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SOCIOLOGY AND NATURAL LAW*

Philip Selznick

AMONG MODERN SOCIOLOGISTS, the reputation of natural law is not high. The phrase conjures up a world of absolutisms, of theological fiat, of fuzzy, unoperational, "mystical" ideas, of thinking uninformed by history and by the variety of human situations. This is sad, because sociology should have a ready affinity for the philosophy of natural law. Both are anti-formalist in spirit. Each looks beyond what is given and immediate to what is latent and inchoate; each is committed to the study of "nature" as yielding something more permanent and more universal than the transitory judgments of the hour or the epoch.

One of the chief writers on the sociology of law, Eugen Ehrlich,¹ made a cardinal point of his quest for law, not in formal institutions alone, but in the "inner order" of human associations, in the natural settings and adaptive outcomes of group life. "At the present as well as at any other time," Ehrlich wrote, "the center of gravity of legal development lies not in legislation, nor in juristic science, nor in judicial decision, but in society itself."² This is not in itself a natural law viewpoint. It does, however, reflect the general emphasis in sociology that education, politics, religion, and other social activities, are found outside of the specialized institutions established to deal with them. Sociology has located these phenomena "in society," that is, in more informal and spontaneous groupings and processes. A corollary view, not usually made explicit, is that sociologists, in looking beyond formal arrangements, are identifying something closer to a "natural" order.

Most sociologists today, addressing themselves to the legal order, would still agree with Ehrlich that "the center of gravity of legal development" lies in altered ways of life and in the changing organization of society. They would argue, however, that it is bootless and sterile to call every kind of order "law" and that the study of legal development, including probable future changes in law, entails no commitment to a theory of justice. There would be a fairly ready acceptance of the distinction between law as com-

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1. *FUNDAMENTAL PRINCIPLES OF THE SOCIOLOGY OF LAW*, trans. by Walter L. Moll (Cambridge: Harvard U. Press, 1936).

2. *Id.* at xiv. In his Foreword, Ehrlich offers this as a one-sentence summary of his book.

monly understood and the *sources* of law as the whole range of influences on legal development and stability. In this way, they would hope to avoid seemingly endless terminological discussions and vexing philosophical issues.

There is much that is appealing and wholesome in this way of thinking. It does indeed apply to broad areas in the study of law and society. But in some very important respects it is a superficial and profoundly mistaken view. In this essay I shall attempt to state why I think this is so and why I believe that a modern version of natural law philosophy is needed for a proper understanding of the law as well as for the fulfillment of sociology's promise. I speak here of natural law as a legal philosophy and not as a general system of ethics.

In approaching this task, I accept two basic commitments. First is a commitment to naturalism. My approach purports to be in all respects consistent with the spirit and logic of scientific inquiry. I offer only the caveat that it is John Dewey's philosophical pragmatism, and not a narrower positivism, which frames my view of naturalism. A second commitment is to a demanding concept of natural law. We are speaking of something more than a name for the sources of law, or for the moral foundations of law. Natural law is more than "the law that ought to be." If it is to mean anything significant, natural law must be itself legally efficacious, in some sense legally authoritative.

First I shall consider two obstacles to natural law thinking in sociology — the separation of fact and value and the doctrine of moral relativism. Then I shall analyze the meaning of legality and of positive law, finally turning to some attributes of natural law as they bear on sociological inquiry.

I. MASTER IDEALS IN SOCIOLOGY

THE MAIN DRIFT of contemporary sociology has been toward positivism, especially toward an ever-greater emphasis on empirical observation and techniques of measurement. A striving for objectivity, for clarity of thought, and for scientific respectability has produced a strong feeling against speculative inquiry and especially against moral philosophy. At least, these ancient preoccupations are thought to have no place in modern sociology, whatever other value they might have as literature. This movement of thought has much to commend it. At the same time, just because it is a "movement," it harbors many illusions and often serves to close minds rather than to open them. It is a procedural canon of inquiry that the study of fact must be assiduously protected from contamination by the value preferences of the observer. From this methodological requirement has been de-

rived a quasi-metaphysical dogma, namely, that fact and value belong to alien spheres.

It is easy to understand why this separation of fact and value should arise. Surely one of the first necessities of education is to impress upon unsophisticated minds the necessity of distinguishing what the world is really like from what they would like it to be. As educators, we certainly have the obligation to lead the student toward realistic understandings. This very often requires that harsh truths be faced and that old habits of thought, so largely influenced by private needs and wishes, be set aside. Furthermore, the advance of science seems to require that we respect the autonomy of nature and recognize that there are structures in being and forces at work whose existence depends not at all on human awareness or contrivance. For these and similar reasons it makes good sense to segregate preference from observation and to stress the logical distinction between normative statements and fact statements.

But the needs of the unsophisticated cannot forever dominate the minds of scholars and teachers. Education also means unlearning, if need be, the easy and reassuring formulae of our intellectual youth. So it must be with the separation of fact and value. It is not that this principle lacks all merit but that too much is claimed for it. We must limit those claims if social science is to deal effectively with some of the most important dimensions of social life.

The entire issue of fact and value is too large to be set forth here, but I shall try to contribute to the discussion, and at the same time advance the argument of this paper, by analyzing briefly one area in which a significant intersection of fact and value occurs. I have in mind those phenomena in the social world whose very nature encompasses the realization of values.

Social scientists are not troubled by the idea of a "norm" or standard of behavior. A great deal of anthropological and sociological writing is devoted to the description and analysis of norms and systems of norms. That a cultural prescription exists, that it changes, that it is related to other prescriptions in determinate ways — these matters of fact can be handled by the social scientist quite blandly, without an uneasy conscience. From the standpoint of the observer, norms are factual data and that is that.

But suppose we are interested in the following: friendship, scholarship, statesmanship, love, fatherhood, citizenship, consensus, reason, public opinion, culture (in its common-sense and value-laden meaning), democracy. These and a great many other similar phenomena are "normative systems," in a special and "strong" sense of that term. I have in mind more than a set of related norms. A democracy is a normative system in that much complex

behavior, as well as many specific norms, is governed by a master ideal. Behavior, feeling, thought, and organization are all bound together by a commitment to the realization of democratic values. It is impossible to understand any of these phenomena without also understanding what ideal states are to be approximated. In addition we must understand what forces are produced within the system, and what pressures exerted on it which inhibit or facilitate fulfilling the ideal.³

In a normative system, the relation between the master ideal and discrete norms may be quite complex. For example, it might be concluded that under certain circumstances maximizing the number of people who vote, irrespective of competence or interest, would undermine rather than further the democratic ideal. This is one reason for stressing the difference between a normative system and a set of related norms. A normative system is a living reality, a cluster of problem-solving individuals and groups, and its elements are subject to change as new circumstances and new opportunities alter the relation between the system and its master ideal. Put another way, the norms applicable to friendship or democracy are derived, not directly from the master ideal, but also from knowledge of what men and institutions are like. Only thus can we know what specific norms are required to fulfill the ideal.

