Notre Dame Law School
NDLScholarship

Natural Law Forum

1-1-1958

Books Reviewed

Andrew Hacker

Alfred L. Scanlan

Arnold Brecht

J. M. Cameron

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

Part of the Law Commons

Recommended Citation

Hacker, Andrew; Scanlan, Alfred L.; Brecht, Arnold; and Cameron, J. M., "Books Reviewed" (1958). *Natural Law Forum*. Paper 34.
http://scholarship.law.nd.edu/nd_naturallaw_forum/34

This Book Review 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.

BOOKS REVIEWED

ON POLITICAL GOALS. By George Catlin. The Weil Lectures delivered at the University of North Carolina. New York: St. Martin's Press, 1957. Pp. 150. $2.75.

The author, so the dust jacket informs us, "is at once a political philosopher, professor and practical man of affairs." All this those of us who have followed the career of George Catlin know to be true. Yet I have another trinity of roles to bestow on him. They make curious bedfellows, and I am persuaded that an exploration of their peaceful coexistence can help us understand not only the workings of George Catlin's mind, but also the workings of the world in which we live.

A careful reading of his Weil lectures shows that Catlin has three commitments. He is, first of all, a man committed to a belief in natural law. He is, moreover, a member of the fraternity of social scientists. And he is, also, a democratic socialist. There will be no need to torture logic here: no attempt will be made to show that socialism or social science can be derived from an acceptance of natural law. It will be sufficient to see how these positions stand together, how they affect one another. It will also be interesting to approach this question through the mind and heart of George Catlin. While he is but one among many, the coherence of his position may serve to illustrate the outlooks of others in our midst.

On Political Goals is a tract for the times. It is a program spelling out strategy and tactics for the Free World's conflict with World Communism. It is at the same time a plea to the West to put its own house in order. No follower of Catlin's work will be surprised to learn that the capstone of his program is a Commonwealth of Free Nations based on what he calls "the power house of the West": the United States, Great Britain, and Canada. Whether or not it is realistic — or even idealistic — to talk of such an alliance is not my present concern. What I wish to do is to see if I can discover how the structure of values which is implicit and explicit in his thinking has come to be built.

Ever since the appearance of *The Science and Method of Politics* over thirty years ago, Catlin has been in the vanguard of social scientists. Always optimistic about man's potentialities for understanding himself, he has readily acknowledged the importance of the humble fact. Yet Catlin is a man of judgment. Social science is, after all, a method. He claims no more than this. If the scientific study of society appears to take the proportions of an ideology, that is the fault not of the discipline itself but of some overzealous social scientists who wax too eloquent about the unlimited vistas of their calling. It is easy — all too easy — to

denigrate the toilers in the vineyard: the fact-collectors. Professor Eric Vogelin, for example, has read his Auguste Comte and thereupon decided to write off as latter-day gnostics all of Comte's legitimate and illegitimate heirs. Indeed, by pasting a facile — not to say pedantic — label on their colleagues in anthropology, sociology, and social and clinical psychology, political theorists act as if they have come up with an ironclad dispensation which excuses them from not keeping up with developments in social science. How many students of Aristotle know what the "F-Scale" is? How many experts on Hobbes can make sense out of a "Thematic-Apperception Test"? How many commentators on the mistakes of Marx can compute a correlation coefficient? The fact that some of us feel that Comte was a gnostic does not mean that we have a right to stand apart from and in ignorance of the knowledge of man and society which our colleagues in social science are slowly and painstakingly accumulating.

Catlin never deserted the ranks of social science. No program, no policy, can be viable save by resting on a studied knowledge of human psychology and social structure. And such knowledge must be more than intuitive. The "nature of man" is not to be understood simply by the process of turning our minds inward. The assumption of all too many intelligent people is that they already know the significant facts. They read informative newspapers and magazines; they even chat with taxicab drivers. The supposed sufficiency of common sense is one of the grosser fallacies of our time. The "well-informed" layman of today has, in the final analysis, as stereotyped an image of his world and his fellow citizens as that of the taxi drivers who help to set the stage for him. What are the effects, for example, of segregation on the mind of the upper middle-class Negro? Does the average intelligent white man know? Would he know how to find out? Would he know how to interpret such clinical tests as he might come across? The psychological impact of segregation is a factual matter. And the facts in question must be uncovered by techniques which only the specialist can employ with any effectiveness. Facts such as these are central to a serious understanding of man. We cannot, to be sure, have facts about everything we want. But there is a far larger potential area of empirical knowledge within our grasp than most laymen will admit.

Next we have Catlin's socialism. This is never made explicit in his Weil lectures. Nor is there reason why it should be. After all, Catlin is not standing at Chapel Hill as Labour candidate for Parliament — a role he has filled several times in the past. Nevertheless, the rallying cries of his democratic, non-Marxian socialism ring through. Catlin's compassion is for the small man. "What has to be emphasized," he insists, "is a concern, of integrity, for little people, not indeed only because they are little but because they are people." Entrenched institutions of property, colonialism, and racial inequality ought to be swept away because they deny the possibility of the good life to millions of human beings. Those self-styled conservatives who make a principle of inequality are invariably the haves: all too often victims of pride and hypocrisy, they elevate their comfort and security to a pseudo-philosophy. Catlin is indignant, compassionate, and right. He sees that man's need for fraternity is central. All human creatures crave an equality of spirit and of fellow-feeling. Yet we cannot be content with a feudal or pa-

ternalistic fraternity: neither cant about the White Man's Burden nor self-satisfied musings about the Great Chain of Being can be allowed to confuse the main issue. Men must be taught to live together as genuine equals: material wealth, mutual esteem, political power — all these must be brought as close to a parity as possible. This is Catlin the socialist. The spirit of the French Revolution, of Robert Owen, and of William Morris conjoin in a heartfelt concern for freedom — for the freedom of all men to live together as brothers and equals.

"The sentiment of fraternity is not something deducible from scientific surveys," Catlin contends. "It is a religious and indeed theological principle of faith, which yet has support sociological and psychological." Here is the transition. White men in South Africa quote the Bible to postulate the inequality and separateness of man. Rich men in Detroit call on natural law to condemn welfare legislation that seeks to help the less fortunate. How can Catlin invoke religion, indeed theology, and speak with such certainty for equality and fraternity? Has he more title to truth than the Christians of Johannesburg and Detroit? He admits that the sentiment he holds dear cannot be deduced from surveys of the sort conducted by social scientists. Does this mean that his socialism is as idiosyncratic as another man's individualism — or even fascism?

No, it does not. The key lies in the sociological and psychological support which underlies Catlin's sentiments. His conception of right is not simply intuitive: it is also based on the facts. Through the sciences of sociology and psychology, imperfect as they are, we know that men in the modern world are in fundamental need of both equality and fraternity. In this respect it is interesting to note that Catlin spends some time lecturing his North Carolina hosts on their obligation to provide equal protection under the law for all of their fellow citizens. And the now famous eleventh footnote to the even more famous Supreme Court decision of May 17, 1954, calls on the evidence of social scientists to show that if men are to be full citizens they must be guaranteed psychological rights as well as legal rights. Segregation, psychologists and sociologists have found, creates tensions, anxieties, and frustrations in the minds and hearts of those segregated. There cannot be such a thing as "separate-but-equal." To be separate is to be unequal. This is a finding, a fact, of social science which cannot be disputed. The average white man cannot comprehend such a view in its total significance unless he studies the work of social and clinical psychologists. If he does, he will learn of the subtle yet penetrating impact of institutional barriers on the minds of men. The man who would tear down these barriers — be they in Chapel Hill, Westchester, or Capetown — is not simply acting on sentiment. He is also acting with the support of science. There is no other alternative. Science gives no backing for the doctrines of racial inequality.

Nor does it, for that matter, lend its strength to the doctrine of individualism. We have sufficiently accurate social and economic research to show us that opportunities to rise to the top are too infrequent, that the market mechanism is too imperfect, to guarantee the chance of a good life to the larger part of society. Perhaps, in an earlier age, when mobility was more fluid and the market more automatic, the individualist idea may have had some basis. But the facts of social life today indicate that government welfare programs are not frills or

featherbeds for the frivolous. They are, on the contrary, necessities for a society which no longer has assurances that the material conditions for a civilized existence will be provided by the free play of social and economic forces. Those who advocate less government, less taxes for welfare purposes, may be sincere and selfless men. But it is also true that they are not aware of the facts. They are looking at the world and yet they do not see it. Bound by their interests, they prefer an anachronistic image because it justifies their own status in society.

Catlin's chief emphasis is on man's need for community. This craving for a settled place and the esteem of one's fellows is a constant throughout human history. But it is only as societies industrialize that the need becomes crying, even pathological. Uprooted from the traditional community — the farm, the small town, the urban ghetto — we are a world of transients faced with an anomic void in life. The lonely crowd is lonely because it lacks the communal life without which a man is incapable of existing. In America, our "new" middle class tries frantically to create the community they once knew and so need: they join, associate, and foregather at an alarming tempo. Churches, P.T.A.'s, Leagues of Women Voters, Country Clubs, and Coffee Hours are scheduled and scheduled again in an effort to sink roots which will flower in meaningful fellowship. But the soil is shallow, the product is superficial. Community must have a base more profound than that offered by transitory suburban socializing. Here, too, social science has made discoveries which the average intelligent man perceives but dimly. Industrial sociologists have much to tell us about the role of the place of work in the lives of our emerging society. William H. Whyte, Jr., may be horrified at the organization men in our midst. But the point is that our great corporations are providing communal satisfactions to large numbers in our population. Elton Mayo and his followers in the systematic study of human relations were sincerely concerned with the problem of anomie. The development of these corporate communities — private governments, indeed private welfare states — is a sign that psychological and sociological needs can be answered in new and unanticipated institutional settings. We ought to think twice before we deplore the social ethic. It is, after all, a building stone of these new communities of men.

And natural law? It is, as we know, central to Catlin's politics. He would, I am sure, agree with D'Entrèves that natural law is nothing more nor less than the "right answer." And this answer is to be known by man's reason. Is democratic socialism the right answer? This depends, of course, on the time and place. But for countries which are in the early or advanced stages of industrialization, some variant of socialism is the right answer. Whether it should be in the corporate form as suggested by Father Ryan, or in the guise of welfare capitalism as put forward by Russell Davenport, or in the more traditional setting as programmed by the British Labour Party — this is a matter of means. But the end is clear: reason, aided by science, dictates the need for community. There is no disputing this on the ground that the reason of some men speaks to the contrary. Such gainsayers — the advocates of inequality and individualism — carry in their minds a distorted image of the world. They simply do not know the facts of modern industrialized life. They are incapable of understanding the

knowledge made available to us by social scientists because their interests blind them to such understanding.

Social science is the key to natural law. Facts, and only facts, can give us the right answer. Our danger is not that we may know the relevant facts and yet make the wrong choices. Such an eventuality, while entirely possible, is more a solace to the ignorant than it is a real fear. The real problem is that we are content to make little or no effort to comprehend the complexities and subtleties of our rapidly changing existence. All men tend to see reality only in fragments: both haves and have-nots are bound by their interests to stereotyped images of the world in which we live. The more we show a willingness to learn from social science, the better will we be able to frame the right answer to real problems. Prescriptions for a world of myths are futile. Natural law is living law — law relevant to the world and needs of today. Before we can prescribe for reality we must know what reality is.

