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DOGMATISM AND SKEPTICISM IN LAW

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Recently in a Minneapolis court room an intellectual young college student stood before the bench for sentencing. He had been convicted of violating the draft act. The evidence showed that he had complied with all the requirements of the law and the directives of the draft board until he was to be sworn into military service. Then he refused to take the oath or serve. The reason he gave was that he had a duty to obey God's law which was superior to any human relation, that he would accordingly fight only in wars which were ordained by God, and that he had the right to determine which were such wars. Believing that the military service which was demanded by the United States government did not have such divine sanction, he refused to participate. Asked by the judge if he had anything to say before sentence was imposed, he replied, "Nothing, except that I am dedicated to God."¹

The difficulty of the dilemma presented to the court in such a case as this is only partially indicated by the fact that the district court found this attitude to be a violation of the statute while the court of appeals held that the youth's beliefs amounted to such "conscientious objection" as to excuse him from the duty of military service.² But these decisions were concerned merely with issues of statutory interpretation. More profound and vastly more troubling is the problem of moral judgment presented by the individual who, without hope of personal gain or advantage, as a matter of conscientious belief in principle refuses to obey a duly enacted law. While few of us have a conscience which would drive us this far,

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1. See Minneapolis Sunday Tribune, January 3, 1954, p. 6.

2. *Taffs v. United States*, 208 F. 2d 329 (8th Cir. 1953). For other similar cases see, *United States v. Hartman*, 22 U. S. L. Week 2313 (2d Cir. Jan. 8, 1954); *United States v. Perkanski*, 22 U. S. L. Week 2185 (2d Cir. Oct. 23, 1953); *Annet v. United States*, 205 F. 2d 689 (10th Cir. 1953); *Dickinson v. United States*, 346 U. S. 389 (1953).

most will feel some sympathy, and perhaps even respect and admiration, for such a man. But, if this is our attitude, why then do we obey the law in other matters where we may consider it to be erroneous or personally distasteful? Is it merely because the government is powerful and we too cowardly to defy it, or are there other, more rational, reasons for obeying the law even where it may run counter to personal beliefs and principles? Conversely, from the viewpoint of the court, what basis is there for asserting the authority of the law, and what guidance is available when the law apparently conflicts with moral principle?

These questions are not new. Long before the current crop of "conscientious objector" cases, the debate as to why and when the individual should obey the law had engrossed the attention of philosophers, theologians, reformers, lawyers and a motley array of other thoughtfully inclined men. The issues have almost inevitably involved fundamental attitudes towards life and the world, and, as there has never been any general agreement regarding these, so there has never been any generally acceptable answer to the search for what may be called the "moral foundation of law." Each school of philosophy has developed its own answer, and each philosopher his own version of each answer. The majority of men, not being very thoughtful, are only dimly aware of the problem and have only vague and somewhat amorphous notions of their own attitudes toward it. However, as philosophy is in part the attempt to rationalize and systematize otherwise disorderly concepts and conduct so that they may be more easily comprehensible, the more prevalent ideas toward these matters may be articulated and analyzed.

The fundamental questions with which all the systems of legal philosophy seem to be concerned are: First, whose approval determines moral or legal justification? Second, what standard is employed or implied in such approval? Third, how is such determination communicated to the community? Of these questions, the first two have received the most attention from philosophers, while the third has often been omitted, treated casually, or regarded as implied in the response to the first two. The possible answers to the first question, by whom matters of morals are ultimately to be decided, are (a) the human community, (b) the governing elite, (c) the individual, or (d) the Divinity. The standards by which human beings may reach their own determinations as to such questions seem to involve choices between practical experience, conven-

tion or custom, and the satisfaction or pleasure of one or a group. The standards by which a divine judgment may be made are not usually explored in philosophic speculation.

The systems of philosophy which have been popular are not exclusively classified by this logical analysis. Thus the right of the elite to determine matters of morals for the rest of the community is usually said to rest upon some special delegation by or access to Divinity. However, in general, the philosophies of law tend to be predominantly either secular or religious in character. Correspondingly, the secular philosophies tend to be concerned with questions as to the standards that may be employed in reaching moral determinations, while the religious philosophies avoid this problem. As yet, none of the systems of legal philosophy has succeeded in securing either universal acceptance or even the general adherence of the members of any organized political community.

In the long run all men are pragmatists most of the time. At least those who live long enough to have a set of conscious ideas capable of being generalized into anything that may be called a philosophy inevitably judge ideas by results, insofar as they are able to ascertain results and casual connections. There are several reasons for this. The most obvious and most important is that such an attitude is more or less a condition of survival. The baby who thinks that the pretty glow of a flame is attractive either learns that such an attraction leads to pain and injury or eventually ends as a cinder. All who survive and escape incarceration learn to modify a vast number of ideas and impulses on the basis of practical consequences. Another, less potent, reason is that the pragmatic approach is the one most generally accepted method of persuasion or demonstration of validity and truth. Predilections, prejudices and philosophies differ widely, and disputants frequently differ not only as to conclusions but even as to the evidence that is acceptable in support of their conclusions. But, where such an appeal is possible, the challenge to a test by trial and observation is not often rejected or easily disdained.

The pragmatic approach presents no great difficulty so long as the results sought are immediate and the value of the results is apparent, as in the danger of fire, the necessity of food, the characteristics of materials, and the prowess of a human being. There are, indeed, some philosophers who insist that to attach value even to such a thing as the satisfaction of hunger is to commit oneself to a scale of values which must ultimately rest upon some philosophi-

cal scheme. But the overwhelming majority of people undoubtedly take the common-sense approach that philosophy must be justified by its contribution to human survival and satisfaction, and not the reverse.

So, many philosophers take pragmatism as a sufficient intellectual foundation for our systems of law and morals. But difficulties and disagreements concerning values begin to arise when we seek to deal with more abstract concepts and experience, where the relationship between cause and effect is not immediate or obvious. Even the common maxim that "honesty is the best policy" involves us in subtle and devious difficulties when we seek to prove it by reference to a fundamental system of ethics. With more abstract concepts such as "free speech" or "the golden rule," it becomes even more difficult to remain purely pragmatic. A host of problems arises when we ask to assay the consequences of such ideas. What results shall we watch for and regard as significant? How shall we determine causal relations? What time span shall we take as a fair test? These, and similar difficulties, make the seeming certainty and objectivity of the pragmatic approach largely illusory.