The study of friendship cannot long avoid an evaluation of the extent to which particular social bonds approximate the ideal. Nor can it properly escape specifying the elements of friendship — what modes of response and obligation are called for by the ideal. None of this is inconsistent with detachment on the part of the observer. The observer need not have any personal commitment to the value in question, at least at the time and in the circumstances at hand. He may assess, quite objectively and impersonally, such connections and discrepancies as may exist between the ideal and its fulfillment.

Though this may be true, there is an odd reluctance on the part of social scientists to deal with normative systems. The disposition is to reduce such phenomena to arrangements that can be studied without assessment by the investigator, even when that assessment would entail nothing more than applying a culturally defined standard as to how far an implicit ideal has been realized. Thus, in the name of objectivity and rigor, the idea of friendship is left largely unanalyzed, and sociometric studies of reciprocal choice or differential association become the major line of inquiry. These measures, of course, say little about the quality of the relationship, not so much because they are incapable of doing so as because the studies do not begin

3. Compare the criticism of Max Weber in LEO STRAUSS, *NATURAL RIGHT AND HISTORY* 49ff. (Chicago: U. of Chicago Press, 1953).

with the normative perspective that would be appropriate. Similarly, the study of public opinion, where it is not mere polling, looks for stable patterns of response and for underlying attitudes and values, without much concern for public opinion as a normative idea. Again, social scientists have been much happier with the word "culture" since they have been able to strip it of normative significance and to bar the view that the idea of culture has something to do with excellence.

There is another side to this story, however. In theory, as opposed to the main trend of empirical research, some recognition of normative systems does exist. There is not much of a theory of friendship, or of love, in social science, but we do have the concept of the "primary relation," of which love and friendship are characteristic illustrations. What is a primary relation? It is a social bond marked by the free and spontaneous interaction of whole persons, as distinguished from the constrained and guarded arms-length contact of individuals who commit only a part of themselves to the social situation. In the primary relation, there is deep and extensive communication; individuals enter this experience as a way of directly attaining personal security and well-being, not as a means to other ends. This rough and elliptical statement is very close to what most sociologists would accept. Yet clearly it states an ideal only incompletely realized in the actual experience of living persons.

This illustration permits us to clarify the role of assessment in the observation and analysis of normative systems. The normative concept or model tells us what are the attributes of a primary relation. Only with this in mind can we properly classify our observations or identify the significant forces at work. To formulate the ideal primary relation is part of what theory is about in social psychology. This formulation, to be sure, will avoid the language of morality. It will specify social and psychological states, such as the quality of communication. Still, the intellectual function of the model is to provide a framework for diagnosis, including standards against which to assess the experience being studied. The small nuclear family is largely based on primary relations, but where communication between generations is weakened, and where authority requires impersonal judgment and discipline, the fulfillment of the primary-relations ideal is limited.

Whatever the assessment, it is always *from the standpoint of the normative system being studied*. The student of a normative system need not have any personal commitment to the desirability of that system. We may all agree that primary relations are a good thing, and the values they realize "genuine" values, but it is precisely the role of the social scientists to avoid the moralistic fallacy that primary relations are always a good thing. Where

impersonality and objectivity are needed, the intimacy and commitment associated with primary relations may well be inappropriate. A different ideal, that of "official" behavior, may be called for. This ideal, too, is a demanding one and it is likely to be fulfilled in practice only partially. The investigator, in making his assessments from the standpoint of some purportedly operating normative system, can be quite detached about whether that system's ideals should be striven for in the circumstances. Indeed, the social scientist should be able to say whether the context is appropriate for the institution and support of a particular normative system. It might well be concluded that in the circumstances the attempt to create a friendship, to sustain a university, or to establish a democracy could only result in a distortion of the ideals these phenomena embody.

These remarks about detachment are made without prejudice to the view that certain ideals may be elements of an objective moral order. Whatever we may think of the appropriateness of friendship or love in a *given* context, we may still conclude that the values inherent in primary relations are of vital importance to man's well-being, and sometimes to his survival. This is only to say that he must find them somewhere, not that they are always appropriate. It may also be argued that no normative system is possible, or at least viable, unless it contains some ideals that all men can recognize as having a general moral validity. This position has much merit, but it is not necessary to the argument I am developing here.

Another illustration of support in sociological theory for the relevance of normative systems is the concept of "public opinion." Again, the trend of empirical research is to neutralize the term, to reduce it to the mere distribution of attitudes in a population. But conceptually a "public" is usually distinguished from a "crowd" or "mass" in that the behavior of a public, including the formation of public opinion, has a greater rational component and a greater self-consciousness. The member of a public acts rationally usually in his own immediate self-interest, but also potentially in the light of a larger sense of public interest. The formation of public opinion involves rational debate and is not merely the result of suggestibility or emotional rapport.

Clearly this view of public opinion presumes a normatively oriented system of organization and interaction. Given such a concept, which specifies standards, we can critically analyze opinion-making, not out of our own subjective preferences, but on the basis of a theory stating the conditions under which public opinion as a distinctive phenomenon is created. It follows that the state of opinion we actually observe will only approximate the theoretical ideal.

Concepts that specify ideal states are familiar enough in social science, and elsewhere as well. Any typology must designate, at least implicitly, a "pure" or "ideal" state with which purported instances of the type may be compared. The term "model" suggests a similar logic. However, not all types or models are normative; they do not necessarily have to do with the realization of values. When the realization of values is involved, social scientists seem to lose their zest for model-building. This probably has much to do with anxieties provoked by the epistemological dogma that values are "subjective."

