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Natural Law and Natural Laws

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Natural Law and Natural Laws

David Forte

I

VIRTUALLY THE ENTIRE modern history of jurisprudence has been marked by various attempts to apply the theory of science to the task of understanding the law. Man's intellect seems to possess an almost instinctive drive to apply that which seems definite and knowable to that which seems hopelessly indefinite and elusive of understanding. Particularly since the Renaissance, as law and legal forms became more important to the intellectuals of the day, the understanding of law in its essence seemed to be just beyond the grasp of the philosophers. As vital as the understanding of law came to be, there was clearly an intellectual frustration evident in the continuing efforts to cabin the phenomenon within a rational structure. No one philosophy seemed to satisfy this need, as theory supplanted theory in the competition to find the key to understanding.

It was no wonder, therefore, that the record of science, seemingly the one undoubted success of modern intellectual history, offered hope in diffusing the mists around the law. Especially in the last century and a half have the substantial accomplishments of science beckoned legal analysts to apply its method and achieve its results. Bertrand Russell hardly exaggerated the general view when he proclaimed that science is what we know and philosophy what we don't know. We want to find the "natural laws" of law as we have found the "natural laws" of physics.

This is not the place to chronicle the entire history of "scientific" jurisprudence, but in general recent thinkers have looked to science both for a theoretical or structural knowledge of law and also for a practical or technological understanding of the uses of law. Emphasizing a structural point of view are people like Austin, Kelsen, the Scandinavian Realists, the Vienna Circle, Langdell and the inductive method of legal education, the legal behaviorists, and Holmes, Frank, and Llewellyn of the American Realist School. Those who search for a technological and practical aspect of the law include writers espousing jurimetrics, many utilitarians, Pound and the sociological school, and Posner and the theories of economic efficiency. Of course, the behaviorists and realists often seek to provide mechanisms for the effective functioning of law, and Posner as well as many of the legal sociologists put forward what they regard as an objective model of the functioning of law.

Yet all these scientific theories of law still leave contemporary

jurisprudes unsatisfied, and for good reason. The theories seek to provide value-free natural laws, like the natural laws of the physical world. But for most theorists, this is not enough. Description alone will not do. Consequently, there is a resurgence lately of thinkers who search for norms and values by which laws can be judged and evaluated as well as described. Primarily of the Kantian school, thinkers such as Dworkin, Rawls, Nozick, and Gewirth, disparate as their solutions may be, all seek to impregnate the law from without, as it were, with ethical theories based on a state of nature consensus, or the underlying principles of a liberal political system, or on the notion of man as an active agent. In a fundamental way, many modern moral philosophers have accepted the "scientific" view that the study of law in itself can provide little if any knowledge of what law *ought* to be. For that, we must go outside of law (and science) to develop the normative yardsticks.

It is the thesis of this short note that this recent turn of philosophical events has resulted in two complementary artificialities. First, it is artificial to conceive of law in a non-normative "scientific" manner. Second, it is equally artificial to look *entirely* outside of the law for standards by which to evaluate its goodness and badness. The problem lies, I believe, in applying to law a theory of science that is manifestly inappropriate to its object. The solution, it would follow, would be to utilize a theory of science more appropriate to the object of study.

II

The vision of law given to us by many modern scientific theories shows us less than what is there. The perspectives on law offered by modern science may aid us pragmatically, for example, in determining whether a given legislated highway speed limit will decrease energy consumption more than increase the costs of longer travel time. Certainly, technological findings inform legislators and courts of what harms to avoid and how to legislate against them. Social science techniques can discern patterns of judicial decision-making, inform us of the effectiveness of legal decisions, describe the centers of authority in a society, analyze the role of sanctions, or tell us what results from a particular kind of legal training. But, I submit, modern science can tell us little of what law actually is.

I suggest that unless we accept a teleological perspective, we can never truly understand what it is that virtually all civilizations call law. I know that the Aristotelian doctrine of the final cause has been buried a hundred times or more. Yet stubbornly the teleological view returns, only slightly soiled and seemingly without a trace of decomposition. It takes no great effort on my part to aid in one more exhumation, for I think

human nature is such that we cannot live comfortably without knowing that it is in the purpose of things that makes them what they are. Why then is a teleological view of reality so much more effective in determining the nature of law than are recent and present-day theories of science? The answer lies in the concept of "nature" itself.

