

Perspective on the Natural Law

I Definition

“The fundamental idea of Natural Law,” writes Ernest Baker, is “the idea that there is a natural justice, based on the reason of man, which lies behind all positive law.” According to Jacques Maritain, “there is, by very virtue of human nature, an order or a disposition which human reason can discover and according to which the human will must act in order to attune itself to the necessary ends of the human being. The unwritten law, or Natural Law, is nothing more than that.”

Implicit in all definitions of the Natural Law concept is the idea that there is a law written in the heart of man which is in harmony with something similarly written into the universe. If this is so, the universe is not merely brute fact, nor is it limited to that order of things which we can see, touch or otherwise contact by means of our senses. The implication is that there is another order of reality which we can know by reason, intuition or revelation. This idea is stated by the late Professor C.E.M. Joad as follows:

“The natural order of things existing in time and space is not the only order; there is also an order of reality not subject to time and space from which the natural order derives and to which it is subject. The non-natural order contains values of which truth, goodness and beauty are the most eminent; it also contains God. ...

“Man belongs for the most part to the natural order, although there is also comprised in his make-up an element, the soul or spirit, which is akin to, which perhaps belongs to the non-natural order. Man, therefore, in common with the rest of natural order, is subject to the non-natural. ...

“This attitude to the universe has been on the whole predominant in our civilization. First adopted by the Greeks, it was confirmed and elaborated by Christianity and forms part of the Christian tradition of Western Europe. Periods occur when it is largely forgotten or denied, with the result that the nature of the universe is misinterpreted and man's status in it misconceived.”

Without the setting provided by some such idea of the universe – which is also the minimum religious premise – it is difficult to see how the Natural Law concept can be validly maintained.

II Intimation of Natural Law in Pre History

The Natural Law concept does not become fully explicit until the late Middle Ages and early Modern Era. It came to full flower with the growth and development of the intellectual and religious traditions of Christendom, but if the concept is natural to man as a reasoning and worshipping being, we should be able to detect at least the rudiments of the idea of Natural Law even in primitive cultures.

The Natural Law concept is embedded in religion; being the perception that a God who is just in all his ways demands of his creatures that they be just in their dealings with one another. Accordingly, we should seek the first intimations of the Natural Law concept in early religion.

The basic religious belief is that the universe is not indifferent to man's individual and social life; that, to the contrary, the pattern his life should follow is fixed in the nature of things. It follows that man cannot make up his own rules as he goes along. This being so, we should expect to find evidence, going back as far as investigation will take us, that man has everywhere engaged in practices intended to put himself and his group in harmony with that phase of the universe he regards as divine. The evidence is abundant.

G.R. Levy, in her book The Gate of Horn, has studied the religious concepts of the Stone Age and their influence on European thought by means of an analysis of cave drawings, figurines, and other manifestations of prehistoric art. The evidence, she writes, clearly points to “a living unity of belief and practice, which underlies the religious, artistic and social development of the ancient world before the revolutions of the Iron Age.”

Man tends to learn by experience, so we would expect to find the Natural Law concept emerging more clearly as we come to the dawn of civilization. Egypt furnishes a good example. Henri Frankfort, in his The Birth of Civilization in the Near East writes, “The ideal of a marvelously integrated society had been formed long before the pyramids were built; it was as nearly realized, when they were built, as any ideal social form can be translated into actuality; and it remained continuously before the eyes of rulers and people alike during subsequent centuries. It was an ideal which ought to thrill a western historian by its novelty, for it falls entirely outside the experience of Greek or Roman or Modern Man, although it survives, in an attenuated form, in Africa. It represents a harmony between man and the divine which is beyond our boldest dreams, since it was maintained by divine power which had taken charge of the affairs of man in the person of Pharaoh. Society moved in unison with nature. Justice, which was the social aspect of the cosmic order, pervaded the commonwealth. ... Nor does the Egyptian view lack ethical content. Truth, justice, were 'that by which the gods live,' an essential element in the established order.”

Writing of Mesopotamian Civilization of about the same period, Thorkild Jacobsen writes, “This majesty and absolute authority which can be experienced in the sky the Mesopotamians called Anu. ... Anu is the source of and active principle in all authority, both in human society and in the

larger society which is the universe. He is the force which lifts it out of chaos and anarchy and makes it into a structure, an organized whole; he is the force which ensures the necessary voluntary obedience to orders, laws and customs in society and to the natural laws in the physical world, in short to world order. As a building is supported by, and reveals in its structure the lines of its foundation so the Mesopotamian universe is upheld by, and reflects in its structure, a divine will. Anu's command is the foundation of heaven and earth.