The study of normative systems is one way of bridging the gap between fact and value. At the same time, the objectivity and detachment of the investigator can remain unsullied. The great gain is that we can more readily perceive latent values in the world of fact. This we do when we recognize, for example, that fatherhood, sexuality, leadership, and many other phenomena have a natural potential for "envaluation." Biological parenthood is readily transferred into a relationship guided by ideals. This occurs, not because of arbitrary social convention, but because the satisfactions associated with parenthood — satisfactions which are biologically functional — are not fully realized unless a guiding ideal emerges. The same holds true for the dialectic of sex and satisfaction. On a different plane, but according to the same logic, if leadership is to be effective and satisfying, it must go beyond simple domination to encompass a sense of responsibility.

This perception of latent values in behavior and organization is no mere sop to the moralizer. It enriches the thought and refines the observations of the student of society. Taken seriously, it may also serve to clear up some difficulties in contemporary sociological theory. Thus much attention is devoted these days to "functionalism." This is the view that items of behavior and of social structure should be examined for the work they do in sustaining or undermining some going concern or system. What is apparently or manifestly propaganda may be interpreted as latently a way of contributing to group cohesion by keeping members busy; a mode of punishment sustains the common conscience; selective recruitment of administrative personnel undermines an established policy or bolsters a shaky elite. Functional analysis is most familiar in the study of personality where a great many items of perception and behavior become meaningful only when their contribution to the maintenance of personal adjustment, including neurotic adjustment, is understood.

In all such interpretations, a system must be posited, whether it be at the level of personality or of group structure. The system is known insofar as a theory can be elaborated stating what the system "needs" to sustain it-

self. These needs are sometimes called "functional requisites." But here a persistent difficulty arises. There is a strong and understandable tendency to identify what is required for the maintenance of a system with what is required for the *bare survival* of a group or individual. The very term "survival" suggests that what is at stake is the biological extinction of the individual or the complete dissolution of the group. In fact, however, systems may decay despite the continuity of individual or group life. If a man extricates himself from neurotic dependence on another person, then a system has changed. If an organization maintains its personnel and budget, and even its formal identity, but transforms its effective goals, capabilities, commitments, and role in the community, then too a system has changed. To be sure, *some* systems are indispensable if life is to exist at all; but other systems are required if a certain *kind* of life is to survive. And it is fair to say that in social science the most important analyses have to do not with the bare continuity of life but with certain kinds and levels of organization.

A great many such systems are normative in the sense that their organization and development are governed by certain master ideals. A familiar and widespread illustration is the governing ideal of rationality in economic and administrative systems. In normative systems, it should be noted, terms like "maintenance" and "survival" are relevant but not adequate. They do not prepare us for observing, when it occurs, the evolutionary development of the system toward increased realization of its implicit ideals.

Sociology has studied normative systems, and even the self-realization of systems, for a long time (as witness the monumental work of Max Weber on the unfolding of rationality in modern institutions), but we have not thought through the implications of this intellectual concern. When we do, it will be a matter of course to recognize that a system may be known precisely by its distinctive competence or excellence, as well as by its special inner strains and vulnerabilities.

I have offered these remarks with malice prepense. They are meant to suggest that sociological inquiry has ample warrant for the study of law as a normative order. And this is the first, indispensable step toward a rapprochement between sociology and natural law.

II. RELATIVISM AND HUMAN NATURE

A SECOND BARRIER to the acceptance of natural law among social scientists is the widespread commitment to moral relativism. But whatever else it may or may not be, the natural law philosophy is not relativist. At least, it is committed to the view that universal characteristics of man, and con-

comitant principles of justice, are discoverable. It does not necessarily hold that such generalizations are *known*, only that they are *knowable*.

What should a reading of modern sociology, and related subjects, tell us on this issue? Here we must remember the polemical context within which sociology developed. We must also keep in mind the moral impulses, and the high-minded educational aspirations, that have guided writing and teaching in this field. Sociology was nurtured by the revolt against an atomist, individualist image of man and the corollary view of society as the product of human will, albeit an imperfect will. Society was the dependent variable, created by beings endowed *ab initio* with mind and self. Sociological theory countered by stressing the *creative* role of society, especially in making possible just those attributes of self-awareness, reason, and symbolic imagination that are distinctively human. This approach proved seminal indeed, and a great deal of very valuable work, in many special areas, has resulted from it. At the same time, it lent powerful support to the notion that there really is no such thing as "human nature," that, in familiar accents, man may have a history, but not a nature.

The moral and educational aims of sociologists, social psychologists, and anthropologists helped relativism considerably. These social scientists accepted a liberalizing mission, and many pursued this mission with admirable zeal. They sought more tolerance, more sympathetic understanding, a deeper sense of human community. This breadth of vision and generosity of spirit was to be gained by stressing the fateful dependency of man on his social environment. If we realize that what men can achieve and what they strive for, what they respect and what they fear, are deeply and decisively affected by the conditions under which they grow up, then surely sympathetic understanding will be encouraged. If we recognize the great diversity of cultures, with what variety and ingenuity communities have solved the problems of survival and designed valued ways of life, then our parochial views will be modified and the richness of human experience appreciated. Above all, the easy tendency to treat our own ways as natural and to see them as stemming from "human nature" will be rejected. This understanding would contribute to freedom and enlightenment. It would yield benign doctrines encouraging the transformation of social conditions in order to correct moral ills, shifting the locus of responsibility from the individual to organized society.

A critical scrutiny of this intellectual movement suggests, however, that radical conclusions regarding human nature and moral relativism are neither well grounded in theory nor truly supported by the empirical evidence. In particular, the argument from cultural diversity is at best inconclusive. To be sure, the diversity of cultures is impressive. It is especially impressive to

undergraduates, and is a very valuable antidote for any tendency to guffaw at strange practices and call other people "gooks." No doubt, many older efforts to identify essential traits of human nature, for example that men are naturally acquisitive or pugnacious, have been discredited. But if older generalizations have been wrong, new and more sophisticated ones may yet be valid.

That there is unity in this diversity — what some anthropologists have called the "psychic unity of mankind" — is often acknowledged. This acknowledgment comes easily if we are speaking of drives, such as hunger or sex, and potentialities, such as the capacity to learn and use language. But there are other features of man's psychic unity (not much studied, to be sure) more directly relevant to what is universal in social organization and pervasive in human values. I have in mind such motivating forces as the search for respect, including self-respect, for affection, and for surcease of anxiety; such potentialities as the union of sex and love, the enlargement of social insight and understanding, reason, and esthetic creativity. That man has morally relevant needs, weaknesses, and potentialities is supported, not contradicted, by the anthropological evidence. Moreover, if there are many different ways in which self-respect can be won, it does not follow that a study of those ways would not reveal certain common attributes. Human dignity, and the conditions for sustaining it, would be a proper subject for sustained inquiry. But there has been little interest in it.