This is not a simplistic call for a Utopia governed by social scientist kings. Catlin would be among the first to insist that social science is no more than a means to an end. Only by reason can men know the natural law. And only by a sophisticated use of social science techniques can reason be fortified to the extent necessary for finding the right answer. The problem is more pressing than ever before. In our modern age social reality challenges us with its overwhelming complexity. Yet for all that, natural law is the end. There need not be much dispute on this. And that social science is the indispensable handmaiden of reason ought not, on reflection, to cause much argument. For by social science is meant not master-plans for earthly cities, but systematic explanations of the truths of human and institutional behavior. But that social science leads Catlin to interpret natural law in socialist accents is bound to be controverted. It is interesting to note that most social scientists — almost all of whom reject natural law thinking — will back Catlin's reasoning and prescriptions. And, on the other hand, those who dispute his socialism will, for the most part, be those who profess a commitment to natural law. My own estimate is that Catlin's antagonists, despite their natural law professions, are in the final analysis more ignorant of the truths of man and society than his supporters. Adherence to the verities of natural law becomes little more than verbiage if it is not accompanied by a knowledge of the verities of the world of today. The men of natural law have much to teach the men of social science. But this task ought to wait on a more immediate one: those who hold to natural law must verse themselves in the psychology and sociology of the mid-twentieth century. In this effort, George Catlin, who stands as a mediator between the two realms, may serve as a teacher and a guide.

ANDREW HACKER

FREEDOM, VIRTUE & THE FIRST AMENDMENT. By Walter Berns. Baton Rouge, Louisiana: Louisiana State University Press, 1957. Pp. xiii, 264. $4.00.

The philosophical atmosphere of the Political Science Department of Yale University, it appears, is conducive to conservative constitutional thinking. Professor Berns'[1] carefully labored effort to displace liberty or freedom in favor of "virtue" in the nation's hierarchy of constitutional values seems to be evidence of this. This reviewer assumes that most people are not opposed to virtue any more than they are opposed to freedom. Unfortunately, the rub comes in attempting to identify or define both — the significant difference then being, in the reviewer's opinion, that freedom as a condition precedent of a democratic body politic is much more easily understood and more safely adhered to than recognizing and attempting officially to promote virtue or goodness as the end of government or organized society. Let us examine the author's thesis, however, before we attempt refutation.

The author accepts Aristotle's view that "the good state must possess virtue." Berns maintains that the good man, or men, will give their loyalty to a bad regime. Consequently, the vital difference between the good and the bad regime, in the opinion of the author, is the moral character of the men who are trusted by each regime and who in turn freely pledge their allegiance to each government or regime. Under the author's analysis, it then follows "that a good regime cannot trust bad men." For instance, the United States can trust Norman Thomas and permit him to express his vigorous opposition to the policies and composition of duly constituted governing authority. The good nation, however, cannot afford the same luxury in the case of a Eugene Dennis or a Harry Bridges. The good government must never lose sight of its obligation to promote virtue among its citizens so the latter can be men who can be trusted by the regime. The good government must curtail the opportunities of bad men, or men who cannot be trusted, to interfere with the achievement of the good regime's paramount objective to promote good.

As a philosophical position the author's analysis is controversial enough. He goes further, however. As necessary corollary assumptions underlying his main thesis, the author is forced to contend that the basic freedoms of the First Amendment (those of speech, belief, assembly, and religion) are not absolutely essential in a democratic society; that judicial review of legislative and executive action is basically a nondemocratic function which the so-called liberal members of the Supreme Court have at times misapplied so as to exalt freedom at the expense of promoting a virtuous society; and that it is the unavoidable obligation of public authority to define the virtue or goodness which society in its laws and through its judicial decisions should promote and impose.

This reviewer, like most rational men, admires virtue and hopes that he is so fortunate or so deserving as to achieve it. Nevertheless, he must totally disagree with the author's thesis and the assumptions on which that thesis is founded. In the first place, virtue or goodness rests in the realm of the conscience.

1. Professor of Political Science, Yale University, New Haven, Connecticut.

It is a matter with which the individual must grapple. It can never be imposed or implanted in him through the power of the state. Dean Rostow reminds us that it is regimes which have imposed on their citizens their notions of a social order or a "virtuous" society, not regimes based on "open discussion and political equality, [which] have led modern societies to the rule of the tooth, the claw, and the tommy gun."[2] He is right. In a society where freedom and liberty are the indispensable conditions precedent to the exercise of sovereign power and the acceptance of that sovereign power by those subject to it, the odds are heavily arrayed against the successful triumph of tyranny. On the other hand, in a society where these conditions precedent of liberty and freedom are permitted to be modified and relaxed, even for the purpose of promoting virtue and truth, the odds against the successful emergence of tyranny—of a "bad" regime, as Berns would say—are to that extent lessened.

To pose virtue as the end of government raises more fundamental risks than it avoids. As Pontius Pilate said of truth, we may ask: "What is virtue?" Jesus Christ was crucified in the name of virtue, truth, and the social order of the Province of Judea and the Roman Empire. Other men have experienced the same fate with the same excuses assigned by the regime that destroyed them. When the state or regime in power assumes the role of definer, defender, and promoter of virtue and goodness, it becomes inevitable that virtue should be what that regime says it is.

The basic defect of Berns' thesis, in this reviewer's opinion, is that he ridicules freedom and liberty as the ends of government, whereas really they are not ends in themselves but the indispensable conditions or means to the achievement of the basic ends of government. The obligation of government is to establish and maintain the conditions under which man can fulfill his divine function and achieve his ultimate and immediate end, i.e., life with God forever. Therefore, its aim is more accurately described, as Justice Douglas recently put it, to promote and maintain "security for the individual and freedom for the development of his talents."[3] If we believe that man is a creature of free will whose success or failure in obtaining eternal happiness depends on his performance as a member of society in this life, then freedom or liberty is the required condition or element under which he must work out that destiny. True, as St. Thomas Aquinas reminds us, man is a societal animal; he must stake his claim to immortality in the happiness of a future heaven as he moves within the framework of an organized society. The rules of that society should not be permitted to impair his opportunities for achieving his ultimate destiny. Legislation or judicial decisions that curtail or restrict man's natural rights as a creature of God cannot be sustained. Despite Justice Black's reservations about it, the "natural law gloss" on the Bill of Rights is not misplaced. Nevertheless, this is not quite the same thing as saying that freedom and liberty are flexible concepts or conditions of society to be circumscribed or dispensed with in individual cases on the grounds that those who invoke their protection are not virtuous or good men, but are men

2. Rostow, *The Democratic Character of Judicial Review,* 66 Harvard Law Review 193, 207 (1952).
3. Douglas, The Rights of the People 87 (1958).

who, in the words of Berns, are not to be trusted. If the proper obligation of an organized society is to promote the conditions under which its individual members may best work out their immortal destiny, while permitting other members of society to do the same, then the prerequisite conditions of freedom or liberty are not to be tampered with save in those cases where they must be relaxed or dispensed with in order to preserve freedom for the society as a whole.

Despite the author's opinion to the contrary, the fact that freedom must be limited at times is no argument that it is anything less than the *sine qua non* of the just society under the conditions of the world as it exists today. Freedom, on occasion, must be circumscribed in order to preserve the conditions of freedom for society as a whole. The clear and present danger test, despite the uncomplimentary things which the author has to say about it, is a recognition of this fact. We will not permit freedom to be destroyed in the name of freedom, nor liberty to be divested in the name of liberty. Freedom has its pragmatic as well as its idealistic side. By and large, the Supreme Court over the last twenty years through its interpretations of the First Amendment in cases presenting issues of free speech, free assembly, freedom of religion, and the prohibitions of the amendment against the establishment of religion, has recognized this. Indeed, it has only been in a few aberrational decisions rendered under the pressures of the "cold war" and the irrational hysteria produced in some quarters by a psychological fear of communism and subversion that the Court even temporarily has misinterpreted the proper functions of free government. Under Berns' analysis those decisions could be sustained, perhaps, on the grounds of promoting "virtue," at least the "virtue" of the moment which, as the passage of time already has revealed, was a good deal less than virtue in the longer run. Indeed, we do not have to look to the historical past to see that Berns is wrong and that Douglas is right. "Man's moral and spiritual appetite, as well as his political ideals, [demands] that he have freedom."[4]

The reviewer has said more than he perhaps should have to express his disagreement with the fundamental proposition which Berns attempts to establish in his book. The confines of a book review preclude additional rejoinder to some of the subsidiary arguments advanced by the author. For instance, while judicial review may in one sense be undemocratic, as Berns suggests, to the extent that when it is exercised in any given case it may not necessarily represent the majority view of the body politic to which it applies; nevertheless, the ultimate purpose or function of judicial review of legislative and executive action is in its essence democratic. Judicial review, especially when applied to protect and preserve the indispensable conditions of a just society, i.e., freedom and liberty, as articulated in the provisions of the Bill of Rights and especially those of the First Amendment, is the life preserver of the democratic, just, or "virtuous" society. Without it, our own days would have seen the regime continue to approve of segregation on the basis of race in all fields of societal endeavor; the stamp of traitor imposed upon men without the observance of the essential elements of a fair trial or hearing; and the imprisonment of, or the imposition of a stigma

4. *Id.* at 90.

of infamy on, persons for what they said or thought and not for any action they took to execute their words or thoughts. An institution which preserves us from such unworthy results serves the ends of the good society. Judicial review is the last, and sometimes only effective, brake on the forces which gather from time to time and which, if left unchallenged, would destroy freedom in the name of freedom.

The reviewer will not dwell on the inadequacy of the case analyses which Berns attempts at various places in the book in discussing decisions of the Supreme Court and opinions of the various justices. He brings to bear in such critiques what seems to be the congenital lack of equipment for the task from which political scientists, almost as a group, seem to suffer. In addition, the author has concentrated on the extreme opinions in which the preferred position of rights guaranteed under the First Amendment has been sustained by the Supreme Court. One does not have to agree with each and every decision of the Supreme Court in cases arising under the First Amendment, or other provisions of the Bill of Rights, to maintain that the Court, and especially Justice Douglas and Justice Black — and, it appears, Chief Justice Warren and Justice Brennan — have correctly grasped that it is the obligation of government to preserve freedom in order that those subject to governmental authority may be left free as individuals, within their own conscience and by the exercise of their own free will, to develop their talents and achieve their individual immortal destiny. A regime which downgrades freedom and liberty in the interest of attempting to promote its own conception of "virtue" would, in the opinion of this reviewer, have dangerously misconstrued its proper function. A philosophy which asserts that it should merits rejection. I reject it as it is expounded in this book.

ALFRED L. SCANLAN

DAS PROBLEM DER NATURRECHTSLEHRE: VERSUCH EINER ORIENTIERUNG. By Erik Wolf. Volume 2 of the Freiburger Rechts- und Staatswissenschaftlichen Abhandlungen, herausgegeben von der Rechts- und Staatswissenschaftlichen Fakultät der Universität Freiburg, Baden. Karlsruhe: C. F. Müller, 1955. Pp. xi, 119. DM. 7.00.