Nevertheless, there is a strong general conviction in contemporary society that such things as "honesty," "free speech," "the golden rule," and various other concepts do represent real and important values for man. Most people probably accept such ideas because they are traditional and endemic. Indeed, there are several schools of philosophy which argue that custom or convention are all the justification needed for ethical and legal principles. However those who are philosophers, whether by choice or destiny, usually are addicted to theorizing and speculation, and find such a view much too simple to suit them.

A related but somewhat more elaborate philosophical theory is that usually called "utilitarianism" which postulates that ethical and legal principles are to be tested by the standard of the "greatest happiness of the greatest number." This is, on the face of it, a very plausible ethical philosophy, especially for a democratic society. However, it involves much the same difficulties in operation that an attempt to be consistently pragmatic does. Since a man is normally the best judge of his own happiness, the most obvious method of determining it is to ask him. Similarly, the most obvious way to determine the happiness of the greatest number is to count them, or to take a vote. This is, however, the end of simplicity in the matter. The number of issues that can be submitted to a popular

vote in a populous country is severely limited. Further, the amount of information available to the greatest number is even more severely limited, so that there is real doubt whether any large number have any basis whatsoever for determining whether a particular law will or will not contribute to their happiness. Even assuming that a substantial number of laws could be submitted to a popular referendum, this still would give little assistance in the vastly more numerous problems of applying the laws to individual cases. To the extent that the populace expresses general satisfaction or dissatisfaction with an administration in an election, it may be said that the principle of utilitarianism works effectively. But it is evident that this is a crude and equivocal expression of ethical, political or legal convictions. A legal system which could make no finer discriminations than this would be impotent and useless. Therefore a legal theory must be capable of much more precise application to be very useful.

But if we are unable to utilize the test of experience, unwilling to accept the judgment of tradition or convention, and dissatisfied with the "principle of utility," then we are left with no alternative basis for moral foundations but an appeal to authority.³ The authority to which questions are referred may be either human or divine, but the process of reference necessarily involves two important assumptions: first, that the authority is in some manner better qualified than the rest of us to determine the issues, and, second, that there are available means of intelligible communication on the issues with the authority.

The traditional approach to the matter of devising a philosophical

3. The discussion in the text does not pretend to be an exhaustive mention or review of all the theories of law, but rather undertakes to epitomize the principal classes of secular philosophies on the one hand, and the principal classes of "natural law" philosophies on the other. For a somewhat more detailed list of the theories of law, see Pound, *An Introduction to the Philosophy of Law* 60-67 (1922). Pound says that there have been twelve distinguishable conceptions of law, which he lists as: 1. A divinely ordained set of rules for human action. 2. A tradition of customs acceptable to the gods. 3. The recorded wisdom of wise men. 4. A philosophically discovered system of principles which express the nature of things. 5. The body of declarations of an eternal and immutable moral code. 6. A body of agreements between men in a politically organized society as to their relations with one another. 7. A reflection of the divine reason governing the universe. 8. The commands of the sovereign authority in organized society. 9. A system of precepts discovered by human experience whereby the individual will realize the most complete freedom consistent with like freedom of others. 10. A system of principles whereby the life of man is controlled by reason, or the will of one individual is harmonized with those of others. 11. A system of rules imposed on men in society by the dominant class for the time being. 12. The dictates of economic or social laws regarding human conduct, discovered by observation and worked out through experience. For a more detailed analysis of the concepts of law that have prevailed in the history of jurisprudence, see Stone, *infra* note 14.

justification for law, as such, takes these assumptions in its stride. It postulates the existence of a set of basic principles, commonly called "natural law," which derives its authority by virtue of divine promulgation, and which is discoverable either through specific revelation to a chosen few, or (what comes to much the same thing) by use of the faculty of "reason" which is bestowed upon man so that he may thus discover the principles of "natural law."

This statement is, of course, a considerable over-simplification of a theory that has received as much prolix elaboration as perhaps any other in man's garrulous history. Some writers have argued for a "law of nature" that was not immediately related to any god. Others have insisted that the foundation of all law must be in the immediate word of God as contained in specific revelations. The view established by the scholastics of the middle ages, and the most widely held doctrine, is that "natural law" is to be found in the order of nature established by God and discovered by exercise of man's faculty of reason. This view was virtually unchallenged from the age of Aquinas until the time of Bentham. During the last century, however, the emphasis has been shifted from the divine origin or sanction to the asserted existence of basic principles in the "order of nature." However, this shift has not sufficiently dispelled the aura of mysticism and supernaturalism surrounding "natural law" to secure general contemporary acceptance for it.

Thus, in this century it can be said:

"To defend a doctrine of natural rights today, requires either insensibility to the world's progress or else considerable courage in the face of it. Whether all doctrines of natural rights of man died with the French Revolution or were killed by the historical learning of the nineteenth century, every one who enjoys the consciousness of being enlightened knows that they are, and by right ought to be, dead. The attempt to defend a doctrine of natural rights before historians and political scientists would be treated very much like an attempt to defend the belief in witchcraft. It would be regarded as emanating only from the intellectual underworld. And yet, while in this country only old judges and hopelessly antiquated text-book writers still cling to this supposedly eighteenth-century doctrine, on the Continent the doctrine of natural law has been revived by advanced jurists of diverse schools. . . ."⁴

Without attempting to judge what constitutes a "revival," it can be said that in this country in more recent years there have been many articulate and vigorous advocates of a "natural law" view-

4. M. R. Cohen, in Cohen and Cohen, *Readings in Jurisprudence and Legal Philosophy* 615-616 (1951).

point. These range from practicing lawyers and judges⁵ to academic philosophers. One of the most forceful, thorough and learned statements of the "natural law" viewpoint has been made in a recent book by one of the latter, Professor Wild of Harvard.⁶ He epitomizes the modern view of the subject by declaring:

"To identify natural law with the commands (presumably arbitrary) of a transcendent Deity is certainly to convey an error-

5. See Apsey, *The Natural Law: Scientific or Supernatural*, 37 A. B. A. J. 35 *et seq.* (1951).

6. John Wild, *Plato's Modern Enemies and the Theory of Natural Law* (University of Chicago Press, 1953). Professor Wild's book is astonishingly learned and is academic in both the best and the worst meaning of that term. It was written to vindicate both Plato and the theory of natural law. In undertaking to do the first, Professor Wild crosses swords with most modern commentators on Plato, and even accuses the standard Jowett translation of being biased (p. 20). Professor Wild makes frequent references to phrases and passages in Plato which are set out in the original Greek and which he cites as support for his interpretation of Plato's intentions. It would take an extremely learned scholar to make an adequate appraisal of this part of the book, and this writer frankly confesses his inability to do so. However, it would appear from Professor Wild's own citation of authorities that his interpretation of Plato represents a minority view among contemporary scholars.