Similar examples might be cited from the distant cultures of India and China, but instances from Greece and Rome are more pertinent. The Ancient City, by Foustel de Coulanges, tells of the earliest civil and religious institutions of those two countries. He writes, "... the foundation of a city was always a religious act. ... society developed only so fast as religion enlarged its sphere." ... (from household gods and domestic worship to a conception of a divine order). "Surrounded by a sacred enclosure," he continues, "and extending around an altar, it (a city) was the religious abode of gods and citizens. Livy said of Rome, 'There is not a place in this city which is not impregnated with religion, and which is not occupied by some divinity. The gods inhabit it.' What Livy said of Rome any man might say of his own city; for if it had been founded according to the rites, it had received within its walls protecting gods who were, as we may say, implanted in its soil, and could never quit it. Every city was a sanctuary; every city might be called holy."

At the present time, the Natural Law carries connotations of an affinity with the legal traditions of mankind. It is not the theologian but the legal philosopher who now exhibits a marked interest in the subject; a law school is the major instrument of the present revival of interest in the Natural Law, not a school of divinity. The legal minds sponsoring this revival are clearly aware of the religious implications of their thinking, and their efforts are a credit to their profession. The absence of any comparable movement on the horizon of contemporary theological thought is somewhat surprising in view of the fact that religion provided the soil in which the Natural Law concept first appeared, and still provides the only possible metaphysical foundation for the concept.

In other words, the Natural Law is part of what Leibniz called the perennial philosophy - "the metaphysic that recognizes a divine Reality substantial to the world of things and lives and minds; the psychology that finds in the soul something similar to, or even identical with, divine Reality; the ethic that places man's final end in the knowledge of the immanent and transcendent Ground of all being - the thing is immemorial and universal. Rudiments of the Perennial Philosophy may be found among the

traditionary lore of primitive peoples in every region of the world, and in its fully developed forms it has a place in every one of the higher religions. A version of this Highest Common Factor in all preceding and subsequent theologies was first committed to writing more than twenty-five centuries ago, and since that time the inexhaustible theme has been treated again and again, from the standpoint of every religious tradition and in all the principal languages of Asia and Europe.” (Alduous Huxley)

III The Natural Law as a Subject for Philosophy

The concept of a moral law which takes precedence over the statutes or customs of any given society was familiar to the Greeks even before Plato wrote. Sophocles, in his Antigone (c. 441 B.C.) has his heroine say:

“Nor did I deem
Your ordinance of so much binding force,
As that a mortal man could overbear
The unchangeable unwritten code of Heaven;
This is not of today and yesterday,
But lives forever, having origin
Whence no man knows: whose sanctions I were loath
In Heaven's sight to provoke, fearing the will
Of any man.”

Platonic philosophy presents us with a transcendent realm of Forms or Ideas which somehow interpenetrate and influence this natural world. God, for Plato, is the measure of all things and holds all things in His Hand. “Justice,” he writes in The Laws (c. 350 B.C.) “always follows Him and punishes those who fall short of the divine law. To that law, he who would be happy holds fast and follows it in all humility and order; but he who is lifted up with pride or money or honor or beauty, who has a soul hot with folly and youth and insolence, and thinks he has no need of a guide or a rule, but is able of himself to be the guide of others, he, I say, is deserted of God; and being deserted he takes to himself and to others who are like him, and jumps about, throwing all things into confusion, and many think he is a great man. But in a short time he pays the penalty of justice and is utterly destroyed and his family and state with him.”

Aristotle, Plato's pupil and critic, for centuries provided the philosophical foundation for

Natural Law doctrine. During the Middle Ages, Aristotle was “The Philosopher.” In the philosophy of Plato, the Forms or Ideas were manifested in individuals but their abode was elsewhere; for Aristotle, the Form or Idea was immanent in the individual as a potency to be realized in and through the individual's life. “What each thing is when fully developed,” he wrote, “we call its nature, whether we are speaking of a man, a horse, or a family.” The ethical imperative which emerges from this position may be simply stated as follows: “Realize your nature, conceived as the ultimate end or purpose of your life, by cooperating with the Idea within you which drives toward completion.” It follows that whatever thwarts this development is repugnant to nature, and hence bad; whatever enhances this development cooperates with nature, and is good.

Ernest Barker puts the matter into more technical language, as follows: “In Aristotle's general terminology the word 'nature,' as applied to man and human things, has three senses. It is something which is immanent in the primordial constitution of man, as a potentiality of development. Again it is something which has developed with his development – something which is a growth of his potentiality; but a growth in which his 'art,' or creative mind (which is part of his constitution), has cooperated with the promptings of what we may roughly call his instinct, or immanent impulse. Finally, it is something which is inherent in the final development of man, and part of his final cause or purpose.”

Having secured his ethical foundation, Aristotle distinguishes Natural Law from positive law. “Of political justice part is natural, that which everywhere has the same force and does not exist by people thinking this or that. ... Law is in part particular and in part common; the particular is that which different peoples establish among themselves, and is in part unwritten and in part written; the common law is the law of nature. It is what all men, by a natural intuition, feel to be common right and wrong, even if they have no common association and no covenant with one another.”