Professor Wolf, one of Radbruch's best informed disciples, is the editor of the posthumous fourth and fifth editions of Radbruch's *Rechtsphilosophie,* as well as the author of several important works on legal philosophy. Within the compass of a mere one hundred and nineteen pages he presents what may well be the most compact analysis of natural law ideas from the pre-Socratics to our own time. This accomplishment is made possible by the author's arrangement. The many natural law ideas considered are related to the concepts of "nature" or "law." Thus, the first chapter deals with the concept of "nature," the second chapter with that of "law." Within each chapter the various particular interpretations of either "nature" or "law" are treated as different "theses" concerning

the meaning of these two concepts. Each thesis, in turn, is followed by an analysis of the specific consequences which its acceptance will have for natural law. The various jurists or philosophers who have advanced this particular interpretation are then discussed in historical order, under the many headings or "categories" and subheadings or "subcategories" to which they are assigned. Thus the whole scheme devised by Wolf develops according to the following basic pattern: Chapter I, concept of "nature," 1st thesis, its consequences, 2nd thesis, its consequences, and so on; Chapter II, concept of "law," 1st thesis, its consequences, 2nd thesis, its consequences, etc.

Since American scholars and students of jurisprudence may wish to know something about Wolf's categories, the reviewer will attempt to give a short resume of these categories, thereby conveying also a fairly adequate conception of the book itself.

In the concept of "nature" Wolf distinguishes the following interpretations or meanings: (1) that aspect of a thing which expresses "its" nature, i.e., its characteristic essence (*Wesenseigenart*); (2) that which is "original," i.e., "not derived"; (3) that which is "genuine," "pure," "unspoiled"; (4) that which is "necessary" according to the laws of causality or logic; (5) that which is "ideal," i.e., "nature seen as reason"; (6) that which is "created"; (7) the "nature of things"; (8) that which is "irrational," "impulsive," or "emotional"; and (9) that which is "opposed to tradition."

From these nine interpretations of "nature," there follow nine different approaches to "natural law": (1) a person's or thing's right to exist in his or its own essential individuality; (2) the historical origin of any legal order; (3) the pre-state social order; (4) the empirical and logical laws ruling nature; (5) philosophical doctrines of "absolute" laws; (6) theological doctrines; (7) the immanent practical order of life; (8) the supremacy of appetites or drives, like the will to power; or (9) the principle of reform or revolution.

In the concept of "law," as used within the compound term "natural law," Wolf distinguishes nine "theses" or "meanings": (1) "objective law," i.e., "law and right," (2) man's "convictions" of what is right (*Rechtsüberzeugung*), (3) "subjective rights," i.e., "personal rights," (4) man's "sense" of justice (*Rechtsgefühl*), (5) "just law" (*richtiges Recht*), (6) "utility," (7) "certainty," (8) "historicity," or (9) fulfillment of a "societal function" (*Gesellschaftlichkeit*).

The consequences of these various meanings of the term "law" for the understanding of the compound concept of "natural law" are that the latter is considered as (1) an objective *"lex,"* which is to control either teaching or legislation or both; (2) a prescientific, popular view of justice; (3) a subjective *"jus"* which arises from the public order of social duties, or is innate, or is the result of some social contract; (4) a way of feeling, either individually or collectively; (5) an "idea" which is the source of ideals, or formal principles, or transcendent thought; (6) the right to happiness; (7) identical with the positive law; (8) historical law—restorative, up-to-date, or futuristic (revolutionary); or (9) sociological regularity.

Since the interpretation of the respective concept ("nature" or "law") and the consequences of that interpretation are logically interconnected or overlapping,

the total number of categories, of course, is not thirty-six (four times nine), but eighteen. Yet even eighteen categories, with their many subdivisions, constitute a far greater number than has ever been suggested in any other analysis of natural law. In some cases Wolf has classified a leading thinker such as St. Augustine, Luther (I, 6) or Locke (II, 3), in but one category. Others have been assigned to two (Hobbes: II, 3 and 7), or three (Grotius: I, 5; II, 1 and 3; Rousseau: I, 3 and 9; II, 1), or even four and more (St. Thomas: I, 3, 6, 7; II, 1; Plato: I, 2, 3; II, 4, 5, 6; Aristotle: I, 4; II, 2, 4, 5, 6). The details are handled with the same care and erudition manifested by the author in his four-volume work on Greek legal thought.[1] Succinct particulars and reasons, as a rule, are given for these classifications, and a stunning number of names and dates are accounted for.[2]

What, then, is the significance of Wolf's analysis for present-day political and legal philosophy? This is the chief question he himself raises in his little book, and it is of course our own main concern. Relativists might make good use of this work in order to bolster their view that justice depends on ideas which are beyond scientific demonstration. But it is not Wolf's purpose to support relativism. His aim, as indicated by the ten-page "Introduction" and the seven-page "Conclusion," is in the opposite direction. To him there is only *one* true natural law doctrine. In the conflicting or antinomic interpretations of natural law he sees merely a necessary and wholesome dialectical discussion (*Auseinandersetzung*), through which the unfolding of the doctrine's fundamental meaning—the unity in diversity—can be achieved. Wolf holds that "in the seeming confusion of antagonistic theories of natural law a hidden order operates." While he admits that the *concept* of natural law is ambiguous, he nevertheless insists that its *function* is perfectly clear and has always been the same: to confer legitimacy upon the empirico-historical law, and to provide a basic standard for it. From this sustained identity of function he infers that ". . . natural law *must* be a reality, which . . . practically and ethically justifies and limits all law."[3] But this "must" would be logically untenable without some metaphysical presupposition. We cannot conclude that there actually is a natural law simply because people have always believed in it. But neither, of course, can we deduce from this lack of logical conclusiveness that there is *no* natural law.

The question then remains: What is the "reality" which the natural law *must* have? Wolf answers that this reality "is apparently undefinable, at any rate not determinable a priori." It can only be "experienced, not learned, because it is

1. Wolf, Griechisches Rechtsdenken, vols. I, II, III_1 and III_2 (1950-1956)—vol. IV is still in preparation—reviewed by Chroust in 2 Natural Law Forum 129 (1957).
2. For example, in I, 2 (Nature interpreted to mean "original") Wolf discusses Hesiod, Aeschylus, Sophocles, Plato, Daniel, Vico, Herder, Savigny, Bachofen, Frobenius, and C. G. Jung; in a historical subdivision he discusses Thucydides, Comte, Hegel, and Marx. In I, 4 ("causality" or "necessity") he discusses the sophists in the various stages of their teachings, Aristotle, Ulpian, Polybius, and Cicero; in a biological subdivision he discusses Archilochus, Mandeville, Baumgarten, Kohler, and Somlò; in a mathematical subdivision he discusses the Pythagoreans, Aristotle, Petrus Ramus, Althusius, Weigel, Leibniz, Wolff, Kant, Stammler, and Kelsen, as well as the Cyrenaeics, the Cynics, the Epicureans, and the Stoics; and in a "physical" subdivision he discusses Bacon and Spinoza.
3. Wolf, Das Problem der Naturrechtslehre 108.

a part of being and not merely an aspect of consciousness." Somewhat apodictically he adds: "All men are committed to natural law and, hence, are agreed a priori about the essential need-of-being of natural law, even though they are unable to state uniformly a posteriori what belongs to it." [4] But he concedes his inability to define the sphere in which the natural law ultimately "resides" (*worin das Naturrecht 'eigentlich' lebt*). He concludes that "the idea of natural law can neither be 'practiced' in a spirit of pedantry nor 'invented' in a spirit of fanaticism: it must be cultivated with care. We must not desire to control it (*darüber verfügen wollen*); rather, we must submit to its control."

To accept this proposition one must agree to the very thing to be demonstrated, namely, the existence of natural law. This is true unless Wolf means that we should merely *try* to live with the idea and to "submit to its control" in order to experience its truth. Wolf's next sentence does not go this far. It seems to presuppose the existence, not of natural law itself, but only of the *theory* of natural law. "The theory (*Lehre*) of natural law has the task always and at all times to watch over the law (*Recht*), that it remain within its true essence." It is the "duty of all who partake of law and justice (*Recht*) 'to be there' in constant readiness for [the support of] law and right (*das Recht*)." This could be accepted even by those adherents of constitutional government who are not as certain as Wolf of the existence of natural law.

At the end Wolf rearranges in four categories the ways in which we may seek after both the concept and the foundation of natural law. The question of law and justice is, he says, "one of those fundamental questions of all sciences that deal with being, duty (*'ought,' Sollen*), possibility, and justification (*Rechtfertigung*), i.e., the ontological, the ethical, the logical, and the metaphysical mode of asking questions." Accordingly, he argues, we may ask four types of questions about the natural law. We may inquire about (1) the natural law that *is*, i.e., its being, its reality, as found in ever-recurrent institutions, like marriage and property; (2) the "true" natural law that *ought to be*, in the sense of asking whether, e.g., institutions of marriage and property ought to exist; (3) about the *logical* meaning of natural law, i.e., what the basic concepts of law are; and (4) the *transcendental* character of natural law as an order of being that has its origin not in man but either (philosophically speaking) in the cosmos, or (theologically speaking) in God, with sanctions provided either in immanent retribution (*poena naturalis*) or in the Last Judgment. Wolf holds that all four approaches are necessary in order to establish and justify natural law.[5] As we shall see later, this view enhances greatly the importance of the theory of natural law.

Twice within this century the position taken by German scholars and jurists on natural law has been markedly influenced by the particular sociological and political conditions of the German situation. During the first decade German social scientists of democratic leanings found themselves surrounded by nationalistic professors who freely mingled authoritarian value judgments with their

4. *Id.* at 109.
5. *Id.* at 113.

more strictly professional teachings. This situation, which stimulated inquiries into the differences between scientific data and purely personal preferences, led to the scientific type of value relativism. After the demise of the Weimar Republic, the brutal enforcement of barbaric value judgments by the Hitler regime compelled the German relativists to reconsider their views. But Simmel, Rickert, Georg Jellinek, and Max Weber were dead; Kantorowicz and Kelsen had fled the country. Of the original founders of value relativism only Gustav Radbruch stayed, although after his dismissal from his chair at Heidelberg in 1933 he had become an "inner exile." He consumed himself in the conflict between his belief in the scientific relativity of value judgments and the call of the historic hour which seemed to demand a "scientific" vindication of the belief in inalienable human rights. After the war, hardly a relativist was left among legal philosophers in Germany; they all joined the fight for the recognition of natural law, and the profound seriousness of their motives is evident in their many writings.

Radbruch's own modifications of his former views have greatly contributed to this change of heart. Since Wolf's present book pays only little attention to the development of Radbruch's philosophy,* the reviewer may be permitted to add a few observations of his own. Radbruch, in fact, tried three different ways to meet the problem of totalitarian government: first, by stressing the "aggressive" side of relativism, i.e., the relativist's duty to oppose any attempt of government to force value judgments upon people who do not share them;[6] second, by deriving some limitations for governmental decrees from the "nature of things"; [7] and third, by emphasizing the "idea of justice" as requiring not only the equal treatment of what is equal but the recognition that all men *are* equal and possess inalienable rights.[8]

Needless to say, this reviewer deeply sympathizes with the reasons that motivated Radbruch to modify his earlier views. But at the same time it cannot be denied that every one of his three proposed correctives transcends the boundaries of "science." This is true if the meaning of "science" remains restricted, as it does in Radbruch's earlier writings, to intersubjectively communicable knowledge, distinct from broader conceptions of science, such as metaphysical insights and other controversial intuitions. Such transcendency is characteristic also of all those revivals of natural law thinking in this century that go beyond

---

* For Wolf's views on this subject, see his article beginning at p. 1, *supra.*—Ed.