There is an odd paradox in the teachings of cultural relativism. The very impulse which moves these teachings presumes that there is a morally relevant common humanity. *The whole point of the doctrine has been to encourage respect for others as human.* The underlying assumption is that all men need and deserve respect despite their diverse ways of life. What is this if not a theory of human nature? Moreover, the doctrine assumes that there are general principles for showing respect effectively, despite the fact that for each culture there may be variations in detail. The paradox is that a moral impulse, a bid for humility and sympathetic understanding, has become an obstacle to moral judgment. But that need not be so. A more careful consideration of the conclusions regarding man's nature implicit in the doctrine of cultural relativism, and derivable from comparative studies, can remove the paradox and free inquiry from some formidable roadblocks.

I conclude that the findings of modern social science do not refute the view that generalizations about human nature are possible, despite the effects of social environment and the diversity of cultures. Nothing we know today precludes an effort to define "ends proper to man's nature" and to

discover objective standards of moral judgment. This does not mean that proper ends and objective standards are knowable apart from scientific inquiry. It does mean that psychic health and well-being are, in principle, amenable to definition; and that the conditions weakening or supporting psychic health can be discovered scientifically. It also means that all such conclusions are subject to revision as our work proceeds.

Whether we are able now to say what human nature consists of, is not important. We are not completely at a loss, but any current formulations would still be very crude. The essential point is that *we must avoid any dogma that blocks inquiry*. Relativism is pernicious when it insists, on woefully inadequate theoretical and empirical grounds, that the study of human nature is a chimera, a foolish fancy. To say we "know" there is no such thing, and that there is no use looking for it, is to abandon the self-corrective method of science. It is also to ignore much evidence regarding the psychic unity of mankind.

III. POSITIVE LAW AND THE LEGAL ORDER

MOST DEFINITIONS of law — and they are not really so various as is sometimes suggested — remind us that we are dealing with a normative system and a master ideal, in the sense discussed above. Aquinas is perhaps most explicit, calling law "an ordinance of reason for the common good, made and promulgated by him who has care of the community." But even the efforts of Gray and Holmes to avoid a normative definition surely falter when they emphasize "the rules which the courts, that is, the judicial organs of that body, lay down for the determination of legal rights and duties" or, in the Holmesian formula, "the prophecies of what the courts will do in fact, and nothing more pretentious, are what I mean by the law." For the meaning of "court" or "judicial organ" is plentifully supplied with normative connotations, such as the idea of being duly constituted, independent rather than servile, and offering grounded decisions.

In framing a general concept of law it is indeed difficult to avoid terms that suggest normative standards. This is so because the phenomenon itself is defined by — it does not exist apart from — values to be realized. The name for these values is "legality." Sometimes this is spoken of as "the rule of law" or, simply, "the legal order." Legality is a complex ideal embracing standards for assessing and criticizing decisions that purport to be legal, whether made by a legislature or a court, whether elaborating a rule or applying it to specific cases.

The essential element in legality, or the rule of law, is the governance of official power by rational principles of civic order. Official action, even at the highest levels of authority, is enmeshed in and restrained by a web of accepted general rules. Where this ideal exists, no power is immune from criticism nor completely free to follow its own bent, however well-intentioned it may be. Legality imposes an objective environment of constraint, of tests to be met, of standards to be observed, and, not less important, of ideals to be fulfilled.

This concept of legality is broad enough, but it is not so broad as the idea of justice. Justice extends beyond the legal order as such. It may have to do with the distribution of wealth, the allocation of responsibility for private harms, the definition of crimes or parental rights. Such issues may be decided politically, and law may be used to implement whatever decision is made. But the decision is not a peculiarly legal one, and many alternative arrangements are possible within the framework of the rule of law. How far government should intervene to direct social and economic life is a question of political prudence, in the light of justice, but how the government behaves if it does exercise broader controls or enter new spheres of life quickly raises questions of legality.

The ideal of legality has to do with the way rules are made and with how they are applied, but for the most part it does not prescribe the content of legal rules and doctrines. The vast majority of rules, including judge-made rules, spell out policy choices, choices not uniquely determined by the requirements of legality. Whether contracts must be supported by consideration; whether a defendant in an accident case should be spared liability because of plaintiff's contributory negligence; whether minors should be relieved of legal consequences that might otherwise apply to their actions — these and a host of other issues treated in the common law are basically matters of general public policy. For practical purposes, and especially because they arise in the course of controversies to be adjudicated, a great many of these policy matters are decided by the courts in the absence of, or as a supplement to, legislative determination. In making these decisions, and in devising substantive rules, the courts are concerned with dimensions of justice that go beyond the ideal of legality. Legality is a part of justice, but only a part. It is indeed the special province of jurists, but it is not their only concern. On the other hand, when they act outside the province where the ideal of legality is at issue, the courts share with other agencies of government the responsibility for doing justice. It is not legality alone which determines what the rule should be or how the case should be decided. That

depends also on the nature of the subject matter and on the claims and interests at stake. Whether the outcome is just or unjust depends on more than legality.

However, there are times when the ideal of legality does determine the content of a legal rule or doctrine. This occurs when the purpose of the rules is precisely to implement that ideal, the most obvious illustration being the elaboration of procedural rules of pleading and evidence. In addition, principles of statutory interpretation, including much of constitutional law, directly serve the aim of creating and sustaining the "legal state." Some of these rules are "merely" procedural in the sense that they are arbitrary conveniences, chosen because some device was necessary, for which some other procedure might readily be substituted. Others are vital to just those substantial rights which the ideal of legality is meant to protect. These include all that we term civil rights, the rights of members of a polity to act as full citizens and to be free of oppressive and arbitrary official power. Again, it is not the aim of this ideal to protect the individual against all power, but only against the misuse of power by those whose actions have the color of authority. Of course, in our society we may have to extend our notions of who it is that acts "officially."

Perhaps the most difficult area governed by the ideal of legality is the process of judicial reasoning itself. Fundamentally, of course, this is part of the law of procedure, but it has a special obscurity as well as a special significance. The crucial problem here is to justify *as legal* the exercise of judicial creativity. That there is and must be creativity, whatever the name we give to it, is no longer seriously disputed. The question remains, however, whether there is something beyond the bare authority of the court, or reliance on a vague "sense of justice," to support the idea that judge-made policy has the stamp of legality.

