merely admonitions of forbearance" or "counsels of perfection" to the electorate and the legislators, but as legal principles to be used by the courts to judge the justice and legality of the statutes of the States and of Congress. Any legislation, regardless of the size of the majority behind it, which takes away from the individual any of the personal or property rights specified in the Declaration of Independence and in the Bill of Rights, violates the *raison d'être* of the legislature's very existence and, hence, is illegal. The dissents of Justices Black and Douglas in the Feinberg Law case³² make such an argument and, hence, require such a natural rights philosophy for their justification. Undoubtedly, it was a natural law philosophy with Lockean and Jeffersonian content with respect to property rights that convinced the judges of the so-called "Old" Supreme Court of their rectitude in using the "due process" clause of the Bill of Rights to declare majority-approved social legislation unconstitutional.

Similarly, as noted above, it is the rejection of any natural law jurisprudence, whether of Locke, Jefferson, Blackstone, or St. Thomas, by (a) the American legal realists and (b) Thayer and his Harvardian legal positivists that not merely freed, but also required, the New Court to depart from the precedents of the past and to declare the new social legislation legal. If, as legal positivism affirms, law is the will of the legislature as sole, undivided and unlimited sovereign, then the law of contradiction appears with new content, and it becomes self-contradictory to declare a legislative statute illegal.³³

Curiously, not to say paradoxically, Justice Douglas, who presupposes a natural rights and natural law philosophy in his dissent in the Feinberg Law case, appeals to Thayer and legal positivism in justification of his position with the majority of the Justices on the new social legislation.³⁴ But if legal positivism is correct, then his dissent in the Feinberg Law case is an error, since according to legal positivism the content of the sovereign legislature's will as expressed in its statutes—whether they refer to social legislation or to personal rights is irrelevant—is the sole criterion of what is legal. The fact that it is the sovereign's will is all that matters.

The main point in this reference to Justice Douglas is not to point up the foregoing inconsistency. It should be evident at this point in this paper that

32. *Adler v. Board of Education*, 342 U. S. 496-497, 508-511 (1951).

33. See AUSTIN, *op. cit. supra*, note 14, at 260-261.

34. See note 13 *supra*.

no one has a single consistent theory of law that is adequate for all its needs and cases. As Justice Holmes noted, life is bigger than any legal theory. The point, instead, is to show that even a particular branch of positive law itself, namely, U. S. constitutional law, exhibits a problem which is inescapably philosophical in character, the philosophical issue, namely, between the philosophy of natural rights and natural law which Justices Black and Douglas and our founding fathers believe an adequate legal protection of life's civil liberties requires and the positivistic philosophy of law which these two Justices and the majority of the present Court believe an effective democratic solution of life's social problems calls for.

Let no one suppose that Justices Douglas and Black are the only people for whom this philosophical problem is real. Consider what happens, assuming a judge guided by legal positivism, if the majority in the legislature pass a statute making it a crime for an individual dissenter to practice his particular religious faith and convictions. Even Justice Frankfurter, notwithstanding his Harvardian and Oxfordian legal positivism, finds it difficult to stay with its implications at this point, as his dissent in the *Feinberg Law case*, even though on positivistic procedural grounds, shows.³⁵ Yet, if, as legal positivism affirms, justice is equated with the will of the undivided sovereign, then whatever the will of the legislature is, whether its statutes refer to personal or to property rights, the legislative statute is just. The question, therefore, cannot be escaped: What is going to happen to American civil liberties, to the supposedly basic and inalienable rights of freedom of worship and freedom of scientific, philosophic, political, or religious belief, if the positivistic legal philosophy, to which the present Supreme Court appeals to justify its decisions on social legislation, increases its hold upon legal education and lawyers and judges generally?

Consider also the recent unanimous decision on segregation in education. Insofar as there were any legislative statutes affecting the case, they were those of the Southern States which, if the legal positivist's identification of the legally just with a legislative statute be true, made segregation in education just in those States. Furthermore, Congress had provided the Federal Courts with no federal legislative statute making educational segregation in the positive or living law of any state a crime. Consequently, had the Supreme Court's Justices consistently applied the positivistic legal philosophy which they use to justify their decisions on social legislation, they would have had to conclude that insofar as there was any law or justice relevant to the case, it was that of the Southern State legislatures, and that insofar as any Federal

35. 342 U. S. 497-508 (1951).