6. See Radbruch's paper in 4 ARCHIVES DE PHILOSOPHIE DU DROIT ET DE SOCIOLOGIE JURIDIQUE 105-110 (1934); RADBRUCH, DER MENSCH IM RECHT 80-87 (ed. Fritz von Hippel, 1957).

7. RADBRUCH, VORSCHULE DER RECHTSPHILOSOPHIE 19 ff. (1947). See also FESTSCHRIFT FÜR LAUN (1948). Erik Wolf (*op. cit. supra,* note 3 at 87) doubts whether the report in the VORSCHULE, edited by two of Radbruch's students, contains reliable information.

8. FÜNF MINUTEN RECHTSPHILOSOPHIE (1945) and GESETZLICHES UNRECHT UND ÜBERGESETZLICHES RECHT (1946). Both these works are reprinted on the appendix to RADBRUCH'S RECHTSPHILOSOPHIE (4th and 5th editions, ed. Erik Wolf, 1950 and 1957). GESETZLICHES UNRECHT UND ÜBERGESETZLICHES RECHT is also reprinted in DER MENSCH IM RECHT 111-124. See note 6, *supra.*

inquiries into *poena naturalis*, the self-avenging consequences of unethical actions. Whether or not this abandonment of "science" or change in the term's meaning is to be recommended, the reviewer cannot discuss here; he does so in his forthcoming book on twentieth century scientific political theory. At present he limits himself to a few remarks on what he considers the decisive point.

Is it possible outside the area of the *poena naturalis* to derive from the nature of things or from the nature of man alone moral directives, unless one assumes the operation of suprahuman moral forces? This the reviewer doubts very much. Without that assumption, there is no scientific ground conceivable on which it can logically be maintained that nature—a completely material and mechanistic nature—issues moral laws. The reviewer is, of course, aware of the fact that the attempt to derive moral laws directly from nature without reference to divine forces has played a great role in the history of natural law. But, in the first place, those who inaugurated this type of secularized natural law philosophy actually believed in the divine origin of nature. This is true not only of St. Thomas, but also of Grotius, Hobbes, and Pufendorf. In the second place, any attempt to derive moral laws from nature alone beyond the area of *poena naturalis,* if honestly pursued by a strict elimination of any vestige of divine elements in the process of the argument, can only lead us to purely *human* ideas as the ultimate determinant of moral laws. But these human ideas differ widely among themselves, except for some elements not yet sufficiently explored.[9]

This is not to say that law courts, jurists, public employees, etc., must accept as legally valid or binding even the most barbaric positive laws. These are different questions. The basic error in recent attempts to revive ethical natural law thinking, this reviewer believes, lies in the confusion between the problems of the *scientific* and the *juridical* validity of the judgments which a government tries to enforce. What types of government orders are to be considered juridically valid is a *juridical* question, not one that deals necessarily with *scientific* validation. Society may insist that orders which violate basic human rights are juridically invalid. We must postulate some "basic norm" to the effect that government orders in accordance with a country's constitution are juridically valid, if we want to establish the validity of positive law scientifically. We may also reject an unlimited formulation of this "basic norm" and substitute for it another postulate, one which excludes from recognition as valid any orders violating basic human rights.[10] Science cannot establish the existence of human rights without reference to divine powers. But jurisprudence can.

After this twofold digression the reviewer once more reverts to Wolf's book. As reported above, Wolf considers indispensable all four modes of approach to natural law—the ontological, the ethical, the logical, *and the metaphysical* mode.

9. On these elements, see Brecht, *Relative and Absolute Justice,* 6 SOCIAL RESEARCH 58-87 (1939); also reprinted in THE POLITICAL PHILOSOPHY OF ARNOLD BRECHT (ed. Forkosch, 1945).

10. The reviewer suggested this some twenty years ago in his review of EBENSTEIN, THE PURE THEORY OF LAW. This review was published in 32 AMERICAN POLITICAL SCIENCE REVIEW 1173 (1938). No one, however, seems to have taken notice of this suggestion. The reviewer proposes to resume this particular problem in his forthcoming book.

The fourth mode of approach presupposes the transcendent character of natural law. Wolf's inclusion of this aspect among the indispensable modes of asking questions about natural law is tantamount to his realization that it is impossible to derive natural law from the nature of things alone (beyond the area of *poena naturalis*) without accepting a transcendent ethical will which by expressing itself through nature reaches humanity. The reviewer agrees with this.

Wolf does not care to state what he considers the proper meaning of the term "science"; nor does he say whether he agrees that there is justification in distinguishing between scientific and speculative inquiries—between knowledge that is intersubjectively communicable *qua* knowledge and between knowledge, real or putative, which is not so communicable (although, of course, the latter type of knowledge, too, may be "relatable"). Within the framework of his study he does not seem to be greatly interested in this problem. However, he does remark[11] that one should keep in mind that any reduction of the natural law idea to mere "science" "restricts natural law in an illicit manner, distorts its true meaning and blocks the real access to it." The natural law idea "partakes of a prescientific or metascientific realm of human ability to surmise" (*menschliches Ahnungsvermögen*). Likewise, Wolf does not stop to say whether he thinks that God's existence, in which he believes, can be "scientifically" verified. Nor does he refer to the possibility, mentioned above, of denying legal validity to barbaric decrees not on scientific but on historical-juridical grounds. But he is explicit regarding the one point that matters here: that transcendence is essential to natural law and that, therefore, the existence of natural law presupposes the existence of suprahuman divine powers. This view is not at variance with *scientific* value relativism which—rightly interpreted, or reformulated—does not deny God's existence, but merely insists that it cannot be *scientifically* demonstrated, and that, therefore, the existence of an ethical natural law, too, cannot be scientifically demonstrated, although it can be believed in, speculated about, and be made the standard of justice in practical life.

ARNOLD BRECHT

11. Wolf, *op. cit. supra,* note 3 at 2.

THE COURT AND THE CASTLE. By Rebecca West. New Haven: Yale University Press, 1957. Pp. 319. $3.75.

Miss Rebecca West was invited to deliver at Yale the Dwight Harrington Terry Foundation Lectures, and *The Court and the Castle* is, we are told, "based upon" these lectures. The book discusses a variety of moral, political, and religious themes as these are treated (in Miss West's view) by a series of imaginative writers, dramatists and novelists, from Shakespeare to Kafka. What Miss West wishes to do with these themes as they are brought by her under the two

symbols of the Court and the Castle it is hard to say without giving a very extended account of the book. What she attempts is best, perhaps, given in her own words as "an enquiry into the use of the public life by writers whose interest is in the private life." [1] She is interested in statecraft, in social order and disorder, in political morality and in some theological questions (notably Pelagianism, of which she seems not to approve and which she seems—though this is not altogether clear—to think can be shown to be a false theory by reflection upon experience); and she examines the works, or some of them, of the writers on her list in order to find out what they have to say, or what they can be made to imply, on the topics in which she is interested. Such interest as the book has lies in the shrewdness and wit of the occasional observations rather than in the presentation of a general thesis. Insofar as Miss West has a general thesis it is simply that there "is a tendency of creative literature, when it rises above a certain level, to involve itself with statecraft and with religion." [2]

Miss West is better on some writers than on others. She is very acute about Trollope (e.g., "[The Barsetshire novels] are really novels about the Civil Service, furnished with an ecclesiastical background and trappings"); has some good things to say about Fielding, Henry James, Dorothy Richardson, and Virginia Woolf and some unexceptionable things to say about Kafka; but gets into a frightful tangle over Shakespeare, Dickens—the novels she discusses she cannot have read for years, for she mixes up "the veneerings" (*sic*) with Alfred Lammle and Sophronia Akershem and misspells the name of the family in *A Christmas Carol*—and Proust.

Where Miss West makes mistakes, as I think she does very frequently throughout the book, she does so through an excessive reliance upon a bold and dogmatic temperament. This makes itself felt at once.

> . . . any authentic work of art must start an argument between the artist and his audience. The artist creates that work of art by analyzing an experience and synthesizing the results of his analysis into a form which excites an appetite for further experience.[3]

This is no more than a poor exercise in persuasive definition. The objections to the "must" and to the confident statement about what the—presumably *authentic*—artist does are, one is inclined to think, as evident to Miss West as to anyone else. She has an interesting hypothesis about *Hamlet;* but she does not present it as a hypothesis with strong points and difficulties. On the contrary, "there is nothing obscure about the content of *Hamlet,*" and the unanimity of those many critics and readers who find in the character of Hamlet "a symbol of irresolution"—Miss West thinks this quite without justification—is termed "remarkable" in view of the cogency of Miss West's hypothesis. Her abilities as a commentator on *Hamlet* may be judged by the way in which she handles particular details. Concerning Hamlet's interview with Gertrude in which he taxes her with adultery Miss West writes:

1. West, The Court and the Castle 92 (1957).
2. *Id.* at 305.
3. *Id.* at 5.

> . . . He simply tells her that she is behaving reprehensibly in living with her present husband, not because he had murdered her dead husband and his own brother, but because he was not so good looking as her dead husband. . . . His curious emphasis on the physical difference between the dead King and the living Claudius hints at a homosexual element in his nature. . . .[4]

Of Laertes' speech upon leaping into Ophelia's grave she writes:

> His mind rushes away from the dead girl on too long a journey, all the way to blue Olympus, and forgets its true grief in the excitement of travel.[5]

There is a painful vulgarity in such remarks; and we are not therefore surprised when Miss West permits herself remarks that are both vulgar and cruel, as when she tells us that "the not epicene type of actor loves to play Henry the Fifth."[6]

Miss West observes with justice that

> Criticism which pretends to tell us what was in the conscious mind of an artist during the act of creation is an enterprise of the same order as . . . telling fortunes by tea-leaf readings.[7]

But this is after she has allowed herself to make such remarks as the following, all of which pretend to a familiarity with Shakespeare's mind, a familiarity that rests upon the view that what Shakespeare writes in his plays is good evidence for what he thinks on a number of moral, religious, and political subjects.

> [Shakespeare] hated courts.[8]
>
> . . . what excites Shakespeare in [*Hamlet*] is the impossibility of conceiving an action which could justly be termed virtuous, in view of the bias of original sin.[9]
>
> It is quite certain that [Shakespeare] wished to present Hamlet as a bad man, because he twice makes him rejoice at the thought of murdering men who had not made their peace with God.[10]

The treatment of political ideas is from time to time quite baffling. She writes of Shakespeare that "where he was surely not one with his contemporaries is in his lack of sympathy with the contractual theory of the English monarchy."[11] But who in Shakespeare's day, apart from some Jesuits and some Puritans (and these can scarcely be intended by "his contemporaries"), did believe in such a theory? The infuriating thing is that Miss West knows better, as is evident from the remarks on p. 66. A rich example of the dense confusion into which Miss West plunges us when she deals with the history of political ideas is the following remark, a criticism of Bernard Shaw's *Saint Joan:*

> . . . there is no indication that the shepherdess of Domremy might have been allowed to listen to her voices, had they not, in a roundabout way, supported

4. *Id.* at 17-18.
5. *Id.* at 27.
6. *Id.* at 41.
7. *Id.* at 69.
8. *Id.* at 22.
9. *Id.* at 28.
10. *Id.* at 30.
11. *Id.* at 61.