The sections of the book wherein the author is concerned with defending Plato as a historical character are of little interest to the lawyer or the general reader. Whether they contribute much to the scholarly study of Greek literature must be left to the judgment of scholars in that field. However, one who has merely read the dialogues must wonder whether the debate over Plato's personal views as—and if—expressed therein, will ever be settled with any degree of finality.

In any event, it can hardly be a matter of the first philosophical magnitude whether or not Plato or another first suggested the concepts now embodied in the philosophy of "natural law." Whatever merit or demerit there is in such a philosophical scheme must be because of its content and not of its history. Possibly in recognition of this, the second and third parts of the book are devoted to an exposition of the development and the doctrinal content of "natural law" as a philosophical system.

While the expositions of "natural law" are considerably more interesting than the other parts of the book, even these sections will be hard going for most readers. Professor Wild's style is frequently turgid, and he uses the terms of philosophy so freely, and often so technically, that anyone unfamiliar with his special lexicon will be confused, if not wholly lost. Although Professor Wild scoffs at the tendency of modern philosophy to engage in linguistic and semantic study, one suspects that both his writing and his thinking would be considerably improved if he were to take such studies a little more seriously. Much of the argument of the book is made in terms of such high order abstractions that it tends to approach sheer gibberish. Sentences such as the following are not illuminated by the context from which they have been taken: "Existence is what it is because of the existence which brings it out of nothing." (p. 199) "The logical atomist regards goodness as a fixed determinate structure rather than as an existential category." (p. 216) "Reality is not made up of properties alone but of existent properties with active tendencies." (p. 217) "... this relation of fitness can be read in two ways from tendency to fulfillment (goodness) or back from fulfillment to tendency (rightness). The former is less necessary than the latter but more factual in the sense of sheer thereness." (p. 217)

One is led to suspect that with this, as with much philosophical writing, the appearance of profundity is due solely to the fact of its obscurity.

eous impression to the modern mind. . . . The basic issue between the defenders of natural law and its opponents has never been that of theism versus nontheism. This is a peripheral metaphysical issue. The basic issue concerns the nature of moral norms. Are they grounded in something which exists independently of human interest and opinion, or are they man made? The philosophers of natural law are moral realists. They hold that certain moral norms are grounded on nature, not merely on human decree. . . . Norms that are not man-made must actually exist in some sense. They must be embedded in the ontological structure of things. They are not human construction but ontological categories."⁷ "As we have seen . . . the theory of natural law is basically ontological in character. Ethical categories are . . . traced back to their ultimate roots in the existential structure of finite existence. . . . There are five ontological theses which are required by any articulate philosophy of natural law. These are: (1) the world is governed by a normative order embedded in the very being of its component entities; (2) each finite entity is marked by an intelligible structure distinguishing it from other entities, and determining its development in regular ways which may be expressed by a universal law; (3) the composite structure of any finite entity also includes an active factor of dynamism or tendency which urges it towards further existence not yet acquired; (4) when a concrete tendency is ordered to act in accordance with the law described under 2, this action is natural or right; and (5) good, in the most general sense, is the realization of tendency, evil the lack of fulfillment."⁸

To understand this statement, it is important to recognize that the word "realism" is being used in a special technical sense. In this usage it denotes the philosophical doctrine stemming from Plato that universals have a "real" existence independent of the human mind and discourse.⁹ Thus "redness" exists as a universal category, independently of any specific instances of red things and also independently of the conception of redness. For every specific thing that exists individually—such as house, dog, chair, tree, law and morals—there is a corresponding universal category which has a "real" existence independently of any individual existence and apart from any merely conceptional existence. In this sense, all things, including man, have a "nature," a universal category within which they are included, which exists independently of any individuals embodying that "nature." In the realm of philosophy this "nature" is

7. Wild, *op. cit.* *supra* note 6, at 104-105.

8. *Id.* at 137.

9. See the title "Realism" in any standard encyclopedia or text on philosophy. For a technical discussion of the philosophical fallacy involved, see Willard V. O. Quine, *From a Logical Point of View*, c. 1, *On What There Is* (1953).

called the "essence" of things. Furthermore, this "nature" or "essence" has certain "tendencies" which are themselves "metaphysical principles" with a "real" existence.¹⁰ It is these "tendencies" which are inherent in the "essence" of things that constitute the system of "natural law" to which civil law should conform. Thus it is said that "natural law" is not something that is created or established by man but something that is merely "discovered" by man, and that has an independent existence regardless of its discovery or recognition.

While some views of "natural law" emphasize the theistic aspect more strongly and others give less emphasis to the metaphysical foundation in Platonic "realism," this is, in general, an accurate presentation of "natural law" philosophy. The attractions of the theory are apparent. It offers a firm, authoritative and unchanging basis for our legal system. Although it may require introspective diligence to "discover" the "natural law," since we are assured it exists and is adequate to guide us, we may hope to be relieved of all doubts, fears and anxieties regarding our legal problems as soon as sufficient effort has been made to disclose its commands. Indeed, "natural law" offers us a kind of legal heaven wherein error will not exist and law, morality and justice will coincide completely. Furthermore, once we have discovered any principle of "natural law" it will be the same for all men and for all time. One of the characteristics of "natural law" is that it remains the same for all men everywhere.¹¹ Thus the problem of uncertainty in the law is eliminated by the simple expedient of making the law certain and unchanging.

"Natural law" philosophers tend to derogate more modest theories of law by characterizing them with such terms as "relativism," "subjectivism" or "scientism." These terms, of course, are merely pejorative epithets, of no more logical weight than characterizing natural law philosophy as "superstition." Insofar as they have any intellectual content, these terms imply that a concept of morality lacks any validity unless it claims universal and eternal validity. Since universality and eternity are beyond the reach of experience, expression or even clear conceptional formulation, such a proposition is, by its own terms, incapable of either demonstration or refutation. But if the experience and common acceptance of mankind be taken as any indication, such a proposition is false.

