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Roger T. Simonds

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THE "NATURAL LAW" CONTROVERSY: THREE BASIC LOGICAL ISSUES

One of the significant events in modern philosophical and juristic literature is the revival of interest in the classical Western theory of "natural law" or naturalistic jurisprudence. The result has been a complex and rather violent debate, in which the most widely known antagonists are perhaps John Wild¹ and Hans Kelsen.² The controversy goes on, without much prospect of a truce, at the conventions and in the professional journals.³

The purpose of this article is to clarify certain logical confusions that plague the issue on both sides. Sometimes the defenders of natural law seem as vague about what to defend as their opponents are vague about what to attack. Hence, the arguments are often inappropriate to the main issue.

Generally speaking, of course, it is agreed that the main issue is whether there exists a normative natural law or not. Let us assume for the present that "natural," or scientific, laws exist. Our question then is, are any of these laws *normative* with respect to human beings and institutions? Transforming this existential question into its epistemological form, we ask: can any normative social laws be objectively (i.e., existentially) verified?

I

It is important to avoid certain confusions at the outset. In the first place, we must not suppose that absolute verification is in question here. If the impossibility of absolute verification is to be held against normative laws, then it must also be held against "descriptive" laws such as those of mathematical physics. Yet no one is going to argue seriously that the methods of the natural sciences are "fallacious" because they involve the assumption of certain propositions which cannot be verified absolutely. There is no more reason to demand absolute verification in jurisprudence than there is in physics; in either case, the demand could be satisfied only by an empty formalism. But, then, if we do not want to make this demand, we must be willing to accept the consequence: normative juristic propositions are hypotheses having indirect and uncertain verification. Later on, I shall deal more explicitly with theories of absolute verification.⁴

In the second place, we should avoid the plausible but treacherous view that a theory of naturalistic jurisprudence depends solely on the possibility of a logical deduction of normative propositions from "factual" ones. Under certain conditions, this sort of deduction is indeed possible;⁵ but a naturalistic theory

1. JOHN WILD, *PLATO'S MODERN ENEMIES AND THE THEORY OF NATURAL LAW* (University of Chicago Press, 1953).

2. HANS KELSEN, *WHAT IS JUSTICE?* (University of California Press, 1957). This is a collection of essays and addresses, largely reprints.

3. See Felix E. Oppenheim, *The Natural Law Thesis: Affirmation or Denial?* in 51 *AMERICAN POLITICAL SCIENCE REVIEW* 41 (1957) together with critical comments by Harry V. Joffa at 54 and a rebuttal by Oppenheim at 65.

4. See pp. 135-37 *infra*.

5. See pp. 134-35 *infra*.

need not rely on it. There may be normative naturalistic propositions which are hypothetical and hence underived. The crucial requirement for the verification of normative juristic propositions, if they are hypothetical rather than necessary, is that certain existential "factual" propositions should be *deducible from them* sooner or later.

It is clear that this requirement is indispensable. From the standpoint of modern formal logic, any explicit propositions must be classified as universal, singular, or existential. Examples of each type, respectively, might be: (1) "All things are green," (2) "Henry is green," and (3) "There is something that is green." When the word "things" is interpreted in the most general way possible (namely, as a variable which can be given any value whatever), it is obvious that the second proposition follows from the first. The universal proposition in our example, then, may be said to have "existential import" in this sense. In the same sense, any universal proposition can be shown to have existential import, since it may always be interpreted as an assertion about all things whatever. If "All pelicans are carnivorous," then "For all things, it is the case that if they are pelicans they are carnivorous."

In conditional universals, such as the example just given, there is a sense in which they do *not* have existential import. We may be quite certain that there exists something which, if it is a pelican, is carnivorous; but we may not infer that there exists something which is a pelican. Of course, our universal hypothesis may be true even though no pelicans exist. But in that case we would have no way of verifying it, assuming that it is nontautological. To verify a conditional universal hypothesis, therefore, we must always know or assume, *independently* of that hypothesis, that there exist one or more instances of the specific kind of things to which it applies.

The same considerations pertain to jurisprudence. If I want to verify the normative assertion, "All men ought to obey the law," I must know or assume independently that there are such things as men. Otherwise, my assertion can neither be verified nor applied to any situation in practice. In this respect, at least, normative juristic theory differs not a whit from "descriptive" scientific theory.

II

This brings us to an important bone of contention between the naturalists and their opponents. The fundamental concepts in jurisprudence, it is generally conceded, are the concepts of "obligation" and "right" (which are mutually converse relations). The naturalists contend that there are certain normative propositions in jurisprudence which are, at the same time, statements of natural "fact." The usual objection to this is that no proposition can be both normative and factual, or prescriptive and descriptive. This objection, presented as though it were a self-evident axiom of logic, is to be found in virtually all anti-naturalistic arguments.