> the case of Dante's *De Monarchia,* and that the Papacy's claim of international temporal power forbade the Church to tolerate independent nationalist heroines.[12]

What *was* the case of Dante's *De Monarchia,* one would like to ask Miss West, that Joan's voices supported, in however "roundabout" a way?

We have already seen that Miss West has well-marked views on homosexuality and on what constitutes evidence for latent homosexuality. A very strange thing happens when she comes to deal with Proust. She greatly admires Proust; but she argues that because Proust deals so frequently in his novel with homosexual love, he can have no motive for portraying homosexual love under the guise of heterosexual love (Miss West has in mind the affair with Albertine, though the relations of the narrator with Gilberte and with Andrée are also in question and ought to have been discussed). A great deal could be said about this. For example, Proust knows very well how to describe a heterosexual love affair (Swann and Odette). It would be easy to show from the text of *La Prisonnière* that the love there depicted is either infantile and auto-erotic (with "Albertine" as the catalyst) or homosexual. No heterosexual behavior is either described or hinted at. But Miss West has missed a most obvious clue. "Albertine," "Gilberte," "Andrée"—in each case we are offered the feminized form of a man's name. If this were all we had to go upon we could dismiss it, as this form is very common in France. But the weight of evidence surely goes against Miss West's view. She should at least produce stronger arguments on the matter than she does.

I have noticed something wrong with the syntax of two of Miss West's sentences. They are to be found on pp. 103 and 109.

J. M. CAMERON

12. *Id.* at 34.

THEORY AND HISTORY: AN INTERPRETATION OF SOCIAL AND ECONOMIC EVOLUTION. By Ludwig von Mises. New Haven: Yale University Press, 1957. Pp. 384. $6.00.

Ludwig von Mises has the reputation of being an obsessed defender of economic liberalism. The title of the present work roused hopes that the necessity of dealing with what man can know in history would relax his obsession. The expectation was vain. *Theory and History* is all of a piece with *Socialism, Bureaucracy,* and *Omnipotent Government.* This is to say that it is a limited rather than a broad treatment of its subject. It is exceedingly single-minded and obsessed. But like its predecessors it also abounds in acute criticism and challenging observations. Von Mises is the hedgehog about which Isaiah Berlin has written so well. He knows only one thing, and for him the one thing is all-important. His limitation, however, is the ground of his strength—for everything is acutely scrutinized in relation to economic liberalism.

His earlier works presented a consistent theme. In them he celebrated liberalism, a purer liberalism than ever existed except in the writings of some

classical economists. This liberalism, resting on the sternly uninterrupted play of the free market, is the sole guarantor of a free society. The unimpeded sway of supply and demand is the only conceivable rationally organized society. For rationalism calculation is necessary; and, if man is to calculate and be calculable, men must act solely from self-interest.

Thus, man must be considered simply as an individual. He recognizes that man's social life is rather more than the interested cohering of individuals. But any effort to stress a non-atomic view of society meets his impatient severity. In his mind such a view brings in all the demons of irrationality, and man must be rational in the author's manner or freedom farewell. The reason advanced for this insistence is that society has but precariously triumphed over the struggle for existence. Man may indulge in social cooperation and enjoy his hardly won reprieve from the Darwinian free-for-all—or, more accurately, free for the strong—if he carefully fosters the sources of modern productivity, the division of labor, specialization of tasks, and the free market. Where these are interfered with, no matter the grounds or the ends, the result leads to tyranny, which he defines as the attempt to do the impossible.

Von Mises is an enthusiast of freedom. His limited conception of freedom, however, makes him the critic of every modern state, though he might exempt contemporary Germany. His Central European background weighs heavily on him. There, so he argued in *Bureaucracy* (1944), government carried a prestige, destructive of rationalism and liberty. In his definition bureaucracy is a matter not of size but of the absence of economic calculation. Bureaucracy replaces the rational choice of the consumer and the rational decision of the producer by the decision of political power and intrigue for political power.

Louis Brownlow entitled his autobiography, *A Passion for Politics.* Von Mises might properly entitle his own, *A Passion against Politics.* This passion, which has, also, characterized a small number of Americans who proclaim themselves Jeffersonian democrats, has inspired von Mises to make incisive analyses of European bureaucracies. To him socialism means the negation of the market and the creation of the incalculable and irrational power that tempts its wielders to romantic crusades and suicidal folly. He extends this condemnation to all forms of state intervention in economic life including Keynesianism. He has insisted not only that state intervention in the depression to relieve unemployment was self-defeating but that the free play of the market would have finally removed unemployment without intolerable hardship. Von Mises is doctrinaire and courageous enough to have said this in 1931-1933, but very few of those living in that period would then have shared his confidence or agreed with his notion of the intolerable. As a doctrinaire, he simply prescribes his teaching, although it is irrelevant to the conditions in which man then had to live. Tariffs and restrictions on immigration also receive his condemnation. These, too, breed irrationality and bureaucracy, and these make for war. At the end of World War II he expressed his belief that the victorious democracies, committed as they were to interventionist policies, would precipitate war. Of course, he can explain the latter developments as the product of the monstrous interventionism of the Soviet Union. He can explain everything, and he is not wholly wrong. But he

is spectacularly irrelevant to the needs of men who want to live through the next decade.

His indictment of Marxism finally leads to the basis of his thought. A major count is that the Marxists by emphasizing that social views are merely the projection of class interest deny the universal validity of the reasoning process. This is the only certain universal. Values and ends are ultimately exempt from the scrutiny of reason. Reason is universal but values are variable. Values and ends cannot be proved in any scientific or rational way. The reasoning process, however, can demonstrate that a particular choice of means will not serve the intended end. It may reveal the means as productive of the most undesirable consequences. Thus, economics, he insists, can point out to the socialist and interventionist the disastrous consequences of their means. Failure to understand the inevitable results of such policies has been responsible for the pervasive collectivism of modern thought. To this development, positivists, moralists, as well as socialists, have contributed. Indeed, modern intellectual history is presented as a great conspiracy against liberal economics and its later perfection by the marginal utility school. Positivism's sin consisted in refusing to recognize the laws of economics and in embarking on an allegedly scientific quest that sanctioned tyranny, that is, the impossible. Most studies of group behavior and mass phenomena work to the same end.

His starting point is that man acts and that the end of his action is purposeful. You cannot dictate ends to man, but reasoning can discuss the adequacy of his means. Psychology as developed in the eighteenth century established that man will seek his interest, and this will include his material well-being. Any moral criticism about the dangers of acquisitiveness and avarice rouses his severest criticism. Such attempts are the confounding work characteristic of "historicists," among whom he includes the economic historian and Christian socialist, R. H. Tawney, for attempting to discredit "economic appetites. After all it was nature, not the capitalists, that implanted appetites in man and impels him to satisfy them." [1] Do these people, he asks, really prefer infant mortality to the fulfillment of natural appetites? Must these people lament the passing of a tradition which flourished with its inevitable accompaniment, "famines, plagues, wars, the persecution of heretics, and other disasters"?

The tone is eighteenth century, and not by accident. One sentence provides the keynote: "Utilitarianism finally completed the intellectual evolution inaugurated by the Greek Sophists." [2] The finest product of Utilitarianism is economics. As justice in jurisprudence refers only to laws as they are, so economics deals with laws as they are. Ethics cannot call for intervention in economic life, for to do so is ruinous, and "the precepts of ethics are designed to preserve, not to destroy the world." [3] In this discussion the author finally reveals his extreme individualism. He deals with society as though it were solely

1. Ludwig von Mises, Theory and History: An Interpretation of Social and Economic Evolution 238.
2. *Id.* at 49.
3. *Id.* at 55, 57.

something formed by human will for securing ends "which men want to attain by social cooperation." To repeat an old joke about the Epicureans, society is not what the atomists crack it up to be. Society is more fundamental, natural, and inescapable. Here, von Mises' individualism brings him close to his definition of tyranny—the impossible.

Social utility, then, is the only standard of justice and the sole guide of legislation. "There is no such thing as a normative science, a science of what ought to be." [4] As there is no way of eliminating conflicting judgments of value, Utilitarianism has its triumph, for it "does not deal at all with ultimate ends and judgments of value. It invariably refers only to means." With social utility as the sole principle, there is no longer any fundamental conflict between altruism and selfishness, ethics and economics, and the concerns of society and the individual. These apparent antagonisms become simply "the oppositions of short-run and long-run interests." [5] The waxed body of Jeremy Bentham, seated on a chair in the Senior Common Room of University College, London, has the fate of all philosophers—Bentham now has a disciple who is more Benthamite than the master.

There are echoes here of Adam Smith's invisible hand and Hegel's "cunning of reason," although von Mises does not explicitly recognize them. In the sphere of economic appetites, calculation produces harmony; but calculation cannot operate in other fields. Because of his eighteenth century ancestry, and his belief in the harmony of interests, von Mises might be expected to deal with natural law. He treats it but in subordination to the apotheosis of Utilitarianism.

In his eyes the natural law tradition yields only a bewildering diversity of doctrines. This is just enough as a historical judgment. But the sequel is astonishing, for he lists the following three "theorems" as the legacy of the natural law tradition: the idea of a natural order to which man must adjust his actions, if they are to be successful; this order may be known only by reasoning, which exempts no institution from its critical scrutiny; the standard by which actions are to be judged can only be that of the effects produced by such action. To the credit of natural law is its rejection of legal positivism. But, perniciously, the doctrine abstracted and supplanted the teachings of liberal social philosophy. For example, it preached the biological equality of all men. In so outraging nature the tradition of natural law finally caused wars, nationalism, and racism.

Here, it is finally necessary to interject the single word—nonsense. This reviewer has severely held himself to the task of clarifying the thought of a writer with whom he rarely agrees, and never wholeheartedly. Von Mises' knowledge of history is strangely old-fashioned, as might be expected from his Benthamism. He adds little to the subject of his book, *Theory and History,* apart from the recognition that history is not a science but an inquiry which must proceed in the examination of evidence by means of logic, with a knowledge of psychology, not the science of the physiologists and behaviorists but of the human spirit. The historian must, also, know the universally valid laws of economics. To fail to do

4. *Id.* at 55.
5. *Id.* at 49, 55.

so is to compound human error and to yield to historicism. Where Acton was a hanging judge of historical actions in the name of morality, von Mises is a hanging judge in the name of liberal economics. The book is a lesson in the primacy of that discipline, and a warning to historians to respect it.

In sum, he is a hedgehog. His extremism and more than occasional penchant for nonsense contribute to discredit him, and, more seriously, the position he advocates. His economic position has been argued far more plausibly and humanely by Hayek, and some reviewers have unscrupulously pretended to deal with Hayek when they were refuting von Mises.

But the hedgehog, as a defender of freedom, makes many good points. He is merciless with historicists, positivists, and believers in historical cycles. He scores on philosophers of the history of civilization who glibly contemplate the universals of civilization, when, as yet, no one has been able to define and comprehend what a civilization is, or, as a matter of history, describe the life course of a civilization. He rightly criticizes all those who would imprison man's future in the dungeons of their speculative patterns. This is no small service, when history and the philosophy of history face the terrible temptation of intruding upon philosophy and theology to usurp the functions which the latter in their parlous condition so poorly discharge. Historians, it may be hoped, will be sufficiently good philosophers as well as historians to resist the temptation.