10. Wild, *op. cit.* *supra* note 6, at 104-105.

11. *Id.* at 133.

Morality, in its most basic aspects, varies from time to time and culture to culture.

As an example, take one of the most important and widely accepted moral principles: that murder is immoral. This has been accepted by all people, everywhere. However, this is a misleading universality. The principle is accepted only because the term "murder" is itself the symbol of a moral judgment. "Murder" is the killing of a human being by another in circumstances such that the killing is not sanctioned. If, instead of the normative term, we consider the conduct involved, that is, the killing of one human being by another, great variations in moral standards will be found. In the past in various cultures ritual killings of humans have been accepted as not only moral but, indeed, devoutly pious acts. Killings in war and in self-defense have been in the past and are today generally regarded as quite moral. Yet there are a sizeable number today who regard killing in war, or in some wars, as immoral. Most of the recent cases regarding "conscientious objectors" have involved members of a religious sect that regards participation in ordinary wars as immoral but approves participation in theocratic war or conflict in support or protection of the sect. The draft act itself recognizes and sanctions religious scruples against any participation in war. There are some, too, who believe that killing in any war is immoral and unjustified; and there are many who hope that society may quickly develop to the stage in which such an attitude is generally accepted. Similarly, capital punishment has been generally accepted in the past, although many now regard it as primitive and immoral, and society may well develop to the point of rejecting such a crude solution to penal problems.¹² On the other hand, euthanasia, or the "mercy killing" of hopelessly crippled or diseased persons, is not now recognized as moral or legal. Still there are some who contend that it should be accepted as proper, and there is at least the possibility that such an attitude may become the prevailing one in the future.

There is, accordingly, considerable diversity among the situations to which the term "murder" has been thought applicable at various times and in various cultures. Certain types of homicide regarded as quite moral in the past are now immoral. Other types of homicide now regarded as immoral may well be regarded as moral in the future. Still other kinds of killing which up to now have been held to be within the moral code will, in all probability, be patently

12. *Annals of the American Academy of Political and Social Science*, Vol. 284, *Murder and the Penalty of Death* (Nov. 1952).

immoral to future generations. Thus, even as to the most basic moral principles there is an inescapable relation to time and culture, and, consequently, actual or potential change.

If some wish to maintain that this shows merely that what we now regard as morality is not a "true morality" in the sense that it does not correspond with some special idea that they have of morality—such as the necessity of claiming universal and eternal validity—then there is no basis for debate or discussion, since the assertion itself involves the conclusion. However, the only morality it has been given to mortals to know is that which men have recognized or acted upon in the past and present. This morality is not, never has been, and gives no promise of becoming, immutable.

It should be noted that this conclusion is inconsistent neither with theism, religion in general, nor with any particular religion, except as the disciples of a specific creed may choose to make a denial of this conclusion an article of faith. This conclusion is consistent with any view that may be taken of Creation and the Creator. There is no rational necessity, either *a priori* or *a posteriori*, for proceeding from any tenable view of cosmogony or cosmology to a conclusion as to the non-existence of other worlds containing intelligent beings or as to the existence of universally binding standards of moral conduct for such beings.¹³ Certainly a Cosmos or a Creator capable of producing the immense diversity we know to exist, is equally capable of tolerating, approving or commanding (as one may choose to regard it) some variation in patterns of proper behavior within that diversity.

Actually a close examination will disclose that the "objectivity" and "immutability" promised by "natural law" is an illusion. The Platonic universals are "real" only to a philosopher. No man has ever been able to show such a "reality" to another man in the same sense that the "real" objects of scientific study are exhibited to others. "Natural law" is "objective" only to certain philosophers and only in a special sense which ordinary language would call "subjective." In any given case, the sources from which and methods

13. The English astronomer Fred Hoyle calculated in 1949 that there were probably about a million planetary systems capable of supporting sentient life within our own galaxy. Taking all the other galaxies together, he estimated there might well be a hundred trillion of such planetary systems. *New York Times*, Sept. 25, 1949, p. E 9. If the number is even near to this, the probability of other intelligent life existing somewhere in space seems overwhelming. Since Hoyle's estimates, new observations have indicated that the universe is about twice as large as previously thought. Gray, *A Larger and Older Universe*, 188 *Scientific American* 56 (1953). Thus the probable number of planetary systems and the likelihood of intelligent life elsewhere in space have been immensely increased.

by which "natural law" may be discovered appear differently to any two observers. Throughout history the disciples of "natural law" have been in every political and legal camp.¹⁴ The theory has been used to justify the maintenance of every established government, and to maintain man's inalienable right to rebel and overthrow any established government. The "divine right of kings" was based upon "natural law," and so were the democratic and egalitarian ideals of the American revolution. There are those today who urge "natural law" as an antidote to doctrines which lead to tyranny and totalitarian government. Yet the most totalitarian of contemporary governments is firmly devoted to a "natural law" ideology. Communism is philosophically committed to the view that the "nature" of man and the world is such that a communistic social organization is ultimately inevitable. The principles of communism are declared not to be "subjective" ones that have been formulated by philosophers, but rather "objective" facts which have been "discovered" in the natural order of things by Marx and his disciples. Thus, in the preface to the first edition of his great work, Marx compares his own observations to those of a physicist and says:

"Intrinsically, it is not a question of the higher or lower degree of development of the social antagonisms that result from the natural laws of capitalist production. It is a question of these laws themselves, of these tendencies working with iron necessity towards inevitable results."¹⁵

The reason for the amazing diversity among the adherents of an ostensibly "objective" system is that the "nature" from which the principles of "natural law" are deduced is not the same as the "nature" which the scientist studies. The latter consists of the physical objects and phenomenon of the world and the cosmos. These can be identified, exhibited to and handled by one person, a few or many with substantially the same results whenever the same methods are followed. It is principally upon this characteristic that modern science is founded. But the similarity between modern science and the theory of "natural law" is exclusively a verbal one. The "nature" in which the immutable principles of moral law are found is not the realm of physical objects and phenomena but the Platonic heaven of universals which have a "real existence"—but only in the tales of philosophers. As physical science has not discovered and does not deal with universals, these are apprehended not by the faculties of observation, but by the exercise of "reason."