In a forthcoming book, the philosopher Henry B. Veatch notes that modern revolutions in the theory of science have revealed its true epistemology. The destruction by Popper of the justificatory mechanisms of induction and verification, and the subsequent undermining of the theory of falsification by Kuhn, leave science quiet incapable, as Quine points out, of discerning the nature of anything. Any theory, even one based on the Homeric gods, that seeks to describe why the physical universe appears as it does, is capable of an infinite amount of adjustments to contend with difficult counter-examples. We can never truly know which theory is correct. That means, of course, that we can never truly know what the nature of reality is. The only reason why we choose one model over another is merely pragmatic. Whatever model helps us to manipulate the appearance of reality to accomplish what we, for some reason or other, wish to accomplish is the one we opt for, until another more efficient model appears, or until our objectives change. In any case, the truth of it all evades us. The modern theory of science is not even materialistic, for it cannot tell what the material nature of things is. Nor, certainly, can it provide any moral or spiritual content to the universe.

Thus in the end the traditional method of hypothesis, deduction, and application continues to be accepted by science, not for its truth-seeking capabilities, but only because of its pragmatic effectiveness. Veatch further notes that modern science has actually fallen into line with the dominant Kantian philosophical school. He demonstrates that modern scientific theory has taken the Kantian "transcendental turn." Since we cannot make our hypotheses conform to the facts (for we can never know facts-in-themselves), we have to make the "objects conform to our knowledge" as Kant taught. We no longer have two intellectual worlds: a Kantian inability to know things in themselves in contrast to the objectivity of science. No, they at last agree. We can only know and manipulate our ideas about the appearances of things. We can never truly find out the nature of reality.

The result would have pleased Descartes, the true father of modern philosophy and of modern science. It was his revolution that reversed the Aristotelian perspective of reality. Aristotle had seen that all things that were "real" were in motion toward ends peculiar to their natures, but that mathematical and geometric notions were fixed, unchanging, and really out of time itself. Descartes turned Aristotle on his head and preferred to see physical nature only as a series of static mathematical

models succeeding one another without motion, development, or purpose. Reality was always static, and what seemed to be movement was really only a succession of slightly different new worlds each recreated by God in the way we today would see a "motion" picture when there is in truth only a series of stills each taken by a cameraman. The Humean theory of causality and the later Regularity Theory were the logical progeny of Descartes.

Because of the Cartesian and Kantian triumph over science, the result is that today science self-confessedly can never know the nature of any thing, never discern what any thing is in itself. What science can do is to order the manifestations of things and to discover methods (technology) of manipulating those manifestations (for whatever reason) to desired ends.

What does Veatch's insight reveal to us regarding law? For one thing, it follows that if science can never discover the nature of any thing, it can never reveal the nature of law. Instead, we can have competing paradigms of what law is among various positivists, each with differing logical strengths and weaknesses, but all being contrived or structured models of various phenomena denoted as "legal." We look to differing views of law as efficient means to socially desirable ends. Quite appropriately, we find that the gaps in moral theory that the positivists leave are attempted to be filled by Kantian moral theorists who also, to the extent they follow the school's leader, admit that the nature of things in themselves can never be known.

In contrast, the Aristotelian theory of science holds that the nature of any thing can be known, and it is determined in particular (quite literally in particular) by its "end" or final state of actualization toward which it tends. All things, say the Aristotelians, are in motion (actively or passively) toward an actualization of their respective potentialities, that is to say, toward a state of being that would constitute any thing's "perfection" were it ever to be reached.

I suggest that, in the case of law especially, our experience makes such a teleological view much more appropriate and susceptible of discovering the reality of law-in-itself more than any other scientific theory can do at the present time. For is it not true that law is constantly in motion? When we see how law actually operates, is it not always changing at the instigation of agents such as lawyers, judges, legislators, as well as many other "law-making" agents in a society? Further, is it not evident that these changes are never purposeless? Do we not speak of the *development* of law? True, many changes may conflict in their effects, but all changes in the law are purposeful.

Law then is in motion; it is moved purposefully by agents toward an end. What end?, we may ask. What, in fact, is the defining purpose of law? To put it tersely, it is, I believe, the accomplishment of a proper

ordering of social relations among men. Certainly, law is a special kind of ordering of relations, distinguishable but not unrelated to other mechanisms or ordering, such as custom, biology, religion. Certainly, also, law is directed toward a *proper* ordering, for no movement (change) in law can be understood apart from a result that is seen by the mover as "good." In this short piece I cannot gloss law's unique ordering personality. And what norm would indeed constitute a proper scheme of relationships? I leave this to others in the Aristotelian tradition. Nonetheless, it is fair to say that the experience of all who work in law attests that indeed it is an institution in constant change, moving toward its peculiar end of a proper ordering of social relations among men.

III

No doubt, it will be evident I have thus far pinned the validity of a teleological view of law on a rational reflection of our human experience of the law. Indeed, I am suggesting that, at least in law if not for all other things, a teleological perspective is only a rational articulation of what we humans experience of something in a dynamic state of development. Through that experience, we can rationally discern what that nature is of the thing we are looking at.