Aristotle excluded a portion of the human race from that justice which the Natural Law enjoined – those whom he regarded as slaves by nature. For the Stoics, however, slavery was a violation of the Natural Law. Hippias, for example, write, “I hold you all kinsmen, relatives and fellow citizens of nature, though not by law; for like is kin to like; but law, the tyrant of mankind, often constrains by violence in contravention of nature.” The great popularizer of Stoic doctrines was Cicero, who lived just before the dawn of the Christian era. One of his affirmations may be cited as typical of developed Stoic thought – an end product of Greek speculation even though it attracted many adherents in Rome:

“Of all these things about which learned men dispute there is none more important than clearly to understand that we are born for justice, and that right is founded not in opinion but in nature. There is indeed a true law, right reason, agreeing with nature and diffused among all, unchanging, everlasting, which calls to duty by commanding, deters from wrong by forbidding.”

Such, in too brief outline, is the contribution of Greece toward the shaping of the European tradition. Three major influences combine to form the mainstream of the heritage of Christendom; the speculative philosophy of Greece, the religious faith of Israel, and the practical, legal experience of Rome.¹

Natural law for Israel was God's law; Israel regarded itself as a sacred community for which God legislated. No king of Israel successfully set himself up as the source of law; there was another and higher source. There is no doubt as to what their authority was: They looked to God as the source of their law. “The Lord is our judge, the Lord is our lawgiver, the Lord is our King.” (Is. 33:22). All, or nearly all, of the basic laws of this people were written as though emanating from God Himself. Instead of “I, the king,” it was “I, the Lord.” “And ye shall keep my statutes and do them. I am the Lord.” (Lev 20:8) “Thus saith the Lord: Execute ye judgment and righteousness, and deliver the spoiled out of the hand of the oppressor; and do no wrong, do no violence to the stranger, the fatherless, nor the widow.” (Jer. 22:3)

This is the system of law, laid down in the Scriptures, expanded and interpreted by human reason, of which the Psalmist said, “...his delight is in the law of the Lord; and in his law doth he meditate day and night.” (Ps. 1:2). Nearly every man was learned in this law, and also deeply involved in the religious relation to God in which the law was rooted.

But this Law was not something afar off, it was also written on the heart of man: “The word (commandment) is very near you; it is in your mouth and in your heart, so that you can do it.” (Deuteronomy 10:14) Paul, in his Epistle to Romans (2:13-16) stresses the point that this Law is natural to man as such: “For it is not the hearers of the law who are righteous before God, but the doers of the law who will be justified. When Gentiles who have not the law (i.e. of Moses) do by nature what the law requires, they are a law to themselves, even though they do not have the law. They show that what the law requires is written on their hearts, while their conscience also bears witness and their

1 . See appendix I Legacy of the Ancient World. Wm. De Burgh

conflicting thoughts accuse or perhaps excuse them on that day when, according to my gospel, God judges the secrets of men by Christ Jesus.”

The Romans came to an appreciation of Natural Law as a result of practical legal necessity, as the story is told by Sir Henry Maine in his Ancient Law. The ancient legal code for Roman citizens was the ius civile, and the Romans were not disposed to waste their own precious law on the barbarians they had dealings with. Rome was a cosmopolitan city and a trading center, a dwelling place and business site for people of many nations. Frictions between barbarians as well as between Romans and barbarians were inevitable, in these circumstances. Before what system of law should they be tried? Out of necessity came the practical remedy of using as the law in Rome the common denominator of the laws of the barbarian nations. This common law of the nations was called the ius gentium, and it was at first the despised poor relation of Roman Law. Later, it was touched with Greek speculation and was seen to be incipient Natural Law. Maine's own words are worth quoting: “The Just Gentium was merely a system forced on his attention by a political necessity. He loved it as little as he loved the foreigners from whose institutions it was derived and for whose benefit it was intended. A complete revolution in his ideas was required before it could challenge his respect, but so complete was it when it did occur, that the true reason why our modern estimate of the Jus Gentium differs from that which has just been described, is that both modern jurisprudence and modern philosophy have inherited the matured views of the later jurisconsults on this subject. There did come a time when, from an ignoble appendage of the Jus Civile, the Just Gentium came to be considered a great though as yet imperfectly developed model to which all law ought as far as possible to conform. This crisis arrived when the Greek theory of a Law of Nature was applied to the practical Roman administration of the Law common to all nations.

The Jus Naturale, or Law of Nature, is simply the Jus Gentium or Law of Nations seen in light of a peculiar theory.”

IV Scholasticism

It is obvious that legal speculation in Christendom could not proceed along secular lines; the first premises for all thought were laid down in theological terms. The new religion, however, did not arise in a vacuum, nor did it develop in one. It might be said that Christianity universalized the religious principles of Judaism, erected its philosophical structures in the only philosophical terms

available – the terms of Greek speculation – and constructed an institution along the lines of the Roman Empire. (The form taken by ecclesiastical organization provokes a comment by the late Dean Inge. He refers to “the last chapter of the history of the Roman Empire, which perpetuated itself in a marvelous fashion in the institution (the Church) which it first tried vainly to destroy, and then tried only too successfully to capture.”)