14. See Stone, *The Province and Function of Law* 215-238 (1950).

15. Marx, *Capital* 13 (Modern Library ed. 1906).

This term, too, has a special sense in this usage. Ordinarily human "reason" denotes the ability to draw logical inferences from observed facts or assumed premises. But since the principles of "natural law" are themselves the basic premises of a system, they cannot be derived by inference from other facts or premises. So when the term "reason" is used to indicate the method of discovering "natural law" it can mean only some faculty by which truths are intuitively apprehended. Thus it comes to this: that "natural law" is anything which one who asserts its existence intuitively apprehends, strongly believes in or stoutly asserts. Disregarding accidental similarities of terminology, there is nothing in common between the operation of the scientist and of the "natural law" philosopher.

Indeed, for all its pretensions to universality and objectivity, the doctrine of "natural law" is pre-eminently the rationalization of subjectivity in legal thinking. Pound says that by the latter part of the eighteenth century this tendency had become so strong that its implications were anti-social,

"For in effect it made the individual conscience the ultimate arbiter of political and legal obligations." * * *¹⁶ "Nor was the classical natural-law theory less vulnerable on its juristic than on its political side. It came practically to this, that each philosophical jurist made his personal ethical views the test of the validity of legal precepts and the pattern for new precepts or for new shapings of old ones."¹⁷

Probably the most important function of a theory of "natural law" is the reassurance it gives to those who embrace it. To say that "the law should be thus and so because I think so" can hardly be thought by anyone to be a very important or persuasive statement. But to say that "the law should be thus and so because I have discovered an 'objective principle of natural law, eternal and immutable' which embodies this conclusion" sounds like a most significant and impressive pronouncement. Since all that is necessary to transform the former statement into the latter is the assumption that one is intuitively apprehending such eternal verities, it is not surprising that a good many men are willing to make, or at least assert, such an assumption. Justice Holmes made a characteristically trenchant comment on this tendency, saying:

"It is not enough for the knight of romance that you agree that his lady is a very nice girl—if you do not admit that she is the best that God ever made or will make, you must fight. There is in all men a demand for the superlative, so much so that the poor

16. Pound, *Law and Morals* 94 (1924).

17. *Id.* at 96.

devil who has no other way of reaching it attains it by getting drunk. It seems to me that this demand is at the bottom of the philosopher's effort to prove that truth is absolute and of the jurist's search for criteria of universal validity which he collects under the head of natural law."¹⁸

Another powerful, although perhaps less palpable, reason for claiming the sanction of ultimate principles for one's legal conclusions is the escape from the logical necessity of offering specific support for them and submitting them to the uncertain process of examination and analysis by others. One who offers a conclusion as his own opinion, or as his inference from particular data, is at least logically required to state how and why he has arrived at the result, or risk having his opinion adjudged arbitrary and untenable. But one who asserts that a proposition is a fundamental principle of "natural law" is saying both that he believes the proposition to be a proper one and that it is, or should be, self-evident and requires no further justification. Thus "natural law" offers its disciples not only the glory of eternal and immutable superlatives, but also the repose of knowledge acquired without investigation and certainty achieved without private doubt or public debate. A proposition offered as the conclusion of either an individual or a group is always subject to questioning and refutation. But a proposition offered as a principle of "natural law" is, simply by definition of the one who offers it, beyond questioning and immune to refutation.

The difficulty with the assurance that is offered by "natural law" theories is that even when all their assumptions are accepted there is no available methodology for ascertaining the content of the universal principles from which such assurance flows. If we take a theistic version of "natural law" then we introduce the religious problem of divine revelation and interpretation into civil law. As theologians have not yet come to any general agreement on a body of doctrine which may represent the word of God as to basic religious matters, it is hardly likely that lawyers will be more successful in securing an even more detailed set of rules through the process of direct revelation. This is the aspect of the matter that is almost always overlooked by the advocates of "natural law" theories. It is notable that most of their dissertations, including the carefully and scholarly work of Wild, avoid any attempt to give specific illustrations of the application of the proposed method and are confined to

18. Oliver Wendell Holmes, *Collected Legal Papers* 310 (1920). This is from the classic essay on "Natural Law." To anyone interested in the subject, the whole of it is worth reading, or re-reading, if for nothing else than the beautiful clarity of language and thought.

vague assertions concerning the existence and discoverability of certain "universal" principles. What the nature of these "universal" principles is and how they will aid in solving concrete legal problems is never explicated. Yet, as Pound has pointed out,

"The number of problems confronting the courts which can be solved from universally accepted precepts of morals or justice or pure reason is not large. For the greater part all that can be done is to find workable adjustments of relations and orderings of conduct which will satisfy most of the expectations incident to life in civilized society with the least friction and waste."¹⁹

The inescapable fact is that any sort of transcendental or theistic "natural law" is completely and incorrigibly equivocal. Whatever other function it may have, it is practically useless as a guide to decision and action in a mundane system of civil law.

On the other hand, the kind of "natural law" sometimes said to inhere in the scientific laws of physical nature²⁰ introduces new elements of ambiguity into the theory. To begin with, physical nature as such does not have any very obvious claim to moral authority over the conduct of man, unless we assume it to be merely an expression of some transcendental order of being, which brings us back to the original form of the theory. Passing over this point, we come next to the quite apparent fact that physical nature does not offer us any explicitly articulated principles of any kind. Even in the physical sciences "nature" jealously guards her secrets, demanding man's greatest ingenuity to discover underlying uniformities. So, such a version of "natural law" offers us no more than a promise that we may use principles discovered by established branches of science as starting points for legal reasoning.

There are probably few who would quarrel with a proposal to use established principles and facts of natural science in legal philosophy to the extent that they are relevant and useful. What is wanting is a demonstration—or even an illustration—that any substantial contribution to law can be made by applying the deductive method systematically to the principles of natural science. No judge or lawyer is likely to defy the law of gravity in his argument. But if anyone knows how to reason logically from the law of gravity to the decision of any specific legal problem, that fact has not been disclosed publicly.

This is not to say that scientific methods and knowledge may not usefully be employed to discover facts and data that are helpful in

19. Pound, *The Heated Judicial Dissent*, 39 A. B. A. J. 794, 796 (1953).

20. Apsey, *op. cit. supra* note 5.

reaching decisions as to legal problems. The writer, among many others, has suggested that this can be done.²¹ But this is quite a different matter than the attempt to take general scientific principles and by deductive inference construct a system of legal principles from them. In the application of scientific method to the field of law, which has been called "jurimetrics," the problem comes first; the methods to be employed and the facts to be sought are determined after analysis of and in relation to the problem. In the attempt to construct a system of mundane "natural law" from scientific data, the general principles come first and an attempt is made to subsume problems, as they arise, under one or another established principle.