A very few decades ago, during the heyday of logical positivism, the existential movement flowered in Western Europe. For all the absurdity that existentialists found in the world (and frequently put into their own writings) they possessed an insight that we would do well to note. The existentialist philosophers and dramatists were in revolt against what appeared to them to be the sterile rationality of the philosophy of the day. They saw that philosophy was not only irrelevant to the actual experience of human life but also that in many cases the intellectual world did not even care that it was irrelevant. Those activities which plumbed the depths of human experience — literature, theatre, music, art, religion — were outside of rational knowledge. True, their appearances could be analyzed rationally — e.g., what the structure was of Beethoven's "Fifth Symphony," or how Christ influenced cultural behavior compared to, say, Buddha — but the intellectuals could not find the "rationality" in experiencing the "Fifth Symphony," or in living in Christ, or in meditating upon the example of Buddha. And even the existentialists, knowing that the reality of being human was in human experience, could often find no "meaningful" (i.e., rational) theme to the enterprise.

But what they told us was that an analysis only of the appearance and not of the reality of things as experienced by humans could not, almost by definition, give us a full human understanding of what was being looked at. Accordingly, to understand law, we must understand it ra-

tionally, but our rational understanding must not be confined to law's appearances, but to law through and through, to law as we experience it.

We give up the experiential component of rationality (common sense, if you will) only at the expense of giving up part of our humanity. A rational reflection of experience is a way of knowing things as they are. No one, not even Descartes I daresay, "experiences" his life in microseconds of successive static states of being. No static Cartesian model of law can meet, or even pretend to meet, the reality of the thing as humans experience it. To describe law as a command backed by a sanction or that its ultimate articulation is by judges can tell us some things that may be observational data of law, but they do not tell us what law *is*. Such definitions give us nothing by which we can make rational sense of the experience of law.

Now, every person's experience of law is of rules, fixed and determinate in their details at any moment in time, but the whole of which is in constant motion, always in a state of change. The attempt to portray law "scientifically" as Kelsen did, to seek a "pure" formula of describing it, simply runs counter to the experience of all those who work with it, whether they be judges, lawyers, legislators, or citizens. When we ask ourselves why law is always in a state of change, the evident answer is, once again, that it is moved in order to accomplish its end, to actualize its potentiality if you will, of the proper ordering of social relations among men, not only individually but in other social constituents such as the family, clan, guild, church, and state. In sum, without a sense of law's purpose, we can have no appreciation of the very nature of the legal enterprise.

IV

Within my limits here I can only suggest some of the most essential and salutary implications of a teleological view of law.

To begin, by discerning an end to law which informs us of the nature of law, we in no-wise need to find that law ever empirically reaches that end. Like man, law may tend toward the actualization of its innate potentialities without ever successfully fulfilling them. Nor is this a cause for dismay. On the contrary, where a mechanical positivist view of law seeks to draw bright lines so to include or exclude certain social rules as either law or not-law, a teleological conception of law permits judgments to be made on a graduated scale. As law is moved toward its end, or moved away from its "natural" end, we can rationally make judgments on a more-or-less basis. We can discuss which legal system is "better" and which is "worse," which is developing and which is dissolving.

In addition, a teleological conception of law can provide us standards

of justification. A modern scientific approach to law can describe the phenomenon, but not justify it. It can tell us some of the mechanisms of law, at least as they appear to science, but in no way do we know what law is, that is, what is its nature, why it is there, what is it about. Hence the attempt to leaven legal science with ethical norms which legal science itself lacks. But by using the telos as an "ideal type," we cannot only describe the legal enterprise, we can make justifiable judgments as to how "well" it is doing. Since law seeks a *proper* ordering of relations among men (which we customarily call justice), we can logically judge whether indeed a law is just or not.

The fact of the matter is that all know that the law changes and all know that the changes are not undirected to any end. Laws are not Roman candles set off in any direction. We can evaluate a legal system's structure as a better or worse ordering, an ordering closer or further from its purpose. The law may be inefficient, it may cause disruption, or disorder. It may, in other words, fail to create order. On the other hand, it may create order but for such an infamous end that we can rationally call such law "perverted," creating an order contrary to its true purpose. In a word, it may be just or unjust.

Similarly, we can apply the same standards not only systemically but to the worth of individual laws. We can gauge the goodness or badness of laws not only by whether they actualize order among men, but whether they actualize the proper order among men.

