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AIRING A COUPLE OF MYTHS ABOUT NATURAL LAW

*John H. Crabb**

I

The subject of jurisprudence has acquired an abiding reputation for ambiguity and uncertainty. Because it deals with nebulous and controversial matters as to the nature of law, some degree of vagueness is probably not only unavoidable, but perhaps even desirable. Perhaps complaints about such vagueness are most apt to be encountered from lawyers of the Anglo-American legal world, where the juristic tradition has emphasized the importance of concrete results rather than an intellectual analysis of the theoretical underpinnings of law itself. This orientation of Anglo-American jurists may have been responsible for retarding the work of organizing the field of jurisprudence in their own thoughts, and may have tended to perpetuate this vagueness beyond the extent that would be desirable or tolerable.

To say that lack of dogmatism and specific form, may be desirable is merely to allude to the necessity of free and open inquiry, without excessive preconceptions, in a field where the pursuit of truth is a particularly delicate and elusive undertaking. Thus, there should be some tolerance for the fact that in jurisprudence there is not the same consensus for a general plan and organization as is to be found in conventional fields such as torts and contracts, which are more concrete in nature and thereby lend themselves more easily to general agreement as to organization and terminology.¹ However, one is apt to feel that the toilers in jurisprudence might have been more helpful and progressed further had they been less preoccupied with their own bright new ideas, and attempted to build more upon the work of their predecessors. Not infrequently a jurisprudential Messiah appears, offering the incisive analysis that proposes to knife through all the ineffective cerebrations of the best minds of the centuries. But often such efforts upon analysis prove to be merely putting the old wine in new bottles — a new verbalization of what has already in essence been said.²

There are other writers of genuine originality and competence whose efforts fall short of maximum effectiveness because of inadequate linkage of their work to that of their predecessors. Perhaps the most celebrated example of this is Roscoe Pound. He has sifted through, though with considerable unevenness, the entire field of jurisprudence back to the Greeks. But, rather than project their work forward, he has largely concerned himself with fashioning his own intricate system of jurisprudence. While he assumes no sort of crude messianic postures, nevertheless his style suggests a certain dogmatism and inevitability of his conclusions. The system of "schools" of jurisprudence he evolves is peculiarly his own ratiocination. His schools undergo such a maze of division, subdivision, and resubdivision, and that they are far too complex to offer a viable reorganization of the general field of jurisprudence. At the same time,

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1 DIAZ & HUGHES, JURISPRUDENCE 1-23 (1957).

2 Restraint suggests that no examples be cited here.

it is difficult to see where Pound's thinking links with earlier organizational work in jurisprudence so as to propel the whole effort forward. He seems to ignore, for example, the argument between "natural law" on the one hand, and "positivism" on the other.³ This is especially disappointing in that this polarization has been one of the few generally accepted elements of organization of jurisprudence.

This article proposes to accept, as its starting point, the division of jurisprudential thought between positivism and natural law as the basic organizational structure of jurisprudence that receives general acceptance. Unfortunately, this terminology itself is far from satisfactory, and has frequently been deplored.⁴ The two terms themselves do not naturally suggest the opposition intended to be described. Others currently suggested as substitutes have been "idealism" (natural law) and "realism" (positivism), but they generate new causes of confusion and complaint.⁵ The word "eunomics" has been suggested for the natural law school,⁶ but, whatever academic or technical purposes it might serve, the fact remains that it has not found an echo, let alone acceptance. So, despite its inadequacies, the terminology of natural law and positivism probably needs to be recognized as having received general acceptance. The problem of needed specific definitions must then be left to particular authors for their particular purposes, but all within the framework of generally accepted meanings.⁷

The term "natural law" having appeared in the title to this article, perhaps it may seem that providing needed specific definitions of that term is already overdue. However, if indulgence will permit deferring of that duty, an even more pressing order of business may be that of stating what are the two myths about natural law that are the concern of this article.