Perhaps this point indicates as well as anything the logical weakness implicit in the philosophical theories which attempt to base all law upon some single concept. It is of great significance that none of the major systems of philosophical jurisprudence—"natural law," utilitarianism, pragmatism, and their numerous variants—has yet produced a practical working system of specific legal principles. There are at least two reasons for this. First, the philosophical attempt to enunciate a single principle which will encompass all other legal principles necessarily requires a doctrine of such generality that it is of virtually no assistance in formulating any concepts on a more concrete level than that of ontology. Second, this involves the assumption, so far undemonstrated and undemonstrable, that all legal problems have significant elements in common and that all specific legal rules may be related to some single general principle in a significant manner. It is logically possible that there may be some single unifying principle underlying all aspects of the law. However, at this stage of development there is no clear or persuasive reason for assuming that to be so. Certainly there is no apparent common element in the diverse problems arising in law in such classes as those now conventionally termed "homicide," "marriage," "citizenship," "contract," "real estate," "taxation," "corporations," "motor vehicle traffic," "remedies," and so on throughout the legal lexicon. Yet these are the actual stuff of the law. It is not enough for philosophical theory to square with already established attitudes toward a few fundamental matters such as the impropriety of murder and every man's right to eat. All philosophical theories recognize these truisms—but unfortunately few go much beyond them. That is why the philosophical theories of the law which make up the bulk of "jurisprudence," have aroused limited acceptance and small

21. Loevinger, *Jurimetrics*, 33 Minn. L. Rev. 455 (1949).

interest among either lawyers or the general public.²² A theory which does no more than complicate the commonplace is not very useful. Until jurisprudence gives us new tools or data with which to meet the mill-run of legal problems, it will not be taken seriously by any but academicians, nor will it deserve to be.

The limitations and inadequacies of all the variant theories regarding the nature and foundations of law should suggest that the problem with which they are dealing is either improperly formulated or is being incorrectly approached. There is substantial precedent for supposing this to be so, both in physical science and in formal logic we have found in recent years that "solutions" to problems of long standing depended primarily upon recognition that the problems themselves had been erroneously formulated and required restatement. In the field of philosophy particularly much of the difficulty has arisen from unrecognized implications or limitations of the language used to express the problem. Thus, to ask "What is the 'essence' of a chair?"—or of "the law?", or of "justice?"—implies that there is a single entity represented by such name, that it has behind it some mysterious thing called its "essence," and that we can somehow discover and correlate these things. But these are gratuitous assumptions, which, if not demonstrably false, are at least quite useless. Indeed, it is impossible to think of any logical or empirical test which would demonstrate the truth of such assumptions, and consequently it is logically impossible to demonstrate their falsity. On the other hand, such assumptions do lead to great confusion in consideration of the subject matter and to wholly futile metaphysical disputation.

This viewpoint is set forth in a remarkably cogent and provocative fashion in a recent book by the English philosopher, Professor Weldon.²³ The classical theory of meaning, he says, encouraged the

22. The term "jurisprudence," like the term "law" itself is a chameleon word without any clearly defined usage. Its most frequent connotations include the philosophical theories of law discussed in the text. This is the usage which is adopted in this article. However, Stone uses the term to mean the examination of law in the light of other disciplines. Stone, *op. cit. supra* note 14, at 25. In this sense, jurisprudence is something quite different from the body of philosophical speculations which are usually included within its scope, and which are discussed in the present article.

23. Weldon, *The Vocabulary of Politics* (Penguin Books 1953). Although the author of this book is concerned principally to consider what the title suggests, this is inevitably of substantial importance to the lawyer, for the vocabulary of politics is also very largely the vocabulary of law. Thus, the book contains a discussion of such terms as "the state," "authority," "rights," "law," and "freedom." Whether or not the reader agrees either with the author's general viewpoint or with his comments on specific topics, it is doubtful if anyone can read this book thoughtfully without deriving substantial profit from it. It is written in a straightforward and lucid style, without

assumption that truths about facts could be discovered by inquiry into the meaning of words. But,

"There is nothing sacred or immutable about symbols. They are the products of human ingenuity and are as definite as we want them to be in their application. . . .

"In the light of these general considerations it is evident that to ask 'What is the essential meaning of "justice"?' is unprofitable. Like most other words in ordinary use, 'justice' has no single nuclear meaning. There is no precise criterion for its correct employment, and it is useful largely because it lacks such precision. We can, if we find it convenient to do so, *give* it a precise or fairly precise meaning, and then it ceases to be vague or ambiguous and becomes a technical or semi-technical word. It is not uncommon, especially in legal terminology, for this to be done and for the ordinary and technical uses of a word to survive side by side as in the cases of 'fraud' and 'property'.²⁴

"Natural rights are like conventions in the sense that there is nothing logically necessary about them. They might have been otherwise, but there are usually quite good reasons for them, and codified laws are natural in the sense that they are never just arbitrary. They are formalizations not inventions. . . .²⁵

"Hence attempts to make 'right' a technical term and to draw a sharp distinction between legal and natural rights are misconceived. 'Right' is useful largely because it is vague. But although questions about rights are not theoretically difficult to manage, the full answers to them are nearly always highly complicated. Hence there is always a considerable temptation to em-

the usual academic trappings of scholarly and obscure allusions or frequent relapses into an esoteric lexicon. Mr. Weldon is not concerned to offer us definitive answers to the problems of politics, but rather seeks to assist in finding a formulation of the problems that will permit answers to be sought intelligently. He suggests that many of the problems have been incorrectly formulated in the past because of a failure to understand the significance of symbols, and their possible use and abuse. Thus the traditional approach has been to assume that there was some meaning inherent in words like "the state," "right," "law," "good," etc., and that a sufficiently diligent examination of these and related symbols was capable of disclosing such a meaning. Mr. Weldon's thesis is perhaps best epitomized in his own summary of his last chapter: "It is intended to show that when verbal confusions are tidied up most of the questions of traditional political philosophy are not unanswerable. All of them are confused formulations of purely empirical difficulties. This does not mean that these are themselves easy to deal with, but it does mean that writers on political institutions and statesmen, not philosophers, are the proper people to deal with them. As empirical questions they do have answers, but the answers are neither simply nor demonstrably and incorrigibly true, nor can they be discovered by any process of non-empirical intuition. What we need to get us out of our political difficulties is a good deal more thought and a good deal less emotion than is usually devoted to them." (p. 192-193)

This is, by all odds, the best written and most sensible book in this general field that the present writer has read in a very long time.