And this brings us face to face with a standard which cannot only describe a legal system but in the same terms evaluate it as well. That standard derived from the nature of law is, of course, natural law. It is not an external morality which "validates" positive law. No, it is intrinsic to the whole enterprise. First of all, natural law is an appropriate standard in a literal sense because it describes the necessary requirements implicit in the nature of law without which law could not be law (because it would then have a different nature and hence be a different thing). In addition, and somewhat redundantly, natural law is appropriate as an evaluative standard. We need not seek an outside standard to evaluate a value-free science of law. The standard is a logical imperative to law's very nature. To speak about what the proper ordering of law should be is merely to ask what should be the norm consistent with the nature of law. That is all that is meant by natural law and that is all that it ever needs to mean. Indeed, to find out what is "right" in law, we need not go to ethical philosophy as if it were a separate discipline. Rather we turn more logically to natural law which describes interstitially what is good law from bad, or even, in viewing law's teleological nature, what is law at all.

This of course brings us to the content of natural law, another aspect

of the teleological view which I once again sidestep somewhat artlessly because of the scope of this paper. Nonetheless, we can still fruitfully discuss whether natural law requires the observance of procedural norms only, as Lon Fuller seemed to indicate, or whether there are also necessary substantive aspects to the accomplishment of law's purpose.

It will be recalled that Fuller discerned a number of "desiderata" to what he called the "internal morality" of law. They included principles of generality, promulgation, limited retroactivity, clarity, limited contradictions, the possibility of compliance, relative constancy, and consistent enforcement. These procedural norms were necessary for law to be law. Although these norms were unenforceable, were they absent then a proposed "rule" would not be law because the nature of the law as defined by its end would have been fatally undermined. These are constitutive rules, intrinsically necessary to the legal enterprise. That is why Fuller calls them "lower laws" rather than "higher laws."

Fuller emphasized that his eight desiderata are not rigid norms each of which must be strictly fulfilled. Rather, they may in some cases be adjusted so that the defining purpose of the law is fulfilled. Consequently, security may occasionally require a secret law whose ill effects are later cured by a retroactive law. This highlights one of the salient features of natural law, one that is maddening to many positivists, namely, that natural law's norms are categorical only in relation to the telos. The actual practice of a natural law jurisprudence is strikingly dependent on the virtue of reasonable prudence.

By championing a teleological view over those who assumed that law was "like a piece of inert matter," Fuller asserted that the mere concentration on formal structure neglected "the purposive activity this structure is assumed to organize." But does this purposive activity require certain substantive objectives as well as calling for a number of procedural means? Is natural law substantive too?

Fuller tried to draw a line between the procedural and substantive aspects of natural law, but despite his resistance, the criticisms of H.L.A. Hart edged him across that line. Where Hart said that there was no logical connection between procedural values and subsequent "good" laws, Fuller replied that the inner morality of law will tend toward producing external moralities because it is dependent on a view of "man's dignity as a responsible agent." Responsible to what? we might ask. Responsible to fulfilling his nature as a human person, we might answer. And there we have it. The perfection of law's potentialities is therefore parasitic on what will perfect man's potentialities. The "good" of law cannot be had outside of the "good" of man. And thus we are drawn inevitably to understanding human action itself in a teleological framework.

V

Law is not self-moved. It is moved by agents toward its end. The primary agent of law's change is man himself whose good is also part of the purpose of law. Law's purpose is indissolubly tied to man's purpose. A true teleological view of law allows us to say accurately and justifiably that the legal regime of Nazi Germany, or of South Africa, or of the U.S.S.R. is a perversion of the law, for it violates law's nature both procedurally and substantively. I leave for now the debate to Aristotle, Cicero, Aquinas, Vitoria, Suarez, Duguit, Stammler, Dabin, Maritain, Grisez, Finnis, Veatch, and others over what actually constitutes the proper end of man. But if we can find that the holocaust, or slavery, or abortion, or apartheid is contrary to that end, we may justifiably judge that those positive rules are either not law (in the sense that they are not lawful) or that they are, in the true sense of the word, *bad* law. Both conclusions have been reached by thinkers of the natural law tradition.

Modern science has developed the notion of "natural laws" to describe the apparent sequential patterns of the most complex parts of the physical world. But it cannot tell us what we ought to do about arms production, or human sexuality, or abortion, or race, or death. Non-teleological science can no more tell us that nuclear fusion is immoral than it can tell us what is the natural purpose of the solar system.

Natural law, however, can tell us what *ought* to be done in light of the nature of law. If indeed the nature of law is that it is directed toward the accomplishment (actualization) of the proper (just) ordering (a rational and effective structure) of relations (social interactions) among men (human persons in their various states of being), then we can make justifiable evaluative judgments. We can logically call laws good or bad, just or unjust, wise or stupid. What natural laws cannot do, natural law is equipped to do.

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