One such myth is the notion that natural law is a peculiarly Catholic concept. It is surprising to find the high level of presumed professional sophistication at which can be encountered the supposition that as soon as "natural law" is mentioned, it is assumed that the reference is to Catholicism and its particular theories and speculations regarding law. This is only rarely found in professional literature on the subject of jurisprudence. But it is found among lawyers, and even jurists, whose main professional concern is outside the field of jurisprudence. If that is true how much more must law students and laymen be imbued with such an impression, if indeed, they have occasions to have any impressions at all along such lines. The position taken here is that such a quasi-popular belief is unsound, and that its existence tends to obscure analysis of the basic problem or division of jurisprudence.

The other myth, partially related to the first, is that "natural law" means

3 Pound's many writings consistently reflect such views. His system of schools of jurisprudence is generally outlined in 1 POUND, *JURISPRUDENCE* 62-68 (1959).

4 "It is generally agreed that natural law has been a convenient formula for a variety of ideas rather than a single distinct and consistent theory." Chloros, *What Is Natural Law?* 21 *MODERN L. REV.* 609, 616 (1958).

5 *E.g.*, Kelsen, *Plato and the Doctrine of Natural Law*, 14 *VAND. L. REV.* 23 (1960); Olivecrona, *Realism and Idealism: Some Reflections on the Cardinal Point in Legal Philosophy*, 26 *N.Y.U.L. REV.* 120 (1951).

6 Fuller, *American Legal Philosophy at Mid-Century*, 6 *J. Legal Ed.* 457, 477 (1954).

7 Such concerns are discussed in Leclercq, *Suggestions for Clarifying Natural Law*, 2 *NATURAL L. F.* 64 (1957).

that some kind of a "law" exists which is superior to normal "law" in the sense of statutes and judicial decisions, and exists in the nature of a supernatural code, somewhat after the manner of the Decalogue. It is sometimes implied that devotees of the natural law position have recourse to such a code in order to set at naught lawful statutes and the like which happen to displease them. Such a system would, of course, open the door to chaos and subvert the entire legal system. Here is a somewhat more subtle myth, but one which persists and tends to obfuscate progress towards clarifying fundamental issues of jurisprudence.

II

In order to come to grips with the matter as to whether "natural law" is a peculiarly Catholic concept, it becomes necessary to discharge the duty of offering a definition of natural law. In so doing, one approach is to review summarily the history of the schools or movements which have been generally designated as "natural law."⁸

Of course, this whole argument started with those incurable philosophers, the Greeks. Aristotle, in publicizing and synthesizing notions developed by Socrates and Plato, found there was a factor of "justice" which inhered in the legal system. This seemed to serve both as a generator of the system, and its particular rules, and as the standard for measuring their validity. This was a factor residing in human nature, but outside man's power of evocation or control. He was opposed by the Sophist school, with Protagoras as one of the leading exponents. Their system of law may be briefly described as based on the notion that man, in terms of his arbitrary will and self-interest, is the creator of law, and that no extra-human or metaphysical factors are involved. Here, then, is the first opposition of a concept which infuses a metaphysical factor in the law, to a concept rejecting such a factor and making man's will, in more or less material and arbitrary fashion, the full measure of the law. This conflict was carried through the Roman period, with Aristotle's general position being transmitted by the Stoic school and celebrities such as Cicero. If this metaphysical juristic construct indeed be natural law, as it is generally labelled, it is difficult to see how Catholicism *per se* could have had much to do with it in a pre-Christian era or pagan society.

In the early Christian era and through the Middle Ages jurisprudential thought was dominated by lawyer-theologians. In various ways they normally arrived at what we would consider natural law positions. This all culminated in scholasticism and the work of Aquinas. It has remained ever since a vigorous school of jurisprudence, and through the centuries has received favorable treatment and support from those writing from a Catholic point of view. However, it should be fair to say, without trespassing on the domain reserved to theology, that scholastic and Thomistic natural law has never become a doctrine or dogma of the Church in the sense that faithful Catholics must accept it as a matter of obedience or that it is an inevitable conclusion from the theological premises

⁸ An excellent summary review of the history and schools of jurisprudence appears in *BODENHEIMER, JURISPRUDENCE, Part I (1962)*.

of Catholicism. The nominalist views of medieval Catholic philosophers like Duns Scotus and William of Ockham were scarcely in the Thomistic strain, yet these scholars have been accepted as leaders in Catholic thought.⁹

The scholastic and Thomistic theory has operated continuously as the leading Catholic position of legal thought.¹⁰ Its vigor, in terms of effective exponents and apologists, has varied, and is certainly flourishing currently in what is often called a neo-scholastic movement. It seems accepted that the only school of jurisprudence consistently developed under avowedly Catholic auspices or point of view has been the scholastic natural law movement. However, even though such a movement has been widely publicized as the predominant one in Catholic notions of jurisprudence, there is no compulsion on Catholic jurists to subscribe to it.