24. *Id.* at 22-23.

25. *Id.* at 60.

brace the illusion of absolute standards and to pretend that what is needed to answer them is not a detailed study of comparative institutions but some special insight into real, true, or absolute right. And so we get the erroneous notion of a metaphysical cupboard in which Rights, Values, and Standards generally are stored and to which only professional metaphysicians possess the key."²⁶

Even to engage in the argument as to whether "natural law" or convention or pragmatism, or utilitarianism, or some other theory of law is the "right" one is to fall into the trap of granting the major premise: that the term "law" represents a single nuclear meaning, that it has an essence and that some single philosophical or metaphysical principle somehow "explains" or "justifies" this essence. Once these assumptions are taken for granted, we are confined within an intellectual framework of words. We can bandy the words back and forth, combine and re-combine them, but we cannot add to our knowledge.

The difficulty with such a situation is that the belief in and search for absolutes blinds us to the facts of life. We are dealing with psuedo-problems; we are prevented from getting meaningful answers because we are not asking meaningful questions. The question, "How many angels can dance on the point of a pin?" may have been an apocryphal issue among the medieval scholastics, but it well epitomizes the futile character of much scholastic disputation. The history of human thought is replete with examples of the belief in absolutes leading to the refusal to accept or even consider what we now regard as elementary facts. The Ptolemaic viewpoint that all celestial movement must be regarded as orbital revolution around the earth persisted until Copernicus succeeded in introducing the concept that motion was relative, not absolute, and that much more satisfactory results could be obtained in systematizing observations on this basis. But even Copernicus was influenced by the idea that since the circle was the "most perfect" form, celestial orbits must be circular. Later Kepler and Galileo demonstrated that planetary orbits were much better described as elliptical than circular. The most dramatic illustration of the dominance of ideas of an absolute is the ancient notion that "up" and "down" are directions which do not vary from place to place or time to time. Thus it was argued that the world could not possibly be round, for, if it was, people on the other side would be walking with their feet "up" and their heads "down," water would be required to fall "up" rather than "down" and other equally absurd consequences would follow.

26. *Id.* at 61.

Today it does not take much sophistication to accept the relativity of physical concepts such as motion and direction. We have discarded such transcendental and non-empirical entities as phlogiston and ether. We regard debates as to the corporeal characteristics of angels as foolish. Yet it is still argued that mundane experience and human judgment are not enough justification for acceptance of a moral or legal principle—somewhere and somehow we must find some absolute foundation, eternal and immutable. It is not enough for the absolutist philosopher that all of mankind approve a law, he insists that we take a poll of the angels. Even this might be regarded as a harmless philosophical eccentricity were it not for the fact that mankind and its opinion is a supernumerary in this scheme, and that the celestial opinion—as revealed to the philosopher—is all that counts.

This celestial opinion poll approach to values is as futile as the counting of angels on a pin point. The quest is a hopeless one not simply because of the difficulty of counting angels, but because it is a search for an answer to a pseudo-problem and not to a real one. It insinuates that there is something mysterious and requiring explanation about the fact that certain behaviour is regarded as reprehensible and other conduct is regarded as desirable in society. Such a viewpoint even suggests that we are not competent to determine what is desirable and undesirable conduct unless we have the guidance of some absolute or transcendental code. But the best evidence that a thing is visible is the fact that someone sees it. The best evidence that something is audible is the fact that someone hears it. Elaborate theories of the process of sight or hearing are not only unnecessary; they are irrelevant. Similarly, the best proof that something is desirable is the fact that someone desires it; and that is is socially desirable, the fact that most people desire it. Elaborate theories as to what people should desire, or how or why desire operates are not only unnecessary, they are irrelevant.

Thus we are brought to face the same situation that has been found in other fields of knowledge: that the belief in absolutes takes us on a cosmic wild goose chase and prevents study and recognition of the observable facts of actual life. The prosaic facts of terrestrial life seem trivial and unimportant when compared with the celestial glories of eternal verities. Why bother to reach for pebbles if one can grasp a star? But human knowledge has not yet developed any philosophical sky-hooks. The best we have been able to do is deal with terrestrial problems in a mundane way.

Unless one simply assumes the conclusion, it is extremely difficult to suggest any reason why this should not be good enough. There is no use in reaching out for cosmic foundations to put under a chicken coop. For such a task it is much more useful to pay close attention to the grain and strength of the lumber, as determined by simple practical tests, and to the character of the ground upon which you plan to build, then it is to have a comprehensive theory of cosmology or even of theoretical physics. Abstract theorizing is significant only as it is responsive to some genuine problem and related to ascertainable facts. If any one principle of modern science deserves to be called more fundamental and important than the others, it is the one embodied in the famous maxim known as "Occam's Razor": Do not multiply entities beyond necessity—that is, the simplest theory that will explain the facts has the greatest claim to validity. As a pervading principle of modern thought, this deserves application in the field of legal theory.

There is no reason to think that the law needs or profits from an attempt to seek foundations in the devious ramifications of ontology or metaphysics. The problem of the law concerns terrestrial chicken coops, not stars or even planets. The methods and theories of the law must be responsive to its problems if they are to be anything more than mere logomachy. The proof of this lies in our history; for in this the lawyers have been wiser than the philosophers. The questions of metaphysics, and the related questions of philosophical jurisprudence, are no nearer solution today than they were in the days of Socrates, and there is, if anything, a greater variety of proposed answers and a smaller area of agreement. On the other hand, many practical problems of the law are being solved, at least tolerably well, daily by lawyers and judges. Sometimes it is easier to perceive the appropriate disposition of a controversy than to know the reason for it, and often the courts are hard put to rationalize decisions which, in themselves, do not seem to involve much doubt. Often legal results are more widely approved than legal reasoning. Yet by and large, in practical operation, legal theory (whether "right" or "wrong" in any particular case) has fairly well avoided the confused labyrinths of metaphysics and has founded itself upon principles of conduct which have received their sanction by community acceptance.