M. A. FITZSIMONS

ZWISCHEN NATURRECHT UND RECHTSPOSITIVISMUS, GLAUBE UND FORSCHUNG No. 10. By Klaus Ritter. Witten-Ruhr: Luther-Verlag, 1956. Pp. 128. DM. 5.80.

The chief motivation of this short but very thoughtful study is indicated in its subtitle: "An epistemological discussion of recent attempts to restore a metaphysics of law." The author seeks for an unshakeable foundation of law which would resolve the conflict between natural law and legal positivism. According to Ritter the conflict arises out of an antinomy grounded in the very structure of systematic discursive reasoning based upon the complete separation of subject and object. As long as this basis is not abandoned, reason will be forced into extrarational commitments or into skepticism. Thus the solution of the antinomy is not to be found in a decision in favor of natural law (the extrarational commitment) or of legal positivism (skepticism), but in the ascertainment of a new starting point.

The author concedes *ab initio* the invalidity of legal positivism. To prove his thesis about natural law he examines various natural law theories advanced in Germany since 1945. A sifting of the literature demonstrates that the renascence of natural law is more apparent than real, since the term natural law is used loosely. Ritter discusses briefly the views of Mitteis, von Kempski, W. G. Becker, and Erbe and the last works of Radbruch, and notes that their proposals, while

tending towards the natural law, are insufficient for its restoration. The true natural law doctrines are treated under the headings of Christian natural law (divided into Catholic and Protestant positions) and profane natural law. These three positions are represented respectively by Heinrich Rommen (whom the author mistakes to the credit of the Order for a Jesuit), Emil Brunner, and Helmut Coing.

In his searching analysis Ritter is guided by his philosophical (quasi-Kantian, quasi-existentialist) and Protestant theological (Barthian) commitments which permit him to assert neither the possibility of a valid cognition of metaphysical realities nor the possibility of a valid natural theology.

The author takes Rommen's treatise on the natural law as a classic statement of the Roman Catholic position. While admiring the steadfastness with which the Church has clung to the natural law theory, he objects to the metaphysical realism implied in the Catholic doctrine and argues in accordance with his theological premises that Catholic thought attaches far too little importance to the debilitating effect of original sin. Ritter maintains with Kant that absolutely valid principles must be proven without reference to their empirical content and claims that the *principia communissima* incapable of other than empirical proof must be denied universal validity. Another objection is independent of the author's premises and, therefore, of special value. He points out that the universal validity of the general principles cannot be preserved without general rules which determine the application of basic principles to circumstances. General principles of application, however, are not provided by the Catholic natural law theory, so that in actuality the application of the basic principles involves their modification. Thus accommodation to circumstances denotes the use of *ad hoc* assumptions rather than the consistent use of universal principles. Ritter concludes, therefore, that the customary view of positive law as a concrete interpretation of natural law is incapable of substantiation. It is evident that Ritter in his critique has touched upon several points which are also of grave concern to wholehearted admirers of the *jus naturalis.*

In the beginning of his discussion of Brunner's teaching Ritter notes that a Christian natural law presupposes a clarification of the relationship obtaining between reason and revelation. In the course of his analysis of Brunner's thinking it becomes evident that in Ritter's eyes Brunner has not succeeded, and that his position is contradictory. Because of his theological standpoint Brunner is judged to be less one-sided in his approach than Catholic thinkers. He denies that human reason can furnish a natural theology, but holds that reason can achieve a valid cognition of nature and therefore construct a natural law. Ritter points out, however, that Brunner's position entails defects similar to those noted in the Catholic natural law doctrine. Ritter objects to Brunner's rationalist tendencies, to the absence of a nexus between principles and practice, and concludes that Brunner's norms derive ultimately from his religious convictions and not from the natural order of things. It might be open to question whether Ritter with his admitted preference for the theology of Barth displays all requisite empathy for Brunner's very subtle reasoning.

Helmut Coing's work, representative of the profane natural law theory, is the

subject of the author's most detailed and searching criticism. By analyzing Coing's express and implied assumptions Ritter demonstrates that Coing's work is more facile than profound. Coing claims as foundations for his doctrine valid insight into the "a priori realm of values" (Hartmann), given in the intuition of feelings and the constancy of social problems. Both together result in legal principles which have transsubjective and extratemporal validity. Ritter points out that the empirical fact of values does not prove their universality but only their existence. In the opinion of Ritter, Coing weakens his own case in several instances. For one thing, he has no answer to his own question whether we can be certain of the objective and absolute character of values perceived. Besides, while Coing's doctrine of supplementary values points to the interconnectedness of values (Hartmann), he attempts a determination neither of values nor of their respective rank. Ritter notes that any such attempt is foredoomed to failure because of Hartmann's methodological aporia of order, i.e., values cannot be ordered without a scale, and no scale can be constructed without ordered values. Nevertheless, Coing attempts to develop the content of justice from the insight into the ethical value of personality. Ritter points out that Coing's reasoning breaks down when he maintains that social inequality cannot be determined by any standard of justice, since the value of a person cannot be measured. Coing's argument implies not only a commingling of commutative and distributive justice, but also an abandonment of the erstwhile claimed uniqueness of the person. Ritter also makes it clear that Coing's concept of personal value is unclear and contradictory. For if the ethical value of the person be wholly transcendent to experience, it cannot serve as a foundation of empirical law; if it be empirical, it cannot be constitutive of universally valid principles. Coing's use of the ethical value of personality is also open to doubt since he is unable to provide any positive prescriptions for the ethical will. If the interconnectedness of all values be admitted, Coing's assertions that we progressively discover the natural law is tantamount to saying that we do not know the natural law, since partial knowledge of values cannot render an order of preferences. Moreover, Coing himself denies that his own natural law possesses absolute and metaphysical significance. Hence Ritter is fully entitled to doubt that Coing has succeeded in providing a foundation for the natural law. Included in Ritter's treatment of Coing's position is a very rewarding discussion of some fundamental aspects of N. Hartmann's position. The author doubts the fruitfulness of the phenomenological approach in general since in his view it avoids the problem of absolute truth and leads to a practical realism. This reviewer holds that the phenomenological approach is not as unsuitable as Ritter thinks.

Ritter concludes that the natural law is an impossibility. No valid connections exist between absolute principles and contingent circumstances, and the epistemological presuppositions of any absolutely valid law cannot be substantiated. Nor can any attempt to ground natural law in the structure of the human person succeed. Ritter, in agreement with H. Blüher and K. Barth, holds that personality is neither a philosophical object, nor the autonomous subject of a moral world, nor a clearly discernible image of the Divinity, but a reciprocal relationship of free beings.

The classic ideal of philosophy, namely, objective absolute truth independent of the thinking subject, must be abandoned altogether. For, according to Ritter, philosophical realism, which has become doubtful since Kant, has been shown to be untenable by the philosophical conclusions that von Weitzsäcker draws from the principle of indeterminacy. Instead, Ritter suggests, we must find the source both of human value and of knowledge in man's continuous and deliberate openness to the unconditioned ground of existence—God. Ritter envisages a philosophy of existential commitment which demonstrates in its very structure the ultimate unity of faith and knowledge. In the opinion of the reviewer a consideration of von Laun's work might have been useful to the author.

This very penetrating and thorough study by Ritter constitutes a real contribution to the clarification of some of the problematics inherent in natural law. Differences in approach and of conviction should not deter anyone from reading this book.

ULRICH S. ALLERS

GENERAL PRINCIPLES OF LAW. By Giorgio del Vecchio. Translated by Felix Forte. Boston: Boston University Press, 1956. Pp. x, 111. $3.50.

It is not easy to see why, after seventeen major and minor works of Del Vecchio's have been translated into English, another should have been singled out for the difficult labor of expert translation into English and separate publication. The work chosen is an introduction to a course on philosophy of law, read in December 1920 at the University of Rome. It is reproduced unchanged, except for bracketed references to new Italian legislation, especially the *Codice Civile* of 1942 insofar as it has superseded the references in the original.

This lecture falls towards the end of Del Vecchio's Neo-Kantian period, from which his most important work dates. It was not much later that, like so many other Continental jurists, Del Vecchio sought intellectual justification for the Italian Fascist regime, of which he became an ardent supporter, by gradually sliding from a Neo-Kantian into a Neo-Hegelian philosophy. No other philosophy, of course, lends itself so easily to glorification of absolute state power, and the suppression of any opposing rights or values — under the cover of moralizing phrases — as Hegelianism. It is not, therefore, entirely without a sense of irony that anybody who has followed the course of Del Vecchio's work, will read the present lecture, which staunchly upholds the "Law-state," i.e., an irreducible minimum of individual rights against the power of the State. Philosophically, this lecture makes two major points, which are not necessarily correlated. One is that a legal system, however completely codified, is not analytically self-contained, that it must be interpreted and developed creatively by reference to the basic ideas and values that underlie the legal system as a whole. This is expressed specifically in some modern codifications such as the Swiss Civil Code. But it has come to be accepted as a matter of course in the legal philosophy and judicial practice of all the great civilian systems (as, indeed, from very different premises

in the common law jurisdictions). Such an approach, which is no longer novel or original, does not necessarily lead to a natural law philosophy. Nobody has been more insistent on the necessity of articulating the ultimate values inherent in any legal and social order than the great relativists such as Max Weber or Gustav Radbruch (or, we might add, from very different premises, Oliver Wendell Holmes).

Del Vecchio couples with this necessity to supplement the logical and analogical interpretation of a codified law by reference to what has now, in the parlance of the Statute for the International Court of Justice, become the well-known phrase of "general principles of law recognized among civilized nations," with an appeal to natural law as a guide to such principles. His attempt to spell out these basic principles of natural law remains somewhat vague. The basic ideal is respect for the human being as a personality. From this follow three principles: the concept of the sovereignty of the law; the concept of equality before the law for all; and the concept of separation of powers, as a further insurance of the supremacy of the law against the other activities of the State. Strangely enough, a relatively minor problem, not much discussed in the common law, the right to one's portrait, occupies a considerable amount of Del Vecchio's discussion of the rights of personality. Freedom of contract and, subject to the limitation of abuse of rights, the right of property are added to the list.

Today all this sounds a trifle stale, a criticism not so much of what Del Vecchio had to say in 1920 as of the choice of this lecture for publication in English in 1956. Whether we believe in natural law or not, we have, since, been faced with problems of overwhelmingly greater magnitude and difficulty. At what point can we agree — as Radbruch suggested in his writings after the Second World War — that a positive law is "non-law" because of its monstrosity? We probably all agree that the Nazi orders, decreeing the extermination of millions of Jews and others in gas ovens and concentration camps, should not be recognized as law — provided always that the regime is overthrown and another order permits judgment upon it. We hardly need to appeal to natural law to condemn and punish those responsible for such unspeakable barbarities. The real problem arises with the underlings: those who are placed before the dilemma of either assisting in the preparation and the execution of immoral laws, or risking severe penalties for disobedience. The generals leading armies to aggression; civil servants preparing concentration camp orders; soldiers killing women and children under orders of their superiors who will shoot them for disobedience; the choice between the sacrifice of the life of a mother, perhaps the center of a large family, or the preservation of a small embryo — these and a hundred other problems cry out for solution, by natural law or any other code of values.