A further aspect of historical proof of the lack of identity between Catholicism and natural law is the existence of other natural law movements quite apart from Catholicism. Reference has already been made to the natural law of the ancient world. In that the scholastics drew upon this juristic thinking, particularly in its Aristotelian form, some might tend to view this as a sort of "pre-Catholic" jurisprudence which was subsequently incorporated. But there have been a number of well-known movements of purely secular jurisprudence in modern times which have been generally classified as "natural law."¹¹ These have not solidified with the same consistency and identity that the scholastic natural law has, so that various points of view are encountered still conceived as being within a natural law concept.

Undoubtedly the first such secular modern jurist of natural law is Hugo Grotius. He is widely known and correctly so in a limited sense, as the "father of international law," and his natural law is credited with making possible the system of international law. This was the beginning of the rationalistic scheme of natural law, reaching its epitome in the eighteenth century. Representatives of this development are Pufendorf, Locke, Montesquieu, and, in the United States, Judge James Wilson. In this period the notion of a hypothetical social contract as the basis of law and the state predominated. The kinship of this notion to the scholastic natural law lies in the metaphysical origin of this social contract. For they say men make the contract not as a result of their arbitrary will, but rather as a result of an innate perception or faculty of their human nature. Moreover, in varying degrees these theories impose further strictures on the validity of positive law man may make even after the system has been inaugurated by the figurative social contract. Other writers, such as Hobbes and Spinoza also refer to something like a social contract, which seems too much dependent on the subjective will of man for its existence to partake of the metaphysical aspects that would qualify for a natural law designation.

Lastly, there are currently a number of writers classified as within the

9 See Oakley, *Medieval Theories of Natural Law: William of Ockham and the Significance of the Voluntarist Tradition*, 6 NATURAL L. F. 65 (1961).

10 To use the terms "scholastic" and "Thomistic" interchangeably is probably technically incorrect, the term "scholastic" being the broader of the two; but hopefully, no serious impropriety results in this article from such freedom of usage.

11 For recognition by a professedly Catholic writer of non-Catholic schools of jurisprudence, see Kenealy, *Scholastic Natural Law*, 3 CATHOLIC L. REV. 22 (1957).

natural law orbit that expressly or implicitly reject the neo-scholastic school of natural law. These other writers themselves do not form any cohesive grouping, except to share in common with each other, along with the neo-scholastics, a metaphysical basis for their construct of law. This basis is variously expressed by them, with justice, morality, and rationality being among the most prominent of the metaphysical elements they assign as the keystone of their structures. Examples of this numerous group would be Duguit, Fuller, Recaséns Siches, and Coing. All writers of this group might not necessarily welcome a natural law designation, and this is perhaps out of fear of the widespread confusion of the term natural law with the more particular scholastic version of natural law.

The foregoing summary has been for the purpose of indicating that historically the term natural law has had wider application than only to the version of it that has been prominently and traditionally (though not necessarily) espoused by Catholic theories of the nature of law, and that they are not identical or coterminous concepts. For some, such an exercise is certainly uselessly elementary; but experience indicates that for others it is necessary to clarify such a point. The purpose of this entire exercise is of course not to disparage either the Catholic or a-Catholic versions of natural law, nor to read either one out of the party, but merely to correct a widespread naiveté.