Theology provided a healthy setting for the Natural Law concept, and this concept reached its peak in scholastic thought. To summarize scholastic thought would require a book in itself, but a quotation from its greatest exponent, Thomas Aquinas, will give an inkling of the harmonious way the Natural Law fits into the edifice of scholasticism.

“The precepts of the natural law are to the practical reason, what the first principles of demonstrations are to the speculative reason; because both are self-evident principles. ... the first principles in the practical reason is one founded on the notion of good, viz., that good is that which all things seek after. Hence this is the first precept of law, that good is to be done and ensued, and evil is to be avoided. All other precepts of the natural law are based upon this: so that whatever the practical reason naturally apprehends as man's good (or evil) belongs to the precepts of the natural law as something to be done or avoided.

“Since, however, a good has the nature of an end, and evil, the nature of a contrary hence it is that all those things to which man has a natural inclination, are naturally apprehended by reason as being good, and consequently as objects of pursuit, and their contraries as evil, and objects of avoidance. Wherefore according to the order of natural inclinations, is the order of the precepts of the natural law. Because in man there is first of all an inclination to good in accordance with the nature which he has in common with all substances: inasmuch as every substance seeks the preservation of its own being, according to its nature: and by reason of this inclination, whatever is a means of preserving human life, and of warding off its obstacles, belongs to the natural law. Secondly, there is in man an inclination to things that pertain to him more specially, according to that nature which he has in common with other animals: and in virtue of this inclination, those things are said to belong to the natural law, which nature has taught to all animals, such as sexual intercourse, education of offspring and so forth. Thirdly, there is in man an inclination to good, according to the nature of his reason, which nature is proper to him: thus man has a natural inclination to know the truth about God, and to live in society: and in this respect, whatever pertains to this inclination belongs to the natural law; for

instance, the shun ignorance, to avoid offending those among whom one has to live, and other such things regarding the above inclination....

“For it has been stated that to the natural law belongs everything to which a man is inclined according to his nature. Now each thing is inclined naturally to an operation that is suitable to it according to its form: thus fire is inclined to give heat. Wherefore, since the rational soul is the proper form of man, there is in every man a natural inclination to act according to reason: and this is to act according to virtue. Consequently, considered thus, all acts of virtue are prescribed by the natural law: since each one's reason naturally dictates to him to act virtuously....

“The force of law depends on the extent of its justice. Now in human affairs a thing is said to be just, from being right, according to the rules of reason. But the first rule of reason is the law of nature, as is clear from what has been stated above. Consequently every human law has just so much of the nature of law, as it is derived from the law of nature. But if in any point it deflects from the law of nature, it is no longer a law but a perversion of law.”

V The Growing Secularization of Natural Law

Far reaching changes in man's outlook attended the waning of the Middle Ages and the birth of the modern world – roughly the period comprised in the fifteenth to the seventeenth centuries. Perhaps one of the first indications of the impending revolution in human life occurred even earlier with the thinking of William of Occam, a Franciscan monk who died c. 1349. William engaged in the Realist-Nominalist controversy as to whether universals are real or are mere signs by which the mind represents reality to itself. William took the Nominalist position that only individual particles – objects of sense – are real. Abstractions, general ideas – objects of thought or intuition – are mere names.

The medieval period was tired; the vitality of its leading ideas had lessened. People wanted to get down to earth after the strain of other-worldliness. It was time for another of those gigantic pendulum swings which mark history. William of Occam did not consider himself a revolutionary, far from it. But he released an idea which has been spelling itself out from that day to this. Richard Weaver has brilliantly traced this development in his book, Ideas Have Consequences. The basic idea of the modern period, the past several centuries, has been the growing assurance that man can organize his

own life and that of his societies without reference to any order of reality than that supplied by sensory experience. In the terminology of religion, secularism is the blanket term for a number of ideologies which are premised on the belief that man can organize his life apart from God.

This development reaches its logical conclusion in Marxism. A 1950 publication of the British Communist Party puts the case bluntly: “The materialists ... assert that the material world is real, and that the mind is a product of matter at a late stage of development (when the brain has developed).

“In opposition to idealism, materialism maintains: that there is only one world, the material world, and thought is a product of matter; there can be no thinking without a brain.”

As was indicated early (p. 1) the traditional belief of Christendom, a belief shared by almost every other developed culture of record, is that reality is complex. In addition to the realm of nature where things change, decay and perish, things we can see, taste, touch and smell, there is an order of supernature with which we are in touch via thought and intuition. The basic premise of religion is the existence of this latter realm. But if it is assumed that the only avenue to reality is by way of experience and experiment, then a supersensible realm is denied by this first premise.