But it is precisely in this kind of problem that general precepts such as those indicated in the present little book take us nowhere. For under the cover of the right of personality, the rule of law, or liberty of contract, subject to the interests of the community, all sorts of conflicting solutions are possible. Hundreds of books and articles have been written, not excluding Declarations of Human Rights, setting forth eloquently the basic and immutable principles. But very

few go down to the agonizing details of problems where there is a choice between conflicting values, loyalties, ideas, duties, each of which has a claim to recognition. It is only in the concreteness of the individual case that the dilemma of natural law emerges. Does natural law command — as we are taught by the Neo-Scholastic doctrine — that any form of birth control, other than by the use of the calendar, is contrary to the natural order of creation, even if the consequence of this doctrine in our age of improved hygiene is that the population of the earth will teem with millions of human beings living in animal-like conditions, mere shadows of the human dignity which also is a postulate of natural law? Does it command us to deprive a family of wife and mother, so that a yet unborn child in the womb may not die unbaptized? Does it command the civil servant to refuse assistance in the preparation of an immoral law at the risk of imprisonment? (To say that it does, is, of course, infinitely easier after the order has been overthrown and judgment can be pronounced by those who did not have to face the dilemma.)

My own answer to many of these problems often differs from that of the natural law philosophers. This does not mean that I consider their belief wrong and mine right. But the claim of those who hold a contrary belief, to speak in the name of absolute truth, although millions of people differ on these questions of grave ethical dilemmas, appears to this reviewer as an example of human arrogance clothed in supernatural wisdom. I also reject the totally false antithesis between adherence to natural law philosophy and adherence to a skeptical, nihilistic positivism, which knows no values. For the same reason, I reject the assumption — made in Del Vecchio's lecture — that the need to search for principles beyond the text of the code means, necessarily, the acceptance of natural law.

We salute Professor Del Vecchio's lecture, and particularly Judge Forte's careful and able translation, with respect. But we emerge from the reading not much nearer to the solution of the agonizing problems of contemporary law than before.

WOLFGANG FRIEDMANN

ON THE PHILOSOPHY OF HISTORY. By Jacques Maritain. New York: Charles Scribner's Sons, 1957. Pp. xi, 180. $3.50.

Professor Maritain's philosophy of history shows promise of being an important step in the resolution of the problem posed for all natural law systems by the variability of the human condition. The demand for a jurisprudence addressed to the existential situation has long been the source of the most telling objection to all such systems. The idealist-rationalist version of natural law, with its claim to derive all the detailed precepts of human law from the essential qualities of human nature, has been wholly discredited under the force of this demand, while the Neo-Scholastic school of natural law, by confining itself to those principles that can be asserted as applicable to all men everywhere, has given up any possible claim to being a methodologically adequate system of jurisprudence.

The Neo-Scholastic, with his long experience in formulating and applying universally applicable principles of morality, has been able to assert with commendable forcefulness the primacy of the moral order over the legal order. In the vast areas of the law, however, where he can discern no unequivocal moral principle immediately involved, he has been content to leave the field to the positivist. Even in areas where his moral commitments are heavily involved, he is apt to use them to carp at the positive law, rather than to shape it.

What the Neo-Scholastic natural law theorist has in common with the positivist is a blithe disregard for the problems of legal methodology. Methodological questions can be meaningful only when there is something to achieve and limited resources with which to achieve it. The positivist by his doctrine excludes the first of these requirements; the Neo-Scholastic by reason of his lack of concern for the existential situation takes no notice of the other.

The most important attempt to introduce an existential element into a natural law framework has been through the concept of freedom. The natural law itself, it is argued, provides for the variations in the human condition by requiring that each person be left free to do as he thinks best, except insofar as he is restrained by the demands of a like freedom for another, or by the demands of some principle binding on all mankind. Both the rationalist-idealist and the Neo-Scholastic have included some such principle in their theories of natural law. This, however, while it is not without methodological consequences, is fundamentally a teleological principle—a value the law should achieve. Adherence to it makes the methodological inadequacy less harmful, but does not make the methodology less inadequate. Whatever universally binding principle the law attempts to recognize, including freedom itself, cannot be secured without the exercise of a good deal of methodological sophistication. In any given time and place, the way in which the principle is being applied, and the forces arrayed against it, must be carefully considered if the principle is to be secured by law.

For an adequate methodology, then, we need not so much an existential understanding of the human person as an existential understanding of the social context. The fact that human beings are unique, and not interchangeable, is of vital import, but it does not wholly account for the variability of the human condition. The external conditions of human life, both natural and societal, are also capable of variation. The conditions produced by these variations are neither unique to the individual nor common to mankind. The law must deal with them, and cannot deal with them under principles of universal validity.

It is this that has led the school of jurisprudence called sociological to substitute for the value element in law a sociological element empirically determined. This use of mores or some such criterion has avoided the most telling methodological objection to analytical positivism—that the analysis of legal norms divorced from their social contexts simply does not yield results. At the same time, the philosophical objection to positivism is just as applicable to the doctrines of the sociological school. For anyone who insists on philosophical grounds that there must be an ethical element in legal determinations, mores as such cannot constitute an adequate substitute. Methodologically, there is the further objection

that the mores of a given society are ambivalent, so that valid results require a selection between conflicting standards with equal claim to a foundation in the mores of the society, and therefore require a principle of selection. This has been rather apparent in our own society recently in problems of race relations and in problems of obscene literature. It is no accident that the development of empirical techniques for clarifying the actual mores has coincided with a judicial retreat from the use of mores as a standard for legal choice.

The philosophy of history seems to furnish a key to the problem presented by these countervailing and inadequate doctrines of law, the one insufficiently conscious of the contingent factors in the legal determination, the other insufficiently conscious of the ultimate teleological factors. The philosophy of history aims at making what is transitory intelligible in the light of what is ultimate. Thus, it is capable of making law intelligible as a totality—that is, with respect to its total function of giving practical social content to an ethical aspiration.

The Hegelian dialectic, with which the term "philosophy of history" is usually associated in modern times, does indeed, in form, make law intelligible as a totality. Unlike the doctrines thus far considered, it gives rise to a jurisprudence open to no methodological objections; it will yield a principle of selection that is applicable to every case, is not ambivalent, and is not irrelevant to the actual conditions of society. It can be objected to, therefore, only on philosophical grounds. For anyone interested in the ethical considerations recognized by natural law theories, these philosophical grounds are not hard to find. Both in the Hegelian system and in its Marxian modification, there is no ultimate value outside the dialectic toward which the law can aim. Thus, each of the great dialectical movements in history comes equipped with a whole intellectual and social apparatus of its own, including its own jurisprudence. This is especially clear in the case of Marxism, which attributes to each of the conflicting social classes in history its own system of law, calculated to keep it in power. This imprisonment of law within the confines of the dialectic is, of course, wholly inconsistent with the aspiration toward justice for all men that is the mainspring of natural law thinking.

Maritain corrects the Hegelian insight by examining history in terms of a commitment to ultimate principles outside history. The way he accomplishes this is perhaps best summed up in his remark that "we are not cooperators with history: we are cooperators with God."[1] Maritain insists on the historical significance of free human acts—acts intelligible only with reference to an aspiration that does not emanate from history. From the interaction between human freedom and the more or less determined forces of history, he derives his basic doctrine, which is that although history may dictate the necessity for certain changes, the changes themselves can be made either well or badly, depending on the extent to which the human agents that bring it about discern and pursue the extrahistorical good. Maritain gives as an example "the implications of scientific, industrial and technological progress":

1. MARITAIN, ON THE PHILOSOPHY OF HISTORY 59 (1957).

> It is obvious that the passing of humanity under a technological regime is something necessary; it cannot be avoided. But in what spirit, in what manner? In such a way that man is made subservient to the machine and to technique, or in such a way that technique and technology are made instruments of human freedom? The same change can come about in an enslaving and degrading manner, or in a genuinely rational and liberating manner. And that does not depend on any necessity in history, but on the way in which man intervenes. . . . [2]

We may also consider profitably how much free human acts are affecting today the answer to the still open question of whether the inevitable transition of the nations of Asia and Africa from colonial status to independence will be peaceful or violent, whether it will produce responsible and stable new nations or bitter and disorderly new nations.

Looking at history in the light of this fundamental principle of the interplay of historical necessity and free choice, Maritain discerns six principles which he calis "axiomatic formulas or functional laws." These principles can be grouped for our purposes under three heads. The first deals with the scope of the historical context, the second with the scope of free choice in history, and the third with the effect of free choice in history.

Under the first head belongs what Maritain calls the "law of the world significance of history-making events." According to this principle, an event that fixes the mode of a historical change in a given place conditions to a greater or less extent the mode of that change everywhere. Good and evil, to put it another way, will play out their hands in other times and places, but never with quite the same cards again. We can perhaps see this law in operation in the extent to which the social reform that has gone on in non-Communist countries since the Russian revolution has been conceived in terms of answering Marxist criticism or of staving off Marxist-inspired revolution, as well as the extent to which Russian Communism has had to revise its own techniques of expansion to cope with the conditions set up by these social changes. But this and any other obvious example are too much dependent on modern conditions of communication to do full justice to the intuition Maritain is attempting to formulate in this law. As he says:

> I am sorry I did not arrive at any satisfactory formulation, though, given the modern network of economic, intellectual and political communications, encompassing all peoples, such a concept, so far as it is equivalent to that of universal interrelation, may obviously be translated into quite rational terms. Yet I was thinking of a more vital and secret kind of solidarity, as old as mankind is. . . . [3]

The importance for our purposes of the law in question lies in what follows from it as to the existential quality of the historical context. If all historical changes are made for all history, no two historical contexts can be alike. Thus, the intelligibility of history is not that of a number of things displaying essential

2. *Id.* at 25-26.
3. *Id.* at 63.

similarities but that of one thing changing. It is through awareness of this form of intelligibility that a philosophy of history cognizant of the extrahistorical nature of human aspiration may be able to meet the demand for a jurisprudence addressed to the existential situation, and still preserve the essential elements insisted on by the best traditions of the natural law.

Under the second head, that of principles dealing with the scope of free choice in history, come three laws Maritain calls those of "two-fold contrasting progress," of "the ambivalence of history" and of "*prise de conscience*." The first of these refers to the fact that as time goes on the possibilities for good and evil are realized more and more. The metaphysical explanation Maritain advances for this law seems equally consistent with either a cyclic or a lineal pattern. It is that on the one hand the passivity of matter is continually dissipating the creative forces at work in history, while on the other hand these forces are continually being renewed from the inherent creativity of the human spirit. That the pattern is lineal and not cyclic is perhaps attributable to the concomitant, more or less irreversible, process whereby more and more knowledge and technique capable of being put to either good or evil use is piling up in the hands of fallible human beings who sometimes do good and sometimes do evil. Although Maritain does not expressly refer to this process of accumulating knowledge in his elucidation of the twofold contrasting progress, the examples he chooses seem to indicate that he is aware of its significance.

The law of the ambivalence of history Maritain derives from that of the twofold contrasting progress. In a given period of history, and, it would seem, in a given historical impetus, both good and evil are to be discerned. It is this principle that bears most directly on the scope for free human acts in an area such as law that is productive of historical events. The forces for change in history are neither to be resisted as such nor to be accepted as such. They are to be worked upon and purified.