It is perhaps time to redeem the promise made above to explain the sense in which the term "natural law" is being used herein. At this stage, the explanation will also offer the basic linkage conferring a unity on all the natural law concepts as opposed to positivism. This unity derives from the metaphysical element which they ascribe to the essential nature of law. This element is something outside of man's control or creation, inhering in his nature, which functions both as a generator of the system of positive law and as a measure of its validity. On such a premise, it is immaterial where this element itself derives. If, for example, natural law is to be explained as a function of man's innate rationality, it matters not whether one chooses to ascribe this rationality to the deliberate design of a divine creator, or to some kind of a mindless operation of the chemistry of the body, or to any other extra-human cause. Inquiry into the origin of this element is beyond the scope of jurisprudence and into other domains such as theology or general philosophy. And it is the infusion of this element into the essence of law that distinguishes the natural law position from the positivists, who insist that law as such is entirely a matter of human will and creation, and that the element or elements of which natural law jurists speak are at most motivating factors in the creation and criticism of law without being a part of the phenomenon of law itself.

There seem to be various superficial explanations for the assumption that natural law is a peculiarly Catholic theory. One is the age-long and widespread publicity given to the scholastic version of natural law. No other construct of natural law approaches the scholastics in terms of age, tradition, discipline, consistency, or sheer quantity of adherents. This alone would tend to give Catholics center stage in the natural law presentation. A current example of publicity tending to identify natural law exclusively with Catholicism is the publication of the widely circulated periodical entitled "Natural Law Forum" under the

auspices of the prominent Catholic law school of the University of Notre Dame. Sometimes Catholic jurists themselves when writing on natural law assume their scholastic version is the only valid theory of natural law, and consider spurious the nonscholastic theories of natural law. The actual relative position of Thomistic and scholastic natural law with regard to all overtly Catholic theories of law is one of overwhelming predominance, perhaps approaching a consensus, but certainly short of unanimity and not an article of faith for Catholic jurists; and with regard to all natural law theories, it has been and remains the most prominent single school among a number of theories of natural law.

On the basis of the above analysis, the Thomistic construct in its entirety includes theological aspects which are not essential to its strictly juristic position. In its essence it offers this hierarchy of laws:

1. Eternal law: the law for all created things, including, for example, the physical laws of nature, such as the law of gravity.
2. Divine law: divine intervention suspending, on an ad hoc basis, the normal operation of the laws of creation, contemplating such events as miracles and revelations.
3. Natural law: the laws governing human nature, consisting of an intellectual capacity whereby man perceives the proper law (in terms of what is "good" or "just") in any given situation.
4. Positive law: laws made by men for the operation of society, and which must conform to natural law requirements.

It would seem to be a matter of indifference, juristically speaking, as to the way one chooses to account for the total order of the universe; it is the function of the jurist's law to deal with mankind and its environment as it exists after its creation. And whether or not one chooses to believe in the reality of occasional divine intervention too in the natural order, which otherwise remains intact, is primarily a theological proposition that does not purport to deal with the juristic concern of jurisprudence. We have assumed that the central argument of jurisprudence, and the point of its great division, is whether law necessarily includes the metaphysical component of natural law. Hence, it is at the natural law level of this Thomistic structure, and its subordinate positive law, that we encounter the purely juristic concepts.

To suggest that the two top levels of the Thomistic system can be dismissed as a sort of theological superstructure is not to quarrel with such concepts. It is merely to say that they are outside the scope of jurisprudential interest in terms of discussing the inherent nature of law. This may be interpreted as promoting a separation of law and theology in a manner analogous to the positivist's position — which I personally reject — of insisting on a separation of law and morality. That may well be, and if so, the purpose is the same also — to clarify thinking and issues relating to the nature of law, and to disentangle it from other concerns without thereby commenting in any way on those other matters. It is in the interest of such clarification, or purification, to borrow some positivist terminology, that this effort has been undertaken to refute notions that natural law is a peculiarly Catholic concept.

This is by no means to suggest that there is anything subversive or reprehensible about the presentation of the scholastic or Thomistic total position.