In this course there is not only wisdom but responsibility. Whether consciously so motivated or not, the theories which seek to derive moral or legal principles from some absolute code have the

effect of seeming to shift the responsibility for decision from the human beings involved to the superhuman entity, whether an anthropomorphic or pantheistic deity. On the other hand, the theories which take account of the relative and social nature of moral and legal values make it much more difficult to conceal or obscure the responsibility involved in making a decision on any legal issue.

Ultimately it comes to this: that no single theory or philosophy of law has so far demonstrated an adequacy or acceptability sufficient to warrant sole or principal reliance upon it, and attitude toward legal problems is much more important than any general theory that may be invoked for their solution. Each philosophy does emphasize some significant factor which needs to be taken into account. Theories of "natural law" suggest we cannot neglect man's emotional need for identification with something greater than himself. Emphasis of the traditional element indicates that the law must maintain a reasonable stability to perform its function adequately. Utilitarianism emphasizes that the function of law and philosophy is to serve mankind, and not the reverse. Pragmatism teaches that the only data we have to work with is experience, and that all our knowledge derives from this. With respect to specific legal problems, the voices of God, of tradition, of the people and of experience usually speak in Delphic equivocations. A doctrinaire insistence that the answer to all our problems must be found in spinning out the implications thought to be found in one of these elements, to the exclusion of others, cannot serve either the individual or society or be reconciled with the principles of wisdom and sound thinking which have been accepted in other fields.

Fortunately the legal philosophy of judges and lawyers in practice has been eclectic and catholic, so that the law has not rested upon any foundation so shaky as the formulations of a particular theory.²⁷ Had the latter been the case, our legal institutions could not have survived and grown as they have to the present. The viability of law depends not upon its adherence to any theory, but rather upon the maintenance of an attitude of receptiveness, inquiry and skepticism. The law, in its most general sense, represents society's effort to be rational in controlling the relations among men. The characteristics of rationality, in the light of the best of modern thought and knowledge, include, at a minimum, an open-minded willingness to hear and consider any idea or theory, a passion for facts leading to active inquiry, and a skepticism as to one's own conclusions as well as those of others.

27. See Cardozo, *The Nature of the Judicial Process* (1921).

Such an attitude will not guarantee the "right" answer to legal problems (if there is such a thing), or even any answer to specific problems. No philosophy, theory or formula will do that. There is no intellectual hocus-pocus that will enable a judge confronted with a difficult case to escape the unpleasant necessity of wrestling with his own conscience and making his own decision. But an attitude of open-mindedness, inquiry and skepticism will give some assurance that whatever decision is made will be reached only after consideration of all relevant facts and arguments and after sincere and earnest efforts to apply the best available contemporary standards to the issues involved.

The difficulty with any formalized theory or philosophy of law is that it tends to emphasize one aspect of all legal problems, to exclude consideration of other aspects and ideas, to limit inquiry and to encourage dogmatism as to conclusions. It has been said that a creed is a monument set up to show where a man has stopped thinking. There is enough validity in this to make a rational mind uncomfortable with any doctrine which claims to encompass all mundane truth and to possess the only map showing the way to justice. Insofar as legal creeds, theories or philosophies demand exclusive allegiance or promise absolute certainty they tend to create attitudes of dogmatism which are incompatible with the full freedom and activity of the intellect that is a necessary condition of rational determination. It has long been recognized that intellectual freedom and rational thinking by lawyers and judges are essential to a proper and efficient operation of the legal system. Thus to the extent that legal creeds, theories and philosophies imply or encourage dogmatic attitudes, they are a handicap to the law.

On the other hand, to the extent that philosophical speculation tends to draw attention to matters that might otherwise be overlooked it performs a useful function. This is, in fact, the principal role that legal philosophies play in the legal system. In spite of their pretensions, none of the major philosophical systems does much more than offer a partial rationalization of currently accepted principles. Thus the "golden rule," in one form or another, is found in all creeds and is sanctioned by all the variant systems of "natural law," utilitarianism and pragmatism. So it is with most of the fundamental working rules of law. The divergent viewpoint of the philosophies do not imply different legal principles, but merely different rationalizations for accepted principles. So far as general principles are concerned, the systems of philosophical jurisprudence lead to substantially the same results.

But it is axiomatic that general principles do not decide specific cases. What is wanted is not a cosmological reason for favoring virtue and opposing vice, but a practical method for dealing with the recalcitrant and aberrant facts of the daily evidence in the courtroom. For this purpose an attitude of passive reliance on and dogmatic assertion of the principles of any legal creed or philosophical system is worse than useless, it is actually hampering. Without pretending to have found any ultimate answers, the best that courts and lawyers can do now with legal problems is to bring to them an attitude of open-minded receptiveness to all theories and ideas, an indefatigable willingness to inquire into the facts, and a skepticism as to all inferences and conclusions, particularly their own.

A similar attitude of skepticism toward legal dogma will serve society and the citizen equally as well as it does the courts and lawyers. It is the fanatics bred by dogmatism that have made the bloody revolutions and inquisitions in the world; organized skeptics have burned no heretics. Dogmatism promotes uniformity and intolerance; skepticism encourages diversity and tolerance. Democracy needs diversity and tolerance among its citizens for survival. Carried to its ultimate logical conclusion, any absolute theory of law is subversive of a stable government. The true believer in any dogmatic theory of law is logically bound to disobey the law as a conscientious objector whenever it comes in conflict with the principles of his theory. But the citizen who cherishes a wholesome skepticism toward all absolute theories of law or morals is much less likely to indulge in the presumption of disregarding the judgment of organized society solely on the basis of his own conclusions. There is always the possibility of a conviction so strong as to move him to this, though it is unlikely that any abstract theory, or anything less than what appears to him as immediate and compelling necessity, will do so. Thus obedience to the law as a norm of conduct is not a matter of indifference or cowardice, but a rational recognition of the fallibility of individual judgment and a reasonable response to the respect due the judgment of the community by the individual. Fortunately such an attitude of skepticism probably comes closer to representing the actual viewpoint of the average person than any particular philosophical theory of jurisprudence. So, we may conclude that the individual normally obeys the law not because it is always right — which everyone doubts —, or because of lack of courage, but rather because a rational skepticism warns against the arrogance of defying the judgment of society embodied in formal law.