Court is concerned, since there is no federal legislative statute making segregated education in the positive or living law of any state a crime, the Supreme Court of the United States, or any other federal court, has no jurisdiction in the case. In short, the positivistic philosophy of law to which a majority of the Justices appeal to justify their decisions on social legislation is incompatible with their unanimous decision on segregation in education.

The situation is better, but still unsatisfactory, if one considers this decision from the standpoint of the sociological philosophy of law. An examination of the original living law of this country and of its Southern component enables us, at least, to understand what has happened—namely, the general approval of the decision from the country as a whole and the bitterness with respect to it in the Southern States.

New England was founded in major part by nonconformist Protestants who came to the western hemisphere to escape from the rule of the religious majority in Europe and who, like Jefferson, were heavily under the influence of the philosophy of natural rights and natural law of Locke.³⁶ With the opening of the frontier, this living law spread to the Middle West and the Far West. It is exceedingly unlikely that legal positivism has seeped down from Thayer to the masses to a sufficient extent to alter this original and basic philosophy of American culture. The coming of Roman Catholics in large numbers brought in a natural law philosophy also. These two portions of the living law of the United States constitute a statistical majority of the people. Sociological jurisprudence tells us that when a positive legal decision has such qualitative and quantitative support from the living law it can come into being and be effective. Hence, this legal philosophy enables us to understand why, even though there was no positive federal legislative statute on the matter, the unanimous decision of the United States Supreme Court has occurred without a bitter reaction from the majority of the people.

In the Southeastern States, however, an additional, quite different living law came into being through the founders of the Virginia Company and their blood and cultural descendants who spread out to the South and Southwest. The English scholar Mr. Peter Laslett has recently shown that this living law derives from the *Patriarcha* of Sir Robert Filmer,³⁷ instead of from Locke and Jefferson. According to this patriarchal ethics and law, good government is government by the first families, and a good educational system is one modeled after seventeenth-century Episcopal Oxford and Cambridge—a system in which the best education goes to those carrying

36. NORTROP, *THE MEETING OF EAST AND WEST* 71 (New York, 1947).

37. SIR ROBERT FILMER, *PATRIARCHA* 1-46 (Laslett ed., Oxford, 1949).

the greatest familial and social responsibility, namely, sons rather than daughters, the eldest son rather than the younger son because of primogeniture, and, with few exceptions, the sons of the first families only. Equality of education for all, regardless of status and blood of birth, is foreign to the political, legal, and educational ideals of such a society. Jefferson's Lockean democratic egalitarianism modified this aristocratic patriarchal Filmerian living law of the South, but it never removed it.

Sociological jurisprudence tells us that when a positive law decision resting on one norm conflicts with living-law norms to the contrary, the positive law tends to be ineffective. The Prohibition Amendment is an example. Hence, the bitterness in parts of the South at the Supreme Court's decision.

Thus, although the sociological philosophy of law explains how the Supreme Court decision could occur without a federal legislative statute and indicates that it will have support from the country as a whole, it must also affirm that the decision is not law so far as the living law of the South is concerned. At the very least, a lawyer or judge guided solely by sociological jurisprudence might well have counselled living-law changes from below rather than a positive-law decision from above.

It appears, therefore, as with the dissents of Justices Black and Douglas in the *Feinberg Law* case, that the only philosophy of law which will justify the unanimous Supreme Court decision in the segregation-in-education case is one which affirms that legal science contains certain principles that are true independent of and antecedent to the positive or the living law, and that any positive legislative statute or living law custom which violates these principles is illegal. But, as noted above, the traditional philosophy of natural law of the United States is that of Locke, Jefferson, Blackstone, and Baldwin. This theory of law produced the Old Court and would probably require the present Court to follow old precedents in declaring recent social legislation to be unconstitutional.