One approach to this problem gives special weight to the legal tradition, to the received body of concepts, principles, doctrines, and rules. By working with these pre-existent legal materials, the law is in some weak sense "discovered," at the same time that creativity is permitted. Using familiar concepts establishes a link with the past and tends to create (though it does not guarantee) a smooth, gradual transition from one accepted policy to another. In this way legal craftsmanship, defined by its familiarity with the limits and potentialities of a certain body of materials and certain modes of decision, can ease social change by extending the mantle of legitimacy. A new policy, if it can be blanketed into contract doctrine or fitted into the law of torts, can have a peculiarly "legal" quality simply because of the ideas with which it is associated. It seems fair to say that this peculiar func-

tion of the law is weakening because it has become less attractive to the legal profession. This is so in part because of the modern interest in avoiding arcane language, in making policy objectives explicit, and in criticizing conventional legal categories. One may wonder, however, whether enough attention has been given to the role of legal concepts in defining an implicit delegation of power to the courts. This might be thought of as a working arrangement by which society allows the courts to make policy within areas marked out by the received body of legal ideas. It is assumed that these ideas are bounded, not limitless; that legal reasoning and judicial behavior contain some built-in restraints; and there is no contrary action by a legislature.

Another approach is to emphasize, not the "artificial reason" of the law, but the role of natural reason in the ideal of legality. Among the attributes of legality is a commitment to the search for truth, to consistency of thought, and to logical analysis of evidence as relevant, of classifications as inclusive, of analogies as persuasive. In this sense, there is no special legal reasoning; there is only the universal logic of rational assessment and scientific inquiry. The ideals of science and of legality are not the same, but they do overlap. Judicial conclusions gain in *legal* authority as they are based on good reasoning, including sound knowledge of human personality, human groups, human institutions.

The *meaning* of law includes the ideal of legality. That ideal, even though not yet completely clarified or specified, is the source of critical judgment concerning constituent parts of the legal order, especially particular rules and decisions. When a part of the law fails to meet the standards set by that ideal, it is to that extent wanting in legality. It does not necessarily cease to be law, however. It may be inferior law and yet properly command the respect and obligation of all who are committed to the legal order as a whole. At the same time, a mature legal system will develop ways of spreading the ideals of legality and of expunging offending elements.

The subtlety and scope of legal ideas, and the variety of legal materials, should give pause to any effort to define law within some simple formula. The attempt to find such a formula often leads to a disregard for more elusive parts of the law and excessive attention to specific rules. But even a cursory look at the law will remind us that a great deal more is included than rules. Legal ideas, variously and unclearly labeled "concepts," "doctrines," and "principles," have a vital place in authoritative decision. "Detrimental reliance," "attractive nuisance," "reasonable doubt," "exhaustion of remedies," "agency," and "interstate commerce" are among the many familiar concepts which purport to grasp some truth and provide a foundation

for the elaboration of specific rules. In addition, of course, there are even more general ideas or principles stating, e.g., the necessary conditions of "ordered liberty" or that guilt is individual rather than collective. It would be pointless to speak of these as merely a "source" of law; they are too closely woven into the fabric of legal thought and have too direct a role in decision-making.

Variety in law is manifest in other ways, too. We may speak, for example, of variety in function: Law is called upon to organize public enterprises; to establish enforceable moral standards; to mediate differences while maintaining going concerns; to arrange contractual or marital divorces; to make public grants; to investigate; to regulate some private associations, to destroy others. These and other functions have yet to be adequately classified or systematically studied. It seems obvious that such study is a precondition for formulating a valid theory of law.

There are also well-known qualitative differences in the authority of legal pronouncements. If opinions are divided; if there is manifest confusion of concepts, monitored by legal scholarship; if rules or concepts are based on received tradition alone; if a particular rule is inconsistent with the general principles of a particular branch of law — then the authority of opinion or judgment is weakened. If all laws are authoritative, some are more authoritative than others.

These considerations support Lon Fuller's view that the legal order has an implicit or internal morality,⁴ a morality defined by distinctive ideals and purposes. To say this, of course, is not to end inquiry but virtually to begin it. We must learn to distinguish more sharply between "bad law" that is merely bad public policy and law that is bad because it violates or incompletely realizes the ideals of legality. And we must attain a better understanding of how public purpose affects legal principle, as when we recognize that society binds itself especially tightly in the administration of criminal justice, generally requiring evidence of intent and barring retroactive legislation.

If the legal order includes a set of standards, an internal basis for criticism and reconstruction, then an essential foundation is laid for a viable theory of justice. In his sympathetic treatment of the natural law position,⁵ Morris Cohen was almost right in arguing that we must be able to appeal from the law that is to the law that ought to be, from positive law to principles of justice. But he did not quite see that at least some principles of justice

4. LON L. FULLER, *Positivism and Fidelity to Law — A Reply to Professor Hart*, 71 HARVARD LAW REVIEW 645 (1958).

5. MORRIS R. COHEN, *REASON AND NATURE* 408 (Glencoe, Ill.: The Free Press, 1953).

are ingredients of the ideal of legality and are therefore part of "the law that is." In many cases, we appeal from specific rules or concepts in the law to other concepts and to more general principles that are also part of the law. This is sometimes put as an appeal from "laws" to "the law,"⁶ and there is merit in that approach. But it has the disadvantage of suggesting that "the law" is something disembodied and unspecifiable, when in fact all we mean is that general principles of legality are counterposed to more specific legal materials. Both belong to a normative system whose "existence" embraces principles of criticism and potentialities for evolution.

With this approach in mind, we can give to positive law its proper place and meaning. "Positive law" refers to those public obligations *that have been defined* by duly constituted authorities. This is not the whole of law, and it may be bad law. Law is "positive" when a particular conclusion has been reached by some authorized body — a conclusion expressed as an unambiguous rule or as a judgment duly rendered. This definition differs from the suggestion made by Holmes that law is what the courts *will* do, assuming that he meant to define positive law. I am emphasizing what the courts *have done*, because what they will do may depend on the whole body of legal materials.

