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POSITIVE NATURAL LAW

Helen Silving

I. THE SCOPE OF THE CONFLICT OF POSITIVISM AND NATURAL LAW

POSITIVISM AND NATURAL LAW are words of many meanings.¹ Within some of these meanings, there is no contradiction between a positivist and a natural law approach. Thus, natural law may adopt a limited positivist policy, as exemplified by the idea "render unto Caesar." The most positivist principle of law, *nulla poena sine lege*, originated in natural law ideology.² On the other hand, so long as positivism maintains an a-political attitude, exclusively directed to a purely scientific description of law, it implicitly admits lack of "jurisdiction" to either affirm or deny the claim of absolute natural law to "existence" or "rightful" applicability. For defining "law" in truly positivist terms means something different from defining "law" in such natural law terms. The latter purports to grasp the essence of law as a metaphysical entity, whereas the former aims at a purely scientific description. When a natural law adherent says that a certain group of phenomena "is" law, he uses the "is" existentially, whereas a true positivist, when making a similar statement, uses the "is" merely descriptively. So long as he remains within

1. There are various concepts of "natural law" and of "positivism," and in jurisprudential writings the meaning of these terms has been not only divergent but also frequently shifting. For the purposes of the present paper it is important to distinguish the two broad classes of natural law doctrines: absolute and relative natural law. Both are included in the term "natural law" as used in this paper, which is concerned with the relationship between any "natural law" and any positivist doctrine. However, certain references, such as "natural law" which uses the term "is" existentially, apply only to absolute natural law.

By "positivism" I mean both the general philosophical approach, best represented by the Holmesian theory of law, oriented to observable factual phenomena, and the "juristic positivism" of the pure theory of law, oriented to a "posited" system of norms. By "true positivism" I mean one that is a-political and a-metaphysical. As used in the third and fourth sentence of the text, "positivist" refers to political, as distinguished from jurisprudential and ethical-ideological, positivism. On this see Silving, *The Twilight Zone of Positive and Natural Law*, 43 CALIFORNIA LAW REVIEW 477, 500 *et seq.*

2. In the common law the idea of *nulla poena sine lege* is allegedly traceable to the Magna Carta's requirement of judgment *per legem terrae*, although this requirement may have had only a limited, procedural connotation. See JEROME HALL, *GENERAL PRINCIPLES OF CRIMINAL LAW* 22 (1947). In continental Europe the legality principle is generally believed to have been introduced into law by Feuerbach, an adherent of natural law. Montesquieu's demand that judges be but "the mouth that pronounces the words of the law" (*DE L'ÉSPRIT DES LOIS*, in 2 *OEUVRÉS COMPLÈTES*, Texte présenté et annoté par Roger Caillouis, livre XI, c. VI, at 404) was conceived as a postulate of natural law. On this see Silving, *op. cit. supra*, note 1 at 501, note 46.

the confines of a "science of law," he indeed cannot resolve the philosophical problem of the "existence" of law. Nor can he use the term "ought" except perhaps to indicate a distinctive method of interpreting legal phenomena or to reflect the law's own claim to "oughtness."³

An analysis of well-known "positivist" theories of law discloses that, except to the extent that they are themselves natural law doctrines, they do not logically contradict avowed natural law. Thus, Holmes' definition of law as a forecast of what courts will do in the future does not imply that, as a matter of inherent justice or higher law, they "ought" not to do something different, any more than a law of physics implies that nature ought not to be governed by a different course.⁴ Of course, whenever Holmes posits — as he often does — a moral or political view, he actually opposes his own natural law opinion to a particular natural law doctrine, different from his own.⁵ The same is observable when analysing a theory of juristic — rather than general philosophical — positivism, such as Kelsen's.

In Kelsen's view,⁶ whatever the grammatical form of the products of legislative, judicial and other official acts, their "juristic" meaning, as construed by a scientific juristic observer, is an "ought," provided that these acts are to a certain extent effective in the world of the "is" and that the necessary hypothesis of thought endowing them with a juristic imprint is adopted. Logically, the "ought" of the norm is but a symbol of the distinction in meaning between the propositions used by the jurist and factually intended propositions couched in terms of "is." But Kelsen's doctrine does not merely deal with the logical meaning of legal norms.⁷ According to it, in order to conceive of any phenomena as "legal norms," it is not sufficient to adopt a

3. On the limitations imposed upon such approach to defining "law" in purely positivist terms see Silving [Book Review], 37 IOWA LAW REVIEW 319 (1952).

4. Actually, Holmes placed legal rules in the same category with laws of physics or chemistry. Perhaps he would concede that they are distinguishable in the degree of predictability.

5. Holmes' views on moral issues in law are based on a utilitarian philosophy. Utilitarianism, of course, is a natural law philosophy, since it derives rules from human utility or happiness.

6. KELSEN, *REINE RECHTSLEHRE* (1934).

7. For a refutation of Cossio's interpretation of the "Pure Theory of Law" as mere "logics," see Kelsen, *Reine Rechtslehre und Egologische Theorie: Antwort auf: Carlos Cossio, Egologische Theorie und Reine Rechtslehre, eine vorläufige Bilanz von Kelsens Besuch in Argentinien*, 5 ÖSTERREICHISCHE ZEITSCHRIFT FÜR ÖFFENTLICHES RECHT 449, 451-454 (1953).