This particular line of argument is so crucial, and so widespread, that it can hardly be ignored. Unfortunately for the anti-naturalists, it is fallacious. The astonishing fact is that the naturalists themselves have largely failed to see through it and have often chosen to avoid the issue. But the supposedly absolute

distinction between "norms" and "facts" cannot bear a close examination.⁶

The earliest historical advocate of the absolute norm-fact distinction was, I believe, David Hume. This philosopher made the following very curious and influential remarks:

In every system of morality, which I have hitherto met with, I have always remark'd, that the author proceeds for some time in the ordinary way of reasoning, and establishes the being of a God, or makes observations concerning human affairs; when of a sudden I am surpriz'd to find, that instead of the usual copulations of propositions, *is*, and *is not*, I meet with no proposition that is not connected with an *ought*, or an *ought not*. This change is imperceptible; but it is, however, of the last consequence. For as this *ought*, or *ought not*, expresses some new relation or affirmation, 'tis necessary that it shou'd be observ'd and explain'd; and at the same time that a reason be given, for what seems altogether inconceivable, how this new relation can be a deduction from others, which are entirely different from it.⁷

Here there is a very simple and obvious error which has been generally overlooked. Hume was misled by an accident of English grammar into thinking that the auxiliary verb, "ought," can function as the *copula of a proposition*. This is impossible. The only copula recognized in traditional logic was the verb, "to be," in its indicative mood. In modern symbolic logic, on the other hand, the traditional copula disappears, and Hume's argument becomes a matter of purely historical interest. But in the context of traditional Aristotelian logic, the appearance of sentences like "We ought to be good" lent a certain plausibility to Hume's complaint. On first sight one is tempted to say that the subject is "We" and the predicate "good," which leaves "ought to be" as the copula. Or, if one identifies "to be good" as a predicate, then the copula is simply "ought." The result in either case is a kind of "proposition" not recognized at all in traditional logic. Sentences with "ought," however, can always be transformed into sentences with the explicit verb, "to be," as copula. For example, if "We ought to be good," then obviously "We *are* obliged (or obligated, or under an obligation) to be good." The fact that many grammatically correct sentences do not explicitly contain an indicative form of the verb, "to be," does not justify the use of some other verb as copula in a traditional proposition. In normative juristic propositions, the notions of "obligation" and "right" belong to the predicate, not to the copula.

Thus the absolute norm-fact distinction, based as it is upon a confusion of logical form with grammatical form, is fallacious and must be rejected.

There is one sense, to be sure, in which the distinction seems to be correct. A normative juristic proposition cannot be directly inferred from a factual proposition of a *certain type*, and vice versa. We cannot infer the statement, "Henry ought to drink cocktails," from the statement, "Henry drinks cocktails." Yet, with the help of an additional assumption, we could make the inference from one to the other with no difficulty. That assumption might be: "Henry is per-

6. For a somewhat different analysis tending to the same conclusions, see F. S. C. NORTHROP, *THE LOGIC OF THE SCIENCES AND THE HUMANITIES* ch. 17 and 21 (Macmillan, 1947).

7. DAVID HUME, *A TREATISE OF HUMAN NATURE* 469 (ed. Selby-Bigge, Oxford, 1888).

fact" — meaning that Henry always does what he is obliged to do and never does what he is not obliged to do. Unless Henry is God, this is a very dangerous kind of assumption to make. To put the same point more generally: we refuse to allow an inference from a norm to a fact, or from a fact to a norm, if the fact is a member of the relational field of the norm (i.e., if it is prescribed or proscribed by the norm). But this refusal is not required by any logical axiom. It is merely the consequence of a generally accepted "common sense" hypothesis.

Instead of referring to a norm-fact *distinction*, then, we would do better to refer to a norm-fact *restriction*.

It is clear that a great many "factual" statements may be logically related to a given normative statement without falling under the restriction. Reconsider Henry for a moment. On the assumption that Henry ought to drink cocktails, two factual consequences follow immediately: (a) that it is logically possible for him to do so, and (b) that it is also *naturally* possible. We cannot reasonably command Henry to violate the laws either of logic or of nature. Thus, he can have no obligation to construct a round square or to make a running broad jump across the Atlantic Ocean. In this sense the laws of nature (whatever they are believed to be), as well as the laws of logic, are logically implied by any and every normative juristic proposition. Consequently, if there is a significant change in the "laws of nature" — as there is from time to time — there may be a change in the truth-value of any or all of the normative juristic propositions.