The purpose of such presentations is usually for the instruction of Catholics or as an explanation to the world at large as to a total Catholic scheme in terms of philosophy and theology, including the place of law in this scheme. Aquinas and most of the other medieval scholastic writers were priests, and their specifically juristic concerns were only a part of their larger theological and philosophical purpose. Because their purposes went further than our more limited one of jurisprudence, it becomes necessary for us in utilizing their work to segregate out the more narrowly juristic aspects.¹² This juristic aspect should not lose any of its value or relevance to jurisprudence because of its application to some theological premises. To preserve such value and relevance is a purpose of the foregoing discussion.

III

Our second myth about the natural law is a rather more sophisticated one and encountered on a higher level of abstraction. This is the notion that natural law is some kind of an immutable superhuman code, often of a theological nature such as the Decalogue. Roscoe Pound furnishes an example of such a view of natural law when he states that at least some natural law theories consider positive law to be "but a more or less feeble reflection of an ideal body of perfect rules, demonstrable by reason and valid for all times, all places and all men."¹³ However, other commentators or critics of natural law have recognized more explicitly that the code notion has been rejected by significant elements of the natural law school. Thus, Jerome Frank states: "Some Natural Law adherents have maintained that from the Natural Law principles man can logically deduce a detailed code of legal rules valid forever and everywhere. That last notion is rejected in the Roman Catholic conception of Natural Law."¹⁴

Supposedly the alternative to natural law being a code is for it to be something in the nature of a process. Another possible analogical manner of stating the problem is whether natural law is designed as a piece of substantive law or adjective law. While impressions supporting both views seem to have arisen, this precise question does not appear to have been emphasized by natural law writers. These impressions seem largely to derive indirectly from interpretations of what natural law writers have said in the course of dealing with some other point.

One method of investigating and exploding this myth would be to explore among statements made by various recognized spokesmen for the natural law position. However, the difficulty here is that various statements by such persons have been made without being on guard for this particular issue, and as a result they can be interpreted as indicating that natural law is in fact a set of norms, fairly general, perhaps, but nevertheless with a minimal degree of

12 For a suggested distinction between Aquinas' theological and juristic aspects, see Bourke, *Natural Law, Thomism—and Professor Nielsen*, 5 NATURAL L. F. 11 (1960).

13 Pound, *The Theory of Judicial Decisions*, 36 HARV. L. REV. 802 (1923). See also Goble, *Dilemma of the Natural Law*, 2 CATHOLIC LAW. 226 (1956).

14 FRANK, *COURTS ON TRIAL* 362-63 (1949).

specificity. From a standpoint of pure grammatical analysis, such a conclusion may not be unreasonable or inappropriate.

For example, one natural law jurisprudent in the course of directing his discussion toward defining who was qualified to determine the content of the natural law in a given case, had occasion to state: "All understand that traditionally natural law, as the antithesis of ethical relativism, claims to lay down certain general rules of conduct that supposedly apply to all men, at all times, in all places."¹⁵ From a standpoint of pure grammatical analysis, it could not be said to be an unreasonable or inappropriate conclusion that the writer was describing natural law as being a sort of code. And, even when the statement is put in full context, such a conclusion would do no violence to the author, since the question of whether or not natural law is a code was not central to the author's purpose. Thus, statements of people speaking from a natural law position with normally acceptable credentials may be cited to support the proposition that natural law consists of a super-code.

The thesis of this discussion is that such a proposition is erroneous. Because of the susceptibility to ambiguity of statements made by natural law jurisprudents that would seem to relate to this point, a more satisfactory avenue of exploration would seem to be one of *a priori* analysis rather than amassing statements and opinions of natural law jurisprudents. This means taking the description of natural law as offered in the foregoing discussion and demonstrating as a matter of logic that natural law cannot signify a code.

Perhaps an initial task is to discuss and define this notion of code, which natural law is not to be. Probably an acceptable generic meaning of code would be a systematized set of rules, all related with one another toward the realization of a general common goal. A code may be extremely complex and detailed, with codes within codes in a highly organized hierarchy, such as the Code Napoleon. Or it may be very vague and generalized, consisting only of a very few basic precepts of highly limited specific articulation, so that a wide range of opinion is possible as to application of these precepts to a particular case. This would be typically true of broad moral and ethical codes, and to a substantial degree of legal codes such as the Constitution of the United States. Also, the goals toward which a code is directed may be broad or narrow, grandiose or modest. Thus, the Code Napoleon has as its goal the tremendously ambitious undertaking of ordering a very large and complex society. Other codes are modestly limited in scope to ordering the affairs of a small private club or the playing of a simple game. But the common characteristic of all such codes is in existing as a set (meaning a plurality) of rules of some minimal, or at least ascertainable, specificity and direction.