Kelsen has never denied the "natural law" elements contained in his *Grundnorm*. See Kelsen, *Die philosophischen Grundlagen der Naturrechtslehre und des Rechtspositivismus*, PHILOSOPHISCHE VORTRÄGE VERÖFFENTLICHT VON DER KANT GESELLSCHAFT (1928). See also Fuller's criticism of Patterson's misconception of Kelsen, in *American Legal Philosophy at Mid-Century*, 6 JOURNAL OF LEGAL EDUCATION 457, 461 (1954).

purely intellectual hypothesis of thought, such as is commonly assumed for cognitive purposes in any science. In order to comprehend "law" cognitively, it is necessary, beyond that, to adopt a specific political attitude — an etatistic rather than an anarchistic position. Law-cognition is predicated upon law-*recognition* — acceptance of the respective phenomena as "binding." Upon such *recognition* also depends the interpretation of various purported rules, acts, etc., as part of a single system, such as "the law of New York" or "the law of Switzerland." An anarchist cannot, in this view, form any conception of "law"; nor can he conceive of "the law of New York" as a unit.

To the extent, of course, that Kelsen's legal positivism is predicated upon the political position of law-*recognition*, it does conflict with natural law doctrine. For this position not only asserts that "law" means all that and only that which is created in a specific form warranted by the given system accepted as "law," but also claims that all that and only that "ought" to be obeyed, any natural law claim to the contrary notwithstanding. There is no need, however, to follow Kelsen along the last stages of his argument. As any other science, so the "science" dealing with law must proceed on the basis of certain hypotheses of cognition. The "ought" in restatements of law by legal science may be taken to indicate a distinctive reading of legal phenomena, as compared with interpretation of phenomena of nature, described in terms of "is." Potential unity of given legal phenomena may be similarly assumed. It is unnecessary to endow the "ought" or the potential unity with any additional metaphysical or political meaning. The "ought" and the unity may be found to coincide with the claim which legal phenomena themselves express — New York laws purport to be binding and to form part of the "law of New York" — and with the common understanding of the phrase "New York law."⁸

Though thus stripped of its ethical-political elements, Kelsen's theory may still be utilized as basis for a logical analysis of legal phenomena in their relation to the legal system as a unit. This capacity of serving as basis of legal interpretation is the lasting value of Kelsenian jurisprudence. It is this part of Kelsen's doctrine which H. L. A. Hart — on the basis of different philosophical assumptions — has effectively utilized in analyzing legal con-

8. For a fuller explanation see Section IV, *infra*. As to "Unity of the legal system" see also Section V, at notes 36 to 40. It is not clear whether or to what extent Kelsen's theory has been modified by his present position that legal science does not "assume" (presuppose) the *Grundnorm* but merely uses it as a hypothesis of interpretation, (logically) following the "assumption" of the *Grundnorm* by those who create and apply the legal order in issue. See Kelsen, *Was ist ein Rechtsakt?*, 4 ÖSTERREICHISCHE ZEITSCHRIFT FÜR ÖFFENTLICHES RECHT 263, 269, 270 (1952).

cepts such as "right," "duty," "corporation," "state."⁹ He showed that these concepts are neither mere symbols for facts or realities, in the sense of words corresponding to certain realities, nor fictions, nor, finally, "facts . . . but of a complex, future, or psychological variety" (prediction), but that they stand for a *connection*¹⁰ established on the basis of an assumed legal system between certain rules of that system and certain facts found to come within these rules. This analysis, which in jurisprudence is distinctly Kelsenian, is carried out by Hart without any preliminary inquiry into the meaning of statements such as "There is in existence a legal system," or "Here in the territory of Nusquamia there is a legal system in force."¹¹ Of course, Hart does not claim that such alleged "existence" of the legal system is based on a *Grundnorm* implying law-recognition.¹²

II. A NEW TYPE OF NATURAL LAW: POSITIVISM

The "conflict" between natural law and positivist doctrine first arises when the latter ceases to be positivist and assumes natural law elements. Most positivist doctrines at some point abandon the path of positivism and, while preserving the pretenses as well as the appearances of the latter, operate as natural law doctrines. This is true of Kelsen's doctrine as applied by Hart, on the one hand, and of the Holmesian type of positivism as well as of sociological jurisprudence, on the other hand. Perhaps this may be shown by presenting a hypothetical case, the background of which is borrowed from a case construed by Maitland and interpreted by Hart.¹³

9. H. L. A. Hart, *Definition and Theory in Jurisprudence*, 70 *LAW QUARTERLY REVIEW* 37 (1954).

10. The German term used by Kelsen denoting this "connection" is "*Verknüpfung*," which has a somewhat stronger connotation than the English term.

11. Hart, *op. cit. supra*, note 9 at 49; *id.* at 52.

12. Hart does not explain what he believes to be essential in "law," although he does state what is not essential to its existence. See H. L. A. Hart, *Theory and Definition in Jurisprudence*, an answer to Jonathan Cohen, in 29 *ARISTOTELIAN SOCIETY*, Supplementary Vol., 239, 251 *et seq.* (1955).

13. Hart, *Definition and Theory in Jurisprudence*, 51-54 (cited *supra*, note 9), attempts to answer the question posed by Maitland: When the imaginary state of Nusquamia owes you money who owes you this? His answer is this:

1. Here in the territory of Nusquamia there is a legal system in force; under the laws of this system certain persons on complying with certain conditions are authorized for certain purposes to receive sums of money and to do other actions analogous to those required to make a contract of loan between private individuals.

2. When such persons do such acts certain consequences, analogous to those attached to the similar actions of private individuals, follow, including the liability of persons defined by law to repay the sums of money out of funds defined by law.

3. The expression 'Nusquamia owes you £1,000' does not state the existence of these

Let us assume that Nusquamia, Maitland's imaginary state, has passed a "Corporations Act," which defines a "corporation" as a combination of individuals endowed with "juristic personality."¹⁴ Let us further assume that all law professors, legislators, and judges Nusquamia has ever possessed have been ardent adherents of Gierke and have believed that a corporation is an entity equipped with a "*Gesamtwille*" and a separate metaphysical existence or a "*Gesamtperson*," comparable