In this manner, "facts" are deducible from norms — a circumstance generally admitted even though it is in flat contradiction to the alleged absolute norm-fact distinction. "Ought" implies "can," we are told. But if norms can imply facts, then why can't facts imply norms? Apparently, the tendency is to regard the implication as valid in one direction but not in the other. But how the advocates of the autonomy of norms can reconcile their position with the elementary demands of logic remains as much a mystery today as it was in the days of Hume and Kant.

Provided the appropriate restriction is kept in mind, there is no reason why norms cannot be derived from facts. Norms, after all, are only special kinds of facts: namely (in jurisprudence), the facts about obligations and rights. This is generally recognized in everyday legal, business, and professional practice, in spite of lip service to the contrary. How, for instance, do we justify the statement, "Henry ought to drink cocktails"? We do it in the only possible way: by appealing to the relevant facts about Henry, together with the laws of nature and logic. Let us suppose that Henry is suffering from Buerger's disease, for which a regular consumption of alcohol is the prescribed medication. If, on an appropriate occasion, cocktails are the only available form of alcohol, then Henry's obligation to drink them on that occasion is immediately evident.

Obviously, the same kind of analysis can be applied to the more general norm for the treatment of Buerger's disease. This norm is inferred from a combination of normative and other factual premises: to wit, a general norm concerning the treatment of diseases, and the theory of Buerger's disease in particular.

All this would seem to indicate that there must be some ultimate juristic norm, or set of norms, which can supply the apparently irreducible "normative

element" that exists at every stage of analysis. But the appearance is deceptive. It may be true that norms having less generality must be grounded in norms having greater generality, and that there must be a "most general" or ultimate norm on which the whole sequence may be grounded. Nevertheless, it does not follow that such an ultimate norm, or set of norms, must be juristic — i.e., that it must refer to obligations or rights. On the contrary: it follows that the ultimate norm must *not* be juristic, because of the existence of intellectual disciplines having greater generality than jurisprudence. If we wish to find the most general normative propositions, we should look for them in the most general type of theory known. Jurisprudence does not satisfy this requirement; nor, for that matter, does "ethics" or moral philosophy. There is only one type of theory that can satisfy it, and that is the theory of formal logic — more particularly, propositional logic.

Propositional logic is the most general of all theories in that its laws are affirmed, explicitly or implicitly, in all theories whatever (including itself). These laws cannot be derived from anything (other than themselves), since any attempt to derive them would obviously have to appeal to the same laws. For the same reason, they cannot be refuted. The laws of propositional logic are *normative* with respect to all theories because of this circumstance. When confronted with an illogical theory, in other words, we do not reject the laws of logic. Instead, we reject or amend the theory in question.

The search for an ultimate and categorical juristic norm is thus doomed to fail; and it is no surprise that those who attempt it always end by proclaiming tautologies or hypotheses in disguise. The most famous example is, doubtless, Kant's Categorical Imperative. More recently, Hans Kelsen has made similar attempts, such as the following:

An analysis of juristic thinking shows that jurists consider a constitution as valid only when the legal order based on it is effective. . . . That a legal order is "effective" means that the organs and subjects of this order by and large behave in accordance with the norms of the order. . . . The principle of effectiveness is the general basic norm that juristic thinking assumes whenever it acknowledges a set of norms as the valid constitution of a particular state. This norm may be formulated as follows: men ought to behave in conformity with a legal order only if this legal order as a whole is effective. . . . The value judgment that a given constitution is valid, that the creation of the constitution is a legal act, means that it conforms with this general basic norm.⁸

This "general basic norm" may be interpreted either as tautological or as a violation of the norm-fact restriction. It depends largely upon what is meant by the term, "valid." If "valid" means the same thing as "effective," then obviously the statement that "a constitution is valid only when the legal order based on it is effective" is a tautology. But the inference that a "valid" constitution ought to be obeyed, on this interpretation, not only is unjustified but constitutes a violation of the norm-fact restriction. On the other hand, if "valid" means "obligatory," then the normative statement rests on the assumption that all valid constitutions are effective and all effective constitutions are valid. This assump-

8. KELSEN, *op. cit. supra* note 2, at 224.

tion, however, is gratuitous and violates the norm-fact restriction. There seems to be no way to interpret Kelsen's position so as to extricate him from these twin difficulties.

III

In the preceding section it was argued that we have no need to suppose any mysterious "normative element" to distinguish the assertions of ethics or jurisprudence from other types of assertions, and that in fact this "element" is present in all theories whatever. The point can be made clearer by considering what is meant by "normative" propositions.