It seems quite apparent that any viable argument that the natural law position assumes a code would necessarily have reference to a highly generalized code of a moralistic nature, of which, again, the Decalogue furnishes a ready analogy, if not example. But it has been possible to cite instances where arguably the natural law was presented as consisting of rules of an alarmingly high

¹⁵ Constable, *Who Can Say What the Natural Law Is?* 7 NATURAL L. F. 54 (1962). A similar impression can arise from Messner, *Postwar Natural Law Revival and Its Outcome*, 4 NATURAL L. F. 101 (1959).

degree of particularity. Cases may be cited where a judge, purporting to adhere to a natural law methodology, seems to announce his holding for the particular case he is deciding as the application of a specific segment of a natural law code. At various times, American judges have seemed to confer such a status on free business competition and laissez-faire notions of economics. In a fairly recent case, a judge on a most alarmingly naive basis seemed to find it to be a rule of natural law that whites and negroes should not use the same golf course.¹⁶ This kind of abuse of natural law concepts horrifies its more responsible adherents, and leads to various kinds of misconceptions about it, including that of its being a code. But, we may assume that no one seriously contends that in any event the natural law could consist of that type of a code.

We have utilized a definition of natural law as being characterized by a metaphysical element which inheres in the nature of man. Man's nature is of course inseparable from man himself; if natural law inheres in the nature of man, then it too must be as permanent and immutable as man himself. Permanence and immutability are certainly claims the natural law jurists make for their system. A code by its nature has a certain minimum of specificity about it, and this poses the problem of whether anything having a quality of specificity can apply to anything as permanent and constant as the nature of man. To express it conversely, man's essential nature, if accepted as the constant with which we are dealing, is encountered in a myriad variety of men and acting under endlessly changing circumstances; the problem is whether anything having the specificity necessary to be a code could exist to cover such diversity.

One method of analytical inquiry to test the possibility of an immutable code would be to select a conceded constant of man's nature to see if it can logically give rise to any such code. Perhaps the most elementary constant, or bundle of constants, would be man's physical, biological nature. If the preservation of man's physical existence or well-being has some absolute sanctity, perhaps code provisions could be erected thereon. However, it is obvious that, although the preservation of physical human life enjoys a very high priority, it is not an absolute or sacrosanct concept. Every conceivable system of law must permit the deliberate destruction of life under various circumstances, perhaps the least debatable being the defense of oneself or others, such as one's children, when under homicidal attack by another person, whose life one is then entitled to destroy. If human life itself is not protected by any code provision, how much less must any subsidiary physical human need — such as food or shelter — enjoy such protection.

There is, of course, the traditional Christian commandment "Thou shalt not kill," and it is illuminating for our purposes to analyze the relationship of such an admonition to the code concept. Now it is apparent that the Christian societies honoring this commandment do not take it literally, for they recognize a number of situations — war, capital execution, defense of others — where killing may not only be permissible, but be a moral duty and legal duty.

¹⁶ *Hayes v. Crutcher*, 108 F. Supp 582 (M. D. Tenn. 1952); discussed in Kenealy, *Scholastic Natural Law*, 3 CATHOLIC L. REV. 22 (1957).

On the face of it, this would seem to be an ideal higher code, since it deals with a broad and important category of human concern, and is very specific in its direction. But this proves illusory, and the real meaning must be something like "Thou shalt not kill unjustly."¹⁷ That immediately gives the whole show away, since there is no way of knowing what "unjustly" means in any specific or concrete sense, and hence the commandment loses the specificity necessary to qualify as a section of a code. A similar analysis can be made of the commandment "Thou shalt not steal." However, it does not require any redrafting, and contains within itself the legal conclusion which destroys its specificity and hence its eligibility to form part of a code. For, the commandment itself gives no hint as to the type of taking of others' property that will be characterized as "stealing," and there is no suggestion that the taking per se of others' property is condemned.