Again we see how positive legal decisions of one and the same set of Justices in one and the same Supreme Court exhibit inescapable philosophical issues and problems. In fact, on any existent theory of legal science, it is very difficult to make the specific decisions of the present Supreme Court of the United States on social legislation, civil liberties, and segregation in education lie down consistently together.

Hence, the most pressing issue confronting positive American constitutional law and liberal democratic institutions generally is at bottom a philosophical as well as a legal problem. This problem is nothing less than that of so reconstructing the theoretical and methodological assumptions of legal science that a judge of scientific integrity will be free to allow the new social

legislation, without which democracy will fail, to stand, while at the same time not so tying the hands of the judge that by default of jurisdiction he will fail to protect the natural rights and civil liberties of individuals without which, also, there is neither liberty nor democracy.

The foregoing analysis suggests that a natural law jurisprudence with a content different from that of Locke and our founding fathers is required for such an undertaking. Even so, if this new philosophy of natural law ignores the living law of sociological jurisprudence, it will fail. Similarly, a sociological jurisprudence which does not implement itself through a reconstruction of the positive law will betray mankind also by failing to bring the available living cultural and moral resources of the world to bear upon the peaceful resolution of the disputes of men and nations. In an atomic age, such a failure is a serious thing.

Law is, indeed, a complex subject—more complex than any traditional theory has supposed. It has at least three parts, each with its particular scientific and philosophical method: (1) positive law, (2) living law, and (3) natural law.

In the Anglo-American common law world the scientific method for studying the positive law is inductive generalization, of the natural-history type, from particular cases and statutes, combined with the elucidation of the resulting legal concepts by the method of contemporary analytic philosophy. The latter philosophical method is required because the most important legal concepts are incomplete symbols. In the civil law tradition of the Continental European nations, Scotland, Quebec, and Louisiana, the method of determining the positive law is different. Instead of beginning with individual cases and applying to them the method of classification and case-by-case inductive generalization of the natural-history type of scientific procedure, the civil law must be approached, in most, at least, of its parts, with the deductively formulated theory of the method and mentality of mathematical physics as one's model.³⁸ Our earlier references to Professor Sturges remind us that there is a third type of positive law with its still different method. Treating each dispute as unique, it dispenses with legislative statutes, legal principles, and litigation, to settle disputes by the methods of arbitration and mediation.³⁹ This was the preferred method of positive legal procedure

38. See F. H. LAWSON, *A COMMON LAWYER LOOKS AT THE CIVIL LAW* (Ann Arbor, 1955) and this writer's review of it, 54 *MICHIGAN LAW REVIEW* 1029-1039 (1956).

39. CHIANG MONLIN, *TIDES FROM THE WEST* 255-256 (New Haven, 1947). F. S. C. NORTHROP, *THE TAMING OF THE NATIONS* c. 7 (New York, 1952); *The Philosophy of Natural Science and Natural Law*, *PROCEEDINGS OF THE AMERICAN PHILOSOPHICAL ASSOCIATION* 5-25 (1952).

in classical Confucian China. Gandhi turned to it in his South African period.⁴⁰ With the present vogue of philosophical existentialism, nominalism, and ethical subjectivism, accompanied by the increasing influence of Asia with its anti-litigational, mediational ethic of peace-making, this positive legal method is likely to take on increasing importance in the days to come.

The scientific method for determining the living law is that of deductively formulated and indirectly verified theory, as used in contemporary cultural anthropology and the comparative philosophy of the world's cultures. The scientific method of natural law jurisprudence is that of the philosophy of the scientifically verified theories of natural science, including psychology, when the latter science restricts itself to those facts about man that are logically antecedent to, and independent of, the cultural differences between men. Those psychological facts that are culturally relative belong to social psychology and to sociological jurisprudence, not to the psychology of natural man and to natural law jurisprudence.

Clearly, contemporary law is a challenging subject. Its challenge, moreover, appears to be inescapably philosophical with respect to both theory and method.

40. M. K. GANDHI, *GANDHI'S AUTOBIOGRAPHY, THE STORY OF MY EXPERIMENTS WITH TRUTH* 167-168 (Washington, 1948); F. S. C. NORTHROP, *Gandhi's Way to Peace*, in *THE TAMING OF THE NATIONS* c. 4.