On the moral and philosophical plane, Maritain alludes to an irreversible process analogous to that of the accumulation of empirical knowledge, when he states his law of *prise de conscience*. "This," he says, "is the law of growth in awareness as a sign of human progress, and as involving at the same time inherent dangers." [4] By way of example, he refers to the development in politics of the awareness of "the spiritual inner freedom of the human person with respect to the city" and to the development in philosophy with Kant of the awareness of the theory of knowledge as a special discipline. In a later chapter on "typological formulas or vectoral laws" Maritain states a "law of the progress of moral conscience," which seems to be a particularization in the sphere of morality of this same law of *prise de conscience*. By this he understands not that we do better and better, but that we understand better and better what we ought to do. The examples of this should be familiar to most of us. Maritain refers to our ideas of slavery, of the treatment of prisoners of war, of the treatment of workers, and of the relation between superior and subject. Racial segregation furnishes an example closer to home for most of us.

4. *Id.* at 69.

Maritain fills out his discussion of the progress of moral conscience by pointing out the dependence of moral philosophy on moral experience. This is not to say that he denies the proper techniques of moral philosophy as a theoretical discipline. But he does point out that the determinations of moral philosophy, unlike those of metaphysics, are open to criticism from the untutored judgment of good men. Thus, a popular awareness arising from experience may send the moral philosopher back to run through his theoretical operations all over again. The progress of moral conscience, then, does not deny the validity of moral philosophy, but may serve as a corrective on particular applications of the philosophical technique. This should be considered in the light of the conviction that seems to be implicit in a good deal of Maritain's thinking that the forces of history are in some respects moral forces. It is by reason of this moral element that we can gain through the contemplation of history in its ambivalence a new awareness of what ought to be.

This whole second group of principles can free the law from its imprisonment within the dialectics of history, without detracting from the proper place of the dialectic insight. Maritain affirms the dialectic insight in these terms:

> Admittedly, if we consider the manner in which these historical ideas are at play in history, it can be said that each one of them, each one of these forms immanent in time, can reach its final accomplishment in time only by provoking its opposite, and denying itself. But why is this so? It is because its very triumph exhausts the potentialities which summoned it, and at the same stroke unmasks and provokes in the abyss of the real the opposite potentialities. Here is an interpretation which has nothing to do with the dialectical alienation and reintegration, but which shows, it seems to me, that history offered Hegel a kind of material which was akin to his general philosophy.[5]

The dialectic thus conceived, considered in the light of the principles thus far stated, can indicate a function for law. On the one hand, we see good and evil as fellow-travelers in the movements of the dialectic; on the other we see an ever-increasing store of experience and sophistication that continually enhances the potentialities for both. What is important in this is that since the movement of the dialectic is not between good and evil but from one ambivalent condition to another, the quantum of good or evil in a given historical context is freely and not historically determined. It is always open, therefore, for the law, as a free determination with historical consequences, to digest the new potentialities offered by a given advance in awareness or technique, and to enhance the good and reduce the evil in the coming historical context.

Under the last head come the two principles that deal with the manner in which effects are achieved in history, and therefore can be used to position the part played in history by the "rule of law." The first of these principles Maritain calls the "law of the hierarchy of means." Here, he is suggesting that the real changes in history are elicited more surely by spiritual means than by carnal means, and by humble temporal means (*moyens pauvres*) than by rich temporal means (*moyens riches*); in other words, that men are more surely moved by

5. *Id.* at 21.

that which moves the heart than they are by bodily coercion. This is in a way reminiscent of the historical school of jurisprudence, with its theory that law is an emanation of the popular spirit. Maritain is careful, however, to disclaim any interpretation that would give comfort to those who reduce law to no more than such an emanation. That the use of temporal power is less effective than other things does not mean that it is of no effect, or should be abandoned. What seems for our purposes the most important function of this principle is the support it gives to the view that even in the order of expediency the rule of law need not be subordinated to its own preservation. The law can pursue justice at the cost of undermining its own power, with a solid hope that the sacrifice will not be in vain. This we shall have to consider again.

The other law in this third group, Maritain calls that "of the historical fructifications of good and evil." By this he means not that the good prosper, but that what is done well in history is done more successfully than what is done badly. This seems to accord with a long-standing jural experience that justice is more stable than injustice. For truth seems to produce a certain equilibrium in things, whereas error begets antithetical error. It is a rather shrewd insight in Orwell's *1984* that makes rebellion against the suppression of the human personality take the form of sexual license. The bourgeois society of the last century gave rise to a somewhat similar reaction.

Let us consider how the significance of the rule of law is clarified by what this principle implies as to the relation between stability and justice. Let us take for an example the change which an extremely astute Marxian regards as the latest movement in the dialectic, and see how the rule of law has affected the impact of this change on our own society. Milovan Djilas, in *The New Class*, suggests that with the triumph of the proletariat over capitalism there arises a new class of bureaucrats, who grow up out of the need of the proletariat for a machinery to achieve the goals it has set itself. Our own experience, as well as a growing body of literature, shows us that our own society has not been immune to this change. The popular demand for a mitigation of the evils of untrammeled capitalism has brought to the fore a whole body of administrators—in government, in labor, in business itself—who begin to develop more and more similarity to each other, less and less to those whose interests they represent.

With the need for representation of groups too large to represent themselves, it was inevitable that some such class should arise. But it can scarcely be doubted that in our own society we have been able to realize more of the potentialities for good and fewer of the potentialities for evil inherent in this historical development than has been the case with the Communist nations. This might not have happened; it has been argued that but for the reforms instituted during the first years of Roosevelt's administration the necessary changes would have come about through a revolution. Such a revolution would presumably have led to a form of bureaucratization more like the Communist form than like the one that actually developed in our country.

The human free choice to which we can attribute the comparatively felicitous form this development has taken among us was motivated, however, not by a desire to prevent a revolution, but by a growing conviction that objective justice

required certain reforms. That this conviction was given legal and political effect without any general disruption of our legal and political institutions is attributable to our commitment to the rule of law. This in turn postulates that there is in our institutions a certain orientation toward *justice as such* that enables them to absorb any new awareness of *what* is just, and therefore to accomplish the historically necessary changes while maintaining the basic institutional structure intact.

In a society that lacks this commitment to justice institutionalized in the rule of law, the Marxian dialectic tends to become self-validating. Those who deny the possibility of a just solution fail, not unnaturally, to reach one. Thus, the error in every period of history is overcompensated in the next. As we have seen, there is running through Maritain's doctrine the premise that a certain turning toward justice is to be found in the great movements of history; thus, he says that "the yearning for [social justice] among the masses was the real incentive [the Communist revolution] traded upon." [6] In this blind indignation that throws down Adam Smith and raises Lenin in his place, there is something reminiscent of Cahn's "sense of injustice." With no articulated principle of justice to hold down the force of the emotional response to years of a given injustice, society cannot but overcompensate, create a countervailing injustice, and set the process in motion all over again.

One cannot examine the relation between stability and justice in the light of Maritain's vision of good and evil at work in history without seeing new importance in Cahn's basic intuition of the sense of *in*justice, and at the same time realizing the limitations on Cahn's formulation. It is no doubt very largely this negative force that shapes the important movements of history; at the same time, a rational investigation of exactly what it is that invokes this sense of injustice, and how the injustice can be corrected, is essential to the rule of law, and, in turn, requires the idea—if not the sense—of *justice*. The human mind being somewhat efficient for its purposes, an institutionalization of the quest for this idea and its practical implications is likely to be in some degree availing to develop the idea and show how it can be put into practice. Thus, where a complaint is loudly voiced, a society that attempts to do so can probably discern some condition giving just ground for the complaint, and set about correcting it.

This, of course, accords perfectly with the common law tradition of a revisionistic and evolutionary, rather than an idealistic and revolutionary, function for law. It is through this revisionistic tradition that Maritain's philosophy of history embraces what is most attractive not only in Cahn's thesis, but also in the theory sometimes advanced of a "natural law with changing content," and in the notion, already alluded to, of the mores of the society as shaping the ideals of the law.

At this point we can attempt to redefine natural law in the light of the evaluative considerations introduced by the philosophy of history. Natural law thus redefined would be *the norm for evaluating legal events in terms of the demands of human nature in a given historical context.* Thus conceived, it would be an adequate evaluative principle, as it would include both moral and methodo-

6. *Id.* at 67.

logical elements. It would direct the law toward the actualization of the potentialities for good in the particular historical context. It would be subordinated to morality (or natural law in the sense of morality), because human nature in a given context cannot be inconsistent with human nature in general. It would, however, provide a methodological principle of choice between alternatives that morality leaves open, and a moral principle for confining choice to alternatives that are methodologically available.

It should be apparent that the historical element in the natural law as thus conceived is not an element of mere expediency. It is, to be sure, a methodological element, and there is a sense in which any methodological consideration can be characterized as one of expediency. At the same time, natural law remains an ideal or a norm to which the methodology ought to be directed. It remains also a guide for choice, since history as Maritain sees it leaves some kind of choice between good and evil always methodologically open.

As long as there is such a choice between good and evil, we cannot fall into the kind of expediency that is the mark of an institution with no higher aim than to perpetuate itself *qua* institution. The judge or lawyer who defies the political branches of the government is usually regarded as a particularly successful exponent of the legal methodology, and of the political state itself human nature may come to demand in a given historical context that it show that it knows how to perish without compromising the principles to which it is committed. It is precisely at this point where power is least that moral suasion is greatest—the point Maritain seems to be making with his "law of the hierarchy of means."

In the foregoing discussion, no attempt has been made to give a general account of Maritain's philosophy of history, beyond what bears on its possible implications for the natural law. Maritain takes a long view of history and an exalted one; at the same time, he grounds himself, like a good Thomist, on the commonplaces of experience. He writes also with a lack of dogmatism which, without ever compromising his philosophical realism, suggests always that his formulas are an attempt to approach reality, not to supplant it.

Maritain says at the outset that his philosophy of history presupposes human free will and the existence of God. In addition, he writes as a Christian, pursuant to his conviction that practical, as distinguished from speculative, philosophy must take into account the whole existential condition of man, drawing light from whatever source it can. Within this framework, he sets the Christian a task of vigorous involvement in the travail of the good to work itself free through the order of time. In this, his doctrine must be set in opposition to any doctrine that entails a reductive interpretation of the historical context as it affects the temporal mission of the Christian—that matter is merely evil, that the Gospels are a self-sufficient basis for social reform, or that no purpose is to be looked for in created things beyond their own proper natures or the salvation of the human beings that deal with them.

This reviewer, for his own part, sees the basic Christian approach to created things in terms of an analogue of the Incarnation. Lawmen, Christian and non-Christian, have operated in a comparable framework when they have attempted

through their legal institutions to give practical content to—to "incarnate" as it were—some dream of liberty or justice.

It is this "incarnational" orientation that constitutes the particular attraction of a well-thought-out philosophy of history. Had Maritain exploited the affinity for the Christian doctrine of the *Logos* in the Hegelian vision of the self-awareness of the Spirit unfolding through the dialectic movements of history, he might have brought out this orientation more fully, and in so doing done fuller justice to Hegel. But even as it stands, Maritain's doctrine has this incarnational orientation present in it; it is this that provides a congenial setting for the considerations of legal methodology that have been discussed in this review. At the same time, Maritain's view of history does what Hegel's never did: it provides us with the basis for knowledgeable cooperation in the incarnative process, through its insistence on ethical aspirations that emanate from outside history. It is through this juxtaposition of historical and extrahistorical elements that Maritain's philosophy of history has an important insight to offer, not only for the Christian striving in his own place to further the Incarnation of the Word in time, but also for anyone with a dream to which he wishes to impart reality.

ROBERT E. RODES, JR.