Natural Law, in the period under discussion, roughly 1500 to 1800, itself became secularized. Ernest Barker writes: “The general view of the thinkers of the School of Natural Law refers that law and all that depend upon it, to the play of the natural light of human reason. The School is thus a rationalistic school, emancipated from the Church; its tendency, we may say, is to subject the Church to Natural Law rather than Natural Law to the Church; and its thinkers seek to determine the nature of the Church, and the proper scheme of its relations to the State, by principles which are themselves independent of the Church. ...it is also emancipated from the ratio scripta of Roman Law. Its Natural Law is based on pure ratio, without any adjective or qualification: it is the produce of the free lucubration of the legal philosopher, researching in scrinio pectoris sui” (in the desk of one's breast).

Theoretically, there seems to be no inherent difficulty in making full use of the natural rights idea while at the same time maintaining a full awareness that it is rooted in one of the basic ideas of Christendom – the Christian doctrine of man. But historically, things didn't work out that way. The thinkers most enchanted by the idea of natural rights were inclined to dismiss religion as nothing but magic and superstition. By the time the natural rights concept had excited significant numbers of men

to the point of building a political structure around it, these men had pretty much forgotten its religious parentage. This was unfortunate, because the idea of natural rights is not the kind of concept which has legs of its own to stand on; as a deduction from religious premises it makes sense, otherwise not.

Secularism has been a potent factor in European culture from the 18th century down to the present day, especially on the continent. In America, however, secularism did not get a foothold until the turn of the 20th century. We may thank the religious foundation laid down by Puritanism for this two hundred year reprieve. The English legal tradition of the Natural and Common Law came to a head in Sir Edward Coke (1552-1634). There was then a deviation, in England, toward Parliamentary absolutism, finally established by the ascension of William and Mary to England's throne. American legal tradition, however, picked up from Coke through his protegee Roger Williams and others. "In the Puritan atmosphere of North America," writes Barker, "the secular Law of Nature recovers its theological base."

The gist of Coke's thought is contained in his notes on Calvin's case: "The Law of nature was before any judicial or municipal law (and) is immutable. The law of nature is that which God at the time of creation of the nature of man infused into his heart for his preservation and direction; and this is the eternal law, the moral law, called also the law of nature. And by this law, written with the finger of God in the heart of man, were the people of God a long time governed before the law was written by Moses, who was the first reporter or writer of law in the world. ...God and nature is one to all and therefore the law of God and nature is one to all ... This law of nature which indeed is the eternal law of the creator, infused into the heart of the creature at the time of his creation, was two thousand years before any laws written and before any judicial or municipal laws. And certain it is that before judicial or municipal laws were made, kings did decide cases according to natural equity and were not tied to any rule or formality of law."

Coke's principles were restated and elaborated by Blackstone in the following century. The Commentaries received a wide distribution throughout the American colonies after their publication in 1765.

In 18th century America, the Natural Law was to supply a firm foundation for limited, constitutional government and individual liberty within the framework of law. On the European continent, however, the Natural Law was used as an instrument of revolution. (Cf. John Adams'

assertion that the so-called American Revolution was a revolution prevented). Lord Bryce speaking of the Natural Law in this connection, said, “that which had been for nearly two thousand years a harmless maxim, almost a commonplace of morality (was converted into) a mass of dynamite which shattered an ancient monarchy and shook the European continent.”

The presuppositions of the Founding Fathers were in the best tradition of the Natural Law. It is true that some of the men of the period, Jefferson is an example, had been exposed to rationalism and deism from France and toyed with these ideas. But the really moving ideas which were deep rooted even in Jefferson looked to “nature and Nature's God,” and to “divine Providence” as sanctions for the American political venture. The most thorough analysis of this phase of our history is Edwin Corwin's The 'Higher Law' Background of American Constitutional Law (recently put back into print by Cornell University Press.) The American theory, as Corwin phrases it, is as follows: “There are certain principles of right and justice which are entitled to prevail of their own intrinsic excellence, altogether regardless of the attitude of those who wield the physical resources of the community. Such principles were made by no human hands; indeed, if they did not antedate deity itself, they are external to all Will as such and interpenetrate all Reason as such. They are eternal and immutable. In relation to such principles, human laws are, when entitled to obedience save as to matters indifferent, merely a record or transcript, and their enactment an act not of will or power but one of discovery and declaration. ...

“Thus the legality of the Constitution, its supremacy, and its claim to be worshipped, alike find common standing ground on the belief in a law superior to the will of human governors.”²

The 19th century witnessed the triumph of secularism in its various forms; positivism, materialism, mechanism, scientism. Men, by employing the scientific method in limited areas continued to put more and more of nature under their control. In our own time they gained the key to the forces resident in the atom. Science deals expressly with the measurable and quantitative aspects of things, but its successes in these areas laid the ground for a claim to universal validity.

If it be granted that the methods of science are the only avenues to reality, then whatever cannot be rendered accessible by these methods must perforce be unreal. This would be the case when it came to judging the things of religion. God, if He exists, does not exist as does a material object. The methods for finding out about material objects is therefore unsuitable for finding God. But if all

2 . See Appendix two, Walter Lippman's The Good Society

methods for getting at the truth but one, the scientific, are discounted in advance then the fact that the scientific method does not reveal God must mean that He does not exist. Similar fallacious reasoning disposed of all intangible or spiritual reality.³

This was bound to have an effect on society and social theory. Christopher Dawson, describing the 18th and 19th centuries, writes, “Nationality has taken the place of religion as the ultimate principle of social organization, and ideology has taken the place of theology as the creator of social ideas and the guide of public opinion.”