Presumably a limitless or indefinite number of moralistic commandments of that type could be listed. But they hardly could be a code so far as any legal system is concerned, since their lack of specificity precludes them from serving as the basis of any positive law or from deciding specific cases.¹⁸ And if no kind of code provision can be fashioned designed to protect physical human life itself, which is offered as the permanent and immutable aspect of human nature accepted by all, without including within it some moralistic or legal conclusion which destroys its character as a code, it is submitted that no natural law code, in any juristic sense, is logically possible.

Reference has hitherto been made to a metaphysical element in human nature without attempting to define it in any way other than to assert that it is the common denominator of all natural law theories. Various specific descriptions and expositions of this element have been given, but, without necessarily expressing preference for any one of them, it seems fair to say that a reasonable grouping of all of them may be achieved under the label "sense of justice." This is advanced as something which is as surely a part of man's nature as are such things as his hunger for food. It is this sense of justice which inescapably is present when man formulates, applies, and determines the validity of positive law. This sense of justice, in varying degrees of refinement and development, is present in all of us and in continuous operation, even if often in a subconscious or quiescent fashion. It is completely generalized and flexible, capable of acting effectively under whatever particular circumstances that may be obtaining with respect to the operation of law.¹⁹

If natural law cannot function as a substantive code because of the diversities of circumstances in which law must operate, both from a historical and speculative point of view, it must then be something in the nature of a process. This sense of justice in and of itself must be devoid of substantive content, and fill itself up, so to speak, accordingly as it is brought to bear on par-

17 See Kenealy, *Immutable Foundation of Law*, 11 HASTINGS L.J. 440 (1960).

18 "That natural law does not mean a closed legal system is evident from the fact that the fundamental principles do not tell us automatically in *concrete* applications what is good or evil, just or unjust, wise or unwise; what is idolatry, murder, theft, adultery, perjury or calumny." Kenealy, *Whose Natural Law*, 1 CATHOLIC LAW. 259, note 262 (1955). See also Schellens, *Aristotle on Natural Law*, 4 NATURAL L. F. 72 (1959).

19 See Lumb, *Scholastic Doctrine of Natural Law*, 2 MELBOURNE U. L. REV. 205 (1959).

ticular instances. This sense of justice, then, is the permanent and immutable "natural law." It functions as a sort of process, seizing the concrete material that is laid before it, analyzing it, and coming up with a specific answer in positive law terms which falls within the range that justice delimits in the particular premises. Any kind of a code, with its minimal specificity, could only serve to hamper the process by eventually making it inapplicable to some conceivable factual situation in which it could be called upon to function that might be incompatible with the code provision.²⁰

Perhaps one further point should be aired, lest it be thought, as, alas, some quarters seem to feel, that the natural law notion gives carte blanche to judges or indeed, anyone at all who is so minded, to write their own prescription as to what the law is in any given case. Among the facts or circumstances upon which this sense of justice will be called upon to operate will be the various positive law pronouncements then in effect, such as statutes and judicial precedents. At least in terms of our own present society, these will probably actually be the most important single concrete factors influencing the outcome of a given issue. The sense of justice will necessarily give a large scope to the positive law, and indeed, in the routine case, will simply apply the positive law directly as it is written. When positive law has been promulgated by duly constituted authority, and has been relied upon by society as determining the rights and proper conduct of men, a heavy case for justice is thereby created for the validity of such a law, and it would require quite an extreme situation for any natural law process to destroy such a law. To express it another way, such a positive law represents order, and order is one of the cardinal characteristics or aspirations of natural law—*i.e.*, this sense of justice—and hence it is exceptional when a true application of natural law principles would result in a destruction of the positive law. But it is true that, according to its concept, the natural law stands as the superior authority over the positive law, however rarely this superior authority may have proper occasion to operate.