Positive law is the product of legal problem solving. The legal order has the job of producing positive law as society's best effort to regulate conduct and settle disputes. What is done may be only imperfectly guided by legal principles, perhaps because those principles themselves are inadequate, but it remains law for the time being. As such, it has a claim on obedience. Positive law invokes a suspension of personal preference and judgment with regard to the *specific issue*. To suspend judgment, of course, is not necessarily to fail to have a judgment, but someone else's judgment is taken as an authoritative guide to behavior. Suspension in this sense is rightfully invoked because obedience to positive law is essential to the survival and integrity of the system as a whole. For the system to function, it is necessary that only specially appointed individuals may disregard a positive law, by changing or reinterpreting it, or by modifying its effect in a particular case when other rules can be brought to bear.

Obedience to positive law, irrespective of private judgment, is not an abandonment of reason. On the contrary, as has been well understood for a long time, it is a natural outcome of reasoned assent to the system as a

6. See ROSCOE POUND, 2 JURISPRUDENCE 106 (St. Paul: West Publishing Co., 1959). Note also his comment at 107: "Law in the sense we are considering is made up of precepts, technique, and ideals: A body of *authoritative* precepts, developed and applied by an *authoritative* technique in the light or on the background of *authoritative* traditional ideals." (Emphasis supplied)

whole. It in no way precludes criticism or testing of positive law, including the assertion that it is void and without effect. But criticism, testing, and change proceed within the broader framework of the legal order, appealing to its own ideals and purposes when they are relevant. Of special importance is the duty of legal officers, including private counsel, to respond critically to the positive law.

Plainly, positive law includes an arbitrary element. For him who must obey it, it is to some extent brute fact and brute command. But this arbitrary element, while necessary and inevitable, is repugnant to the ideal of legality. Therefore the proper aim of the legal order, and the special contribution of legal scholarship, is *progressively to reduce the degree of arbitrariness in the positive law*. This rule is comparable to that in science where the aim is to reduce the degree of empiricism, that is, the number of theoretically ungrounded factual generalizations within the corpus of scientific knowledge.

If reducing the degree of arbitrariness is accepted as the central task of jurisprudence, a long step is taken toward natural law philosophy. For whatever its variations, or its special errors, the concept of natural law has survived, and flourished periodically, precisely because of the need to minimize the role of arbitrary will in the legal order. The basic aim of this philosophy is to ground law in reason. The question then is, What shall we understand as the meaning of "reason"? I shall take it to mean what John Dewey meant by "intelligence" and, following his basic teachings, suggest that scientific inquiry, including inquiry about proper ends and values, is the road to a science of justice or natural law.

IV. NATURAL LAW

AS A DOCTRINE or perspective, the chief tenet of natural law is that arbitrary will is not legally final. It holds that an appeal to principles of legality and justice is always available. This appeal assumes that every legal order, to the extent that it is one, has an implicit constitution. Thus understood, natural law is more than a "method." It is that surely, because it offers a rule, a guide to inquiry. But it also has content in that it looks to the ultimate formulation of principles stating the conditions of just governance. Science also combines method and content. Even when we emphasize method, there are conclusions to be drawn about the requirements of science as an intellectual enterprise. Similarly, liberalism and conservatism are methods of political thought and action, but they presume some general truths about man and society.

Method and content come together when the conclusions of natural law inquiry become *principles of criticism* to be applied to existing positive law. These conclusions are not more sacrosanct or eternal than any scientific generalization. On the other hand, a conclusion subject to correction is not necessarily precarious. It may be firmly grounded in theory and effectively supported by evidence. Therefore it does not lack the authority of reason as a guide to human action.

By its very name, "natural law" connotes a concern for drawing conclusions about nature. In other words, natural law *presumes inquiry*. And this entails a commitment to the ideals and canons of responsible thought. This does not mean, of course, that legal rules or doctrines are the same as scientific generalizations. The latter are "laws" in a quite different sense. Legal norms or principles are "natural law" to the extent that they are *based upon* scientific generalizations, *grounded in* warranted assertions about men, about groups, about the effects of law itself.

To put the matter this way may seem all too innocent. Among those who seek to improve legal doctrine and the administration of justice, few would question the importance of having more knowledge about how people behave in legal settings. Studies of deterrence and criminal law, of jury behavior, of arbitration, and of legally relevant changes in industrial organization, would all be welcome. Such studies are safe enough when they do not address themselves to the basic ideals of legality and therefore to the constitution of the legal order. In principle, however, there is no reason why the most general concepts of law — equality, reasonableness, fairness, and the like — should not be as subject to criticism, on the basis of scientific investigation, as are narrower legal concerns. When that occurs all innocence is lost and the quest for law is uneasily resumed.

Whatever the scope of our concern, natural law inquiry *presumes a set of ideals or values*. Most broadly, this is the welfare of man in society; law is examined for its potential contribution to that welfare. A more specific objective of natural law inquiry is to study the structure of the legal order as a normative system and to discover how the system can be brought closer to its own inherent ideals. Thus law is tested in two ways: first, against conclusions regarding the needs of man, including his need for a functioning society; second, against tested generalizations as to the requirements of a legal order. To some extent, the latter really includes the former, because among the requirements of a legal order is the capacity to serve human well-being by protecting and facilitating at least some vital aspects of social life.

On one vital point it seems wise to limit our intellectual commitments. It is not necessary for natural law supporters to prove or maintain that man

qua man has any inherent duties, including the duty to live at all or to choose the good and avoid evil. This may be so on other grounds, but it is not essential to the natural law perspective. To be sure, the duties of man as father or as citizen are subject to social and legal definition, but that is a more limited assertion. Moreover, I should like to shift the emphasis. From the standpoint of natural law, *the duty lies in the legal order*. If there is to be a legal order, it must serve the proper ends of man. It must not debase him or corrupt him. It must not deprive him of what is essential to the dignity and status of a human being. Whether or not any particular human being accepts a commitment to life, or to the good life, the law has no such freedom. It exists, on any theory, precisely to insure that at least the minimum conditions for the protection of life are established. The master ideals of justice and legality broaden that commitment considerably. But broad or narrow, it is the *system* that has the commitment.

As I have suggested earlier, there is nothing strange about this viewpoint to the sociologist acquainted with "functional" analysis. Functionalism, in stating "the requirements of a going concern," must identify what is essential to the system it is studying and then work out what is needed to sustain it at some specified level of activity or achievement. The level specified is not necessarily an arbitrary preference; it is at least partly set by the theory of what "is" a nuclear family or a trade union or an industrial society. To study a type of society is to learn what its distinctive structure is, and what it is capable of, as well as what forces are generated within it tending to break it down or transform it. At no point in that analysis is it necessary to show that all participants desire the system or have a duty to uphold it. But if the system is to be maintained, then certain requirements, taking account of natural processes, must be met.