The Natural Law concept has no place in this scheme of things. Jeremy Bentham railed against it, and against its corollary, the idea of natural rights. His follower, John Austin, was instrumental in founding the instrumental school of jurisprudence. For Austin, law was the will of the sovereign authority; it was that which was enforceable, and not to be confused with the dictates of religion or ethics. Its authority, in short, was the power behind it.

VI Revival of the Natural Law

It is important to note that the Natural Law philosophy declined, not because of any logical or structural weakness of its own, but because of the discarding of the king of the world view within which the Natural Law concept is plausible. Statutory law is on the books where it can be seen; it can be enforced and infractions of it punished. All this takes place within the material, natural, human worlds. The Natural Law philosophy, on the other hand, takes as its first premise that there is a realm beyond the material, natural and human worlds. If there is such a realm, it is outside the province of science according to science's own first premise.

For their own limited purposes and as a matter of operational procedure, the sciences work on the basic assumption that the world of physical nature acts like a closed system whose constituent parts are bound together by cause and effect relationships – something like the mechanism of a clock. As an operating hypothesis, this is a legitimate assumption. Purely as a matter of operational procedure or methodology the sciences exclude the supernatural, and this exclusion is justified by the results obtained. This point is the origin of much error.

The initial premise of the scientific method which, as I have said, excludes the supernatural as a matter of operational procedure, also involves religion, because religion is rooted in the conviction that there is a supernatural order. Such concepts as eternity, the spiritual world, the realm of ultimate values, and God, are things which, if they are real, have their abode in some realm other than that of physical nature. These things may be real, but that is beside the present point. I merely want to point out that, contrary to much popular belief, these things have not been proved unreal by the methods of science or by any of its discoveries. Science starts with the premise that these things are not within its province. Within its own terms, it does not deal with them at all.

Granted the lack of clarity in this situation, the unfortunate consequences for religion – and also for society – may have been inevitable. What happened was this. On the one hand, many people came to assume that science had proved the unreality of the things of religion as a result of its investigations; when actually, science begins with the initial premise that these things are outside its purview. On the other hand, the habitual pre-occupation of scientists – and the average citizen as well – with the material world drew so much attention away from the spiritual realities that these realities virtually perished from neglect. When this occurred the immediate consequence was to cast doubt on the truth and reality of religion. The long range consequence was to throw western civilization off balance, because the west is not basically a secular culture. The world view of the 19th century science was, in a large measure, mechanistic and naturalistic. To the extent that this view prevailed – and it acquired enormous prestige – it had far reaching effects on such disciplines as religion, ethics, law and government. It centered religious emphasis on social reform; it reduced ethics to custom or some form of hedonism; it redefined law as any social regulation capable of being enforced; and political theory, enamored of power, tended to become an apologetic for statism.

This is an orderly universe and, as Emerson observed, things won't be mismanaged long. Within our own generation, tremendous changes have taken place in our understanding of the world; science has transformed its outlook, religion and ethics have been rehabilitated, and everyone capable of disillusionment has been appalled to see the pleasant 19th century Socialist dreams of a cooperative commonwealth turn into 20th century totalitarian nightmares.

The revolution in science has been well put by Sir James Jeans. Writing his personal credo in 1930 he said, “Thirty years ago we thought, or assumed, that we were heading toward an ultimate reality of a mechanical kind. It seemed to consist of a fortuitous jumble of atoms which was destined to

perform meaningless dances for a time under the action of blind, purposeless forces and then fall back to form a dead world. Into this wholly mechanical world, through the play of the same blind forces, life had stumbled by accident.

“Today there is a wide measure of agreement which, on the physical side of science, approaches almost to unanimity, that the stream of knowledge is heading toward a non-mechanical reality. The universe begins to look more like a great thought than a great machine. ...

“We discover that the universe shows evidence of a designing or controlling power that has something in common with our own individual minds. ...”

More recently, Dr. Warren Weaver, in a speech upon retiring from the American Association for the Advancement of Science, has put forth the claims of science with extreme modesty. “Science has impressively proved itself to be a powerful way of dealing with certain aspects of our experience,” he said. “These are, in general, the logical and quantitative aspects ... We simply do not know yet how far these methods, which have worked so well with physical nature, will be successful in the world of living things.”

For a variety of reasons, among which the new role science assumes for itself is prominent, there has been a widespread religious revival in our time. Likewise, there has been a renewal of interest in the libertarian philosophy, which comprises limited, constitutional government, personal liberty, and freedom of enterprise. And, as would be expected, the reconstruction of a world view congenial to the Natural Law concept has resulted in a revival of that concept.