IV

The discussion of these two myths about natural law was inspired by having encountered repeated, and even dogged, assertions of belief in these myths. For those not troubled by them, the foregoing has probably been unduly elementary. But these myths do seem to be sufficiently widespread, and even on a high level of professional competence among those who may not have had occasion to focus attention on these points, to justify an exploration and discussion of this sort. The hope is that some contribution has thereby been made toward clarifying issues in jurisprudence, and clearing away some of the underbrush impeding discussion at the hard core of jurisprudential problems.

The assumption has been that this hard core issue of jurisprudence consists of the disagreement between the natural law and positivist positions. And these positions have been described as giving contrary answers to the question of whether the positive law comprises the entirety of what can be called law, or whether law necessarily includes a metaphysical element, such as we have

20 Goble, *Nature, Man and Law: The True Natural Law*, 41 A.B.A.J. 403 (1955).

just discussed in terms of a "sense of justice." It certainly advances the purposes of jurisprudence to have the issues of this central argument as clear and simplified as possible. If the foregoing discussion has contributed toward laying bare the essence of the general natural law position, it may be helpful to conclude, perhaps a bit beyond the announced original scope of this discussion, by comparing this with a generalized essence of the positivist position.

The positivists have relatively little difficulty in establishing the ultimate human fountainhead for their legal system which is entirely human or material in its essence. The fact that they do not come up with the same answers, and indeed, differ widely, if not violently, in their conclusions, is less significant than the fact that they do characteristically locate their ultimate source or prime mover of the law as some kind of a human being or human institution. These vary in abstraction and sophistication from Austin's forthright uncommanded human commander to Kelsen's far more subtle basic norm. Austin seemed to be not overly troubled about the problem of whence came the license of his uncommanded commander to command. However, Kelsen shows an awareness of the logical impasse, and is sensitive about the foundations of his basic norm as the generator of his entire legal system. He declines to compromise the "purity" of his law by infusing any ethical or metaphysical content at this point; instead, faced with the logical impossibility of finding a "legal" explanation for his basic norm, he simply states that it is a premise which must be accepted as the starting point for the game, or else there can be no game at all. He finds it impossible to describe or explain his basic norm on the "scientific" premise of his whole structure that the law must be explained wholly in terms of what is objectively susceptible to cognition.²¹

Natural law theorists should not experience undue difficulty in accepting the notion of a basic norm for the entire notion of law, if that is the way Kelsen would have it put. Indeed, the whole Thomistic structure may be said to stem from acceptance of the one basic norm "Do good and avoid evil."²² If the argument can be given this common denominator it would assist discussion to bring it into sharper focus with one narrow issue. The argument would then become a question of the content of this basic norm. Presumably, Kelsen supporters (assuming all positivists would accept the Kelsian position for purposes of argument) would refuse to accept a metaphysical or ethical explanation of this norm, while the natural law jurists would assert such characteristics as being of the essence of the norm. This would still leave the matter at loggerheads, but at least in a more refined and clarified status. But conceivably some further accommodation might properly come from the positivists. If they do not undertake themselves to explain the origins of the basic norm, they have little reason to object to others offering explanations of it. Even if the positivists choose to reject the explanation offered by the natural law theorists, they can hardly object to the attempt being made, since they expressly decline to offer any explanation of their own. The positivists come to the end of their line with arrival at the basic norm; then the argument

21 The widely known summary of his position appears in Kelsen, *The Pure Theory of the Law*, 55 HARV. L. REV. 44 (1942).

22 See Kenealy, *Immutable Foundation of Law*, 11 HASTINGS L.J. 440 (1960).

becomes whether the additional track laid by the natural law is one on which the legal train can operate, rather than a denial that it is possible to lay more track.

V

Early in the article I expressed doubt that any one flash of messianic insight is likely to lay to rest the jurisprudential arguments that started with Aristotle and the Sophists. The foregoing discussion is offered primarily as a limited one of helping clarify issues rather than setting to rights the accumulated errors of the best minds of many centuries. In the process of doing so, summary and cursory treatment has necessarily been given to some jurisprudential concepts, and some may feel the resulting generality has resulted in inaccuracies or distortions. However, the main purpose will have been achieved if it focuses attention to these myths about natural law, and thereby tends to clear away some of the impediments obscuring the fundamental issues of jurisprudential controversy.