Thus far I have argued:

- a) Natural law presumes scientific inquiry;
- b) Natural law presumes an end-in-view, a master ideal which guides inquiry;
- c) Natural law searches for and incorporates enduring truths regarding the morally relevant nature of man, e.g., his need for self-respect;
- d) Natural law searches for and incorporates enduring truths regarding the morally relevant nature of society, e.g., the distribution and use of social power;
- e) Natural law searches for and incorporates enduring truths regarding the nature and requirements of a legal order.

It is obvious that the authority of natural law, and its development, must depend on progress in the social sciences. Where social knowledge

is weak, as in the formulation of theoretically well-grounded and empirically tested generalizations about universal psychic or political phenomena, natural law must also be limited in its authority. Just because this is so, the natural law school has the right and the obligation to criticize social science and help make it more fruitful and more sophisticated.

One response to the difficulty of discovering general truths about man and society is to emphasize the "flexibility" or "variable content" of natural law. (This may also be a defensive reaction to the criticism of natural law philosophy as absolutist and dogmatic.) There is an important insight here, but it must be placed in proper perspective. It is true that natural law *presumes changing legal norms*, but this does not require abandoning the quest for universals or the assertion of them when they are warranted. A grasp of this point is essential if the relation between sociology and natural law is to be rightly understood.

Why does natural law presume changing norms? The reason is that its basic commitment is to a governing ideal, not to a specific set of injunctions. This ideal is to be realized in history and not outside of it. But history makes its own demands. Even when we know the meaning of legality we must still work out the relation between general principles and the changing structure of society. New circumstances do not necessarily alter principles, but they may and do require that new rules of law be formulated and old ones changed.

In a system governed by a master ideal, many specific norms, for a time part of that system, may be expendable. The test is whether they contribute to the realization of the ideal. Many norms evolve or are devised to take account of quite specific circumstances; and when those circumstances change, the norm may lose its value for the system. Thus the governing ideal of the system may be administrative rationality, but specific norms will vary depending on the purpose of the enterprise and upon its stage of development. For example, the norm of decentralization does not always serve the end of administrative rationality. Yet that end continues to have a vital influence on the selection of appropriate norms.

There are two valid interpretations of the idea that natural law has a changing content. (1) As inquiry proceeds, it is always possible that basic premises about legality, including underlying assumptions regarding human nature and social life, will be revised. (2) As society changes, new rules and doctrines are needed in order to give effect to natural law principles by adapting them to new demands, new circumstances, new opportunities. These perspectives demand that we detach natural law from illusions of eternal stability. They also require us to reject the notion that natural law

must be a directly applicable code or it is nothing. A set of principles is not a code, any more than the principle of the conservation of energy is a specific physical theory. Natural law provides the authoritative materials for devising codes and for criticizing them, in precisely the same way as constitutional principles affect legislation and judge-made rules.

It may be helpful to illustrate briefly the dialectic of continuity and change in natural law. At the same time, we can see something of the relevance of sociological inquiry. Let us consider the idea of "fiduciary responsibility." This is a legal concept containing the implicit principle that where power is exercised under the color of benefit to another, then the one who holds power must comport himself in ways consistent with the fiduciary basis of his authority.⁷ A fiduciary cannot treat his beneficiary as if he were merely his obligee in a contractual arrangement. He owes duties of loyalty and good faith appropriate to the status assumed. Different fiduciary relations call for different duties, but they have some attributes in common.

After much more analysis and testing, the general principle stated here may emerge as part of the corpus of natural law. It is based both on ideals of justice and on empirical theories regarding the temptations that beset men under certain conditions. These conclusions are subject to inquiry and to correction as may be necessary. But even as the principle remains, there is still the problem of giving it effect by embodying it in specific rules and doctrines.

Traditionally, the principle of fiduciary responsibility has been applied primarily in the law of property. In effect, a "trustee" is a kind of fiduciary who holds title to property and has a legal obligation to keep or use that property for someone else's benefit. There are fairly elaborate rules, and associated concepts and doctrines, stating how various kinds of trusts may be created and specifying the powers and responsibilities of trustees. This application of the broader principle reflects, of course, the needs of economic and social life in a particular historical epoch, as for pooling of investment funds, for the protection of family interests, of the interests of minors, and of those for the benefit of whom a public trust may be created. Social needs have joined with concepts of fairness to determine what specific rights will be protected, what norms embodied in positive law, and what legal ideas accepted to guide and justify the formulation of new rules. At the same time, legal development is constrained by a more or less conscious awareness of the limitations of positive law as an instrument of social control.

7. This statement does not necessarily include all the obligations, or embrace all the relations, that may be included in the legal concept of fiduciary duty.

There are good reasons why at any given time the general principle of fiduciary responsibility is not universally or automatically applied wherever fiduciary authority exists. The situations to which it could be applied might not be sufficiently important to justify the social cost of exercising formal control; such control might be ineffective because the resources and techniques of the law are inadequate; there might be other values, such as the autonomy of group life, which outweigh the need for justice based upon this principle. Yet the principle remains latent in the law and can be applied when needed as part of authoritative legal materials.

New historical developments, especially the rise of large bureaucratic enterprises, may well give the principle of fiduciary responsibility a fuller role in the law. The principle has already been applied for some time in regulating the conduct of corporation directors. The director is not technically a trustee, but that he is in some sense a fiduciary is not seriously questioned. Difficulties arise as to whether the fiduciary relation extends from the director to the corporation as an institution, to the stockholders, or perhaps to other classes of beneficiaries, including creditors, employees, customers, and the general public. Some voices are heard to say that all of these interests partake of the *beneficium*, though it is hard to formulate workable norms of responsibility to so heterogeneous a constituency. The important point is, however, that the principle of fiduciary responsibility is no longer clearly tied to a definite *res* or property interest, as that is understood in the law of trusts. The responsibility of the corporate director is more diffuse, both as to subject matter and as to beneficiary.