Jerome Frank's Law and the Modern Mind may be cited as an example. The first edition of this book appeared in 1930. Mr. Frank drew upon the finding of modern psychology and tried to show that law is simply one among several ways to achieve harmonious social relationships; it has nothing to do with transcendent, immutable principles. Frank poured scorn on this idea, labeling it “Bealism” after a law professor who still believed that positive law should be based on Natural Law.

Jerome Frank's book has gone through several editions, and the author's mind has changed over the years. It has changed so radically that Mr. Frank added a new preface to the 1949 edition of Law and the Modern Mind containing this statement: “I do not understand how any decent man today can

refuse to adopt, as the basis for modern civilization, the fundamental principles of Natural Law relative to human conduct, as stated by Thomas Aquinas.”

The advocate of the Natural Law philosophy does not want to return to some previous error. “New occasions teach new duties,” and what is needed is a contemporary application of old principles. That this is being done is evidenced by the appearance of books and articles on the Natural Law, as well as by such ambitious projects as the five Natural Law Institutes held at the College of Law, University of Notre Dame, 1947-1951, and the Natural Law library there.

The Natural Law concept is more than a tool for lawyers. It is an indispensable concept for the proponent of liberty and limited government and, as liberty comes to seem more precious and popular disillusionment with political panaceas become more acute, we may expect to see increasing reliance on the Natural Law philosophy as an indispensable means for achieving a sounder society, one more in harmony with the eternal verities and the accumulated wisdom of the race.

Appendix I

Mingling of Roman and Christian Ideas of Natural Law

(from Wm. De Burgh's The Legacy of the Ancient World, Vol. 1)

Ideas derived from Greek philosophy inspired Roman jurisprudence. “The most striking instance is the concept of law of nature (jus naturale or naturae). Its source lay in Stoicism, the one Hellenic system which evoked a wide response from the practical Roman mind, and still, in the second century, the foremost philosophical school of Greece. Ulpian was mainly responsible for incorporating this concept in the structure of Roman jurisprudence. It comprised the universal rules of conduct which flow from the nature of man as a rational being, irrespective of race or time; such as those enjoining recognition of the tie of kindred, respect for engagements, equitable apportionment of gain or loss, supremacy of the intention over the words in which it found imperfect expression. Thus a slave has,

under the law of nature, rights denied to him by the civil law and the jus gentium.” (p. 302)

“Roman jurisprudence, both in principles and in detail, was accepted, almost without question, by the Fathers of the first six centuries. The concept of a state of nature, anterior to the establishment of civil government; the doctrine that all men, as rational beings, were by nature free and equal; the distinction between natural and civil law; its application to the institutions of slavery, property, and coercive jurisdiction – these ideas were confirmed and strengthened by the Christian beliefs in man's pristine innocence, and in the changed conditions which resulted from the Fall. The visible institution of the Christian church modeled itself instinctively on the majestic structure of the imperial government.” (p. 383, Vol. II)

“Under Constantine and his successors, the trend of the imperial constitutions was towards humanizing the existing law in accordance with the principles of natural right, especially in regard to the family and to testamentary successions.” (p. 423)

“We have seen how the great jurists of the early empire accommodated Stoic doctrine to their science. They taught that behind the civil law of Rome, behind even the common law of nations, lay the law of nature, rooted in man's constitution as a rational and, therefore, a moral being. The acceptance of this juristic tradition went far to strengthen the mediaeval tendency to interpret morality under the form of the law. The groundwork was laid for a reconciliation between the enacted law of the land and the principles of morality, as being two different but mutually consistent expressions of reason, which was the image of the divine original stamped at the creation upon the soul of man. This rapprochement was facilitated by the obvious facts, that the discharge of legal obligations fell within the scope of moral duty, and that justice was recognized by mediaeval thinkers as one of the cardinal moral virtues. Side by side with the triad of the theological virtues, faith, hope, and charity, revealed under the Christian dispensation, and attainable only by its believers, they set prudence, fortitude, temperance, and justice, which as pagan philosophy had witnessed, were the fruit of man's rational nature, independent of special revelation.” (p. 470)

The difficulty rose in a different form in medieval society. “We have seen how Plato and Aristotle taught that the state, as existing by nature, was superior to law, which served as the instrument of its ethical function. Here lay the problem: how was the Germanic conviction that the state was subordinate to law, to be reconciled with the classical tradition that law was subordinate to the state? A

solution was reached by aid of the distinction between the law of nature and positive law. While the state and its ruler derived their right from the higher authority of natural or, a fortiori, of divine law and were consequently subject to ethical obligations; positive law, representing the variable application of natural law to particular circumstances of time and place, was the creation of, and dependent upon, the state. Thus the outcome of mediaeval theory was to broaden the concept of law so as to include within its scope the moral foundations and ideal purpose of political society.” (p 475)

Appendix II

The Meaning of the Interest in Natural Law (from Walter Lippmann's The Good Society)