One might decide that a normative proposition is simply any proposition which makes essential use of the concepts of obligation or right: e.g., commands, prohibitions, judicial opinions, and the like. This sort of restrictive definition is perfectly legitimate, of course, but it is useless as a weapon against naturalism. To argue that ethical or juristic theory is "autonomous" *because* it is normative would, on the definition given, beg the question. But it seems unlikely that a valid proof of the "autonomy" of any theory could be constructed. At best, such a proof could only show that some class of propositions is nonderivable in the system of postulates chosen. It cannot be shown that some class of propositions is nonderivable for all possible choices of postulates. Even basic formal logic is not "autonomous" in this sense, for there are several alternative systems of formal logic. Granting that an autonomous logic might be formulated, however, the anti-naturalists' views are no better off.

I shall adopt the following definition: a normative proposition is any proposition which is naturally necessary. This seems to me to be more in accord with both etymology and ordinary usage, and it includes all types of propositions which would be included under narrower definitions like the one discussed in the last paragraph. The term "naturally necessary" refers of course to modal logic. We may regard a proposition as naturally necessary if it follows by strict implication from the laws of nature. The "laws of nature" are understood to include the laws of logic and mathematics. Thus, everything logically necessary is also naturally necessary, but not *vice versa*. In particular, the laws of nature themselves are naturally necessary or normative. They are not, however, *logically* necessary.

The advantage in thus defining normative theory is that we are able to formulate the "norm-fact restriction" in a very simple and precise way, avoiding the problems associated with the traditional "norm-fact distinction."

We can now formulate the norm-fact restriction by asserting that the laws of nature are logically contingent. In other words, they are not derivable from the laws of logic or mathematics. This assertion is itself contingent, but it presents the norm-fact restriction in its weakest, and hence most generally useful, form. I shall assume here that the philosophical desirability of such a restriction is understood. The assertion of the contingency of natural laws is a form of the norm-fact restriction because it implies that those laws may possibly violate the laws of logic or mathematics (in which case the natural laws will be modified). On the other hand, since nothing is specified about the content of the laws of nature, the proposed restriction is the weakest one possible. We need not specify

whether they are to apply deterministically or statistically, mechanically or teleologically, etc. We are committed so far only to the position that they are hypothetical rather than logically necessary.

So formulated, the restriction identifies "norms" as laws of logic and "facts" as laws of nature; hence, norms are a subclass of facts. More precisely, the logical and mathematical norms are a subclass of the natural norms (the most general class). The traditional "norm-fact distinction" cannot arise, since it would make the two classes mutually exclusive. Moreover, a "normative element" is obviously present in all theories, to the extent that they are logically ordered or systematic. In my view, there is nothing specifically normative about such a concept as "obligation" in jurisprudence as opposed to such a concept as "velocity" in physics. It is difficult to see what could be meant by a "normative concept" unless it were a concept involved essentially in a normative proposition. But any concept may be so involved.

Nothing remains, then, to distinguish ethics and jurisprudence from other types of theory but the particular class of entities to which they primarily refer: namely, human beings, human behavior, and human institutions. The attributes and relations applicable to these entities are specified by the laws of nature, which, being universals, refer to all entities whatever. In fact, the entities peculiar to ethics or jurisprudence are defined in terms of those naturalistic attributes and relations, without which they cannot be distinguished at all.

To forestall the objection that I am taking a "reductionistic" view of ethics, jurisprudence, or normative theory generally, a few final remarks are in order.

The naturalistic theory of jurisprudence advocated here is not so much a rejection of tradition as a reaffirmation of an ancient and useful one. In my view, the grounds for its abandonment by Hume, Kant, and various post-Kantian schools were insufficient and fallacious. Furthermore, I contend, no demonstrably consistent alternative to naturalistic jurisprudence has been proposed, and some proposals currently favored (such as Stevenson's "emotive" theory) are demonstrably inconsistent.⁹ The price of the rejection of naturalism is — if I may adapt a famous sentence by Professor Bergmann — a crude naturalism, implicitly held.

The view presented here does not depend on Thomistic, Aristotelian, Platonic, or any other specific historical orthodoxy. On the other hand, it does not entail a rejection of metaphysics. I take the term "metaphysics" to refer to the laws of nature insofar as they are underived, including any underived rules of procedure by which they are set up, developed, and verified. In any case, the logical issues concerning naturalistic jurisprudence seem to be quite independent of any decision for or against traditional metaphysics.

ROGER T. SIMONDS

9. See F. B. FITCH, *SYMBOLIC LOGIC* 221 (New York, 1952). Professor Fitch points out that a general emotive theory of value would declare its own truth-value to be "emotive." On the other hand, a less general emotive theory presents no serious obstacles to naturalistic jurisprudence.