Some steps have been taken to apply the principle of fiduciary responsibility to trade union leaders.⁸ It is becoming increasingly clear that at least the trade union "international" has been evolving in a bureaucratic direction, with self-perpetuating leaders and with an essentially passive membership which "buys" a service with its dues. This is not the whole truth, of course, but it is sufficiently true to justify the development of new legal safeguards against overreaching and potentially tyrannical union directorates. The sociological truth is that the modern large trade union, like the modern large corporation, cannot be adequately controlled by internal democratic processes. This is so because of a fundamental change in social organization and not because leaders are venal or members morally debilitated. The nature of membership has been profoundly altered. The trade union member does not see the need for effective participation beyond the payment of dues to support the power of the organization and the professional services

8. See Archibald Cox, *Internal Affairs of Labor Unions under the Labor Reform Act of 1959*, 58 MICHIGAN LAW REVIEW 827-29 (1960).

of the union staff. To be sure, this change is probably not as radical as the shift in the meaning of shareholding, but the direction is the same.

The outcome is that members or owners of large enterprises, abdicating effective control, are in need of outside support for the protection of their interests. Such support can come by invoking the principle of fiduciary responsibility. This will not necessarily be effective in the courts, or in legislation, depending on whether the application of it in these circumstances can meet other demands, including consistency with related legal rules and with the effective administration of justice. But the natural law principle can be a starting point for legal craftsmanship.

The application of such a principle often depends on what may be called "institutional assessment." I have in mind the study of a complex enterprise, or type of enterprise, such as a school, church, political party, business firm, or government agency. The aim of institutional assessment is to determine what goals or objectives can be attributed to the enterprise, the capabilities it has, the strategies it lives by, its characteristic weaknesses, the distinctive significance it has for the life of the member, and what its probable line of evolution may be. Institutional assessment is one of the great practical and theoretical aims of social science, to which the sociology of large-scale organizations can make very important contributions. The development of this line of inquiry is still very primitive, but the needs of the legal order may require us to do the best we can with the intellectual tools now available. This is just what is being done in current discussions of the responsibilities of corporation directors and trade union leaders.

As a legal approach to the creation of responsible leadership, the fiduciary principle may have a "competitor." This is the concept of private government. In the assessment of modern industrial institutions, one conclusion taking shape today is that large, stable business enterprises and trade unions are performing significant governmental functions.⁹ If this is more than a vaguely suggestive idea, the question is raised whether general principles of just governance should be applied to the exercise of authority in industry. Should the concepts and norms of "due process" be carried over? This would not necessarily depend on a doctrine of implied delegation of powers from the "official" government to the "private" government. It might mean simply that wherever the functions of governance are exercised there should be corresponding restraints on the exercise of authority. If such a view is ultimately clarified and adopted, the principle of fiduciary responsi-

9. See RICHARD EELS, *THE MEANING OF MODERN BUSINESS* ch. III (New York: Columbia, 1960); also the writings of A. A. Berle and Peter Drucker. For a critical view, see SHELDON S. WOLIN, *POLITICS AND VISION* ch. X (Boston: Little, Brown, 1960).

bility may drop out as a direct source of guidance. It is arguable, however, that the fiduciary principle underlies the responsibility of governors and therefore would still make its contribution to the legal result.

A general theory of responsibility and authority would be part of natural law. The theory rests on both logic and experience, on the clarification of meanings as well as on propositions about anxiety, aspiration, and group structure. Insofar as its elements withstand the test of inquiry, the theory remains a permanent part of the legal order. But how and where principles of responsible authority are applied depends on social needs and opportunities, as well as on circumstances that determine whether a particular rule will have the desired effect.

The significance of historical opportunity may merit a special word. When we consider the problems of large organization, it is tempting to take the view that the growth of private power has created vast new possibilities of oppression, and to make this the ground for seeking the extension of legal protection. I doubt that this accords with reality, and I think it reflects a mistaken view of legal development. Our problem is not so much the resistance of oppression as it is the fulfillment of opportunities. This is not to say that oppression is absent, or that new forms of it have not developed. But far more important is the fact that we now have opportunities not available before to build the ethic of legality into large segments of the economic order. Extending the ideals of due process to private associations might at any time have been a worthy objective. But the development of an inner order within bureaucratic enterprises brings that objective into close accord with a naturally evolving social reality. Legal ideals cannot always be completely realized, principles of justice cannot always be effectively applied, but they remain as living potentialities, awaiting the appearance of historical developments that will permit their application.

A legal principle, including a principle of natural law, belongs to an intricate, interdependent whole. It is not applied mechanically, in isolation from other legal materials. For this reason, among others, *natural law is applied with caution*. This is not an unfamiliar idea, as students of judicial review well know. Natural law, like constitutional interpretation, presumes a conservative posture. Excesses of logical extrapolation, overconfidence in the power and authority of an abstract idea, will thereby be minimized. This means also that the effects of a change in rule or doctrine on the legal system as a whole, or on some especially integrated parts of it, will be weighed.

The principle of caution recognizes a rebuttable presumption in favor of positive law. This is so for two reasons. First, it helps sustain the authority of the machinery for making positive law, and this is necessary to the in-

tegrity and effectiveness of the entire legal order. Second, the presumption recognizes that the funded experience of the political community has a special merit, although not absolute merit. Positive law is always partly a reflection of arbitrary will and naked power politics, but it also registers the problem-solving experience of the community. Above all, it can be a vehicle for the emergence of rational consensus. Therefore positive law makes its own vital contribution to the development of natural law. As a road to natural law, the evolution of positive law has a special claim to respect, because it is a kind of funded experience and because it can bring with it an added dimension of legal authority. This is a corollary of the statement made earlier about "reducing the degree of arbitrariness" in positive law. As that is done, the competence of positive law to aid the development of general legal principles will be enhanced.

In this essay I have outlined some of the foundations for a fruitful collaboration between sociology and natural law philosophy. This has required a critical discussion of both the sociological and the natural law perspectives. I have argued that sociological analysis is quite compatible with the study of social systems, such as the legal order, that are governed by master ideals; and that the relativity of moral judgment is not essential to the sociological view of man and society. I have also offered an interpretation of positive law and of natural law that is consistent with the premises of scientific inquiry. Yet I suggest that this interpretation captures the essential truth in the natural law approach.

I have no doubt that the sociology of law can gain immensely valuable guidance from the study of problems posed by the quest for natural law. I also believe that natural law philosophy would benefit from a greater effort to increase the scientific component of its discourse. A vigorous research program, devoted to the formulation and testing of natural law principles, might do much to advance both the cause of justice and sociological truth.