“For more than two thousand years, since western man first began to think about the social order, the main preoccupation of political thinking has been to find a law which would be superior to arbitrary power. Men have sought it in custom, in the dictates of reason, in religious revelation, endeavoring always to set up some check upon the exercise of force. This is the meaning of the long debate about Natural Law. This is the meaning of a thousand years of struggle to bring the sovereign under a constitution, to establish for the individual and for voluntary associations of men rights which they can enforce against kings, barons, magnates, majorities, and mobs. This is the meaning of the struggle to separate the church from the state, to emancipate conscience, learning the arts, education, and commerce from the inquisitor, the censor, the monopolist, the policeman, and the hangman.” (pp. 5-6)

“The conviction that there is a higher law, higher than statutes, ordinances, and usages, is to be found among all civilized peoples. It springs from a dim apprehension which mankind is forever perceiving, and then losing, and then seeking to rediscover and repossess. For at least twenty-five centuries men have been formulating it. They have stated it in a thousand different ways. They have debated it since they learned to debate general ideas. Usually the conception of a higher law has been denied by the masters and invoked by their subjects. For the belief in a higher law is in effect a prayer invoking against the material powers of an actual ruler some immaterial power which he can be compelled to respect; it imputes to the nature of things universal principles of order to which human caprice can be held accountable.

Though the existence of any such higher law in human societies is constantly repudiated in practice and is even condemned in theory, it derives from an intuition which mankind is unable to abandon. For if there is no higher law, then there is no ground on which anyone can challenge the power of the strong to exploit the weak, there is no reason by which arbitrary force can be restrained. So it is no mere coincidence that from the time when the Stoics first challenged human slavery, down through the long struggle for constitutional government, for the rights of man, and for the freedom of trade, the emancipators of mankind have invariably appealed to some higher and more universal law than the enacted will of their adversaries. Upon the acknowledgment of a higher law rests whatever power constitutions, treaties, and engagements may have to bind the stronger party. In the absence of a higher law there can be tyranny and there can be anarchy, there can be periods when the ruling power is irresistible and others when rebellion is so general that no power can prevail. But a free and ordered society, resting chiefly on persuasion rather than on coercion, on the pacific adjudication of human conflicts, on the security of known rights and duties, and on their revision, is inconceivable in theory and unworkable in practice unless in the community there is a general willingness to be bound by the spirit of a law that is higher and more universal than the letter of particular laws.” (pp. 334-5)

Appendix III

Changing Attitude Toward Natural Law

(from J.U. Nef's The United States and Civilization)

“In recent years the methods and outlook of the natural scientist have been extended in the American universities to cover all the activities of the mind. The scientists themselves are less responsible for this extension than the scholars who deal with the humanities and with social and economic relations. ...

“The extraordinary change in the outlook of scholars in these matters in the United States can be seen by comparing definitions in authoritative encyclopedias. Let us take, for example, the phrase 'natural law.' Natural law is indispensable to the whole conception of limited government, a conception

of vital interest, as Professor McIlwain has shown, to anyone who wishes to preserve democracy. In Western history the appeal to natural law has been a means of restraining tyrants, of preventing an arbitrary exercise of political power whether by a king or a representative assembly. In the Century Dictionary, prepared by American scholars of the 1880's, under the direction of the late Professor William Dwight Whitney of Yale University, the definition of natural law is this: 'The expression of right reason or the dictate of religion, inhering in nature and man, and having ethically a binding force as a rule of civil conduct; the will of man's Maker.' Since at least the middle of the seventeenth century, and possibly much earlier, the English phrase 'natural law' has had another meaning – the scientific. The 'laws of nature,' in the sense of laws of matter or space, came into frequent use in England after the Restoration of 1660, especially among the ever widening circle of men and women who were influenced by the publications of the Royal Society and the experiments of its members. But the older meaning retained its importance throughout the eighteenth and nineteenth centuries. It is the meaning given for 'natural law' and 'law of nature' in the Century Dictionary, although the more modern meaning can be found under 'law.' Only during the last fifty years has the scientific crowded out the humanistic meaning. In the fourteenth edition of the Encyclopaedia Britannica, published in 1929, the scientific definition alone is given. 'Natural law, in science, means the formulation of some uniform characters or connection of things or events; but it is frequently used for the uniformity itself as it exists in natural phenomena. Any such uniformity may be called a natural law; for example, all laws formulated in physics and chemistry. On the other hand, the term 'law of nature' is sometimes restricted to irreducible or ultimate laws (like the law of gravitation), as distinguished from derivative laws (like Kepler's three laws of planetary motion).'

“It is not easy to see how this second definition can be used by free men as a bulwark against dictatorship, or for any moral or philosophical purpose. The contrast between the two definitions reveals the character of the changes that have swept over learning among the Western European peoples and, above all, the Americans, during the last half-century. As the methods of natural science have come to be regarded as the only methods that the mind may appropriately employ in the higher learning, as all procedures of the mind that do not follow the scheme of the natural scientist have been thrown into discredit, the belief that the mind is capable of creating durable values for the guidance of mankind has been lost.” (pp. 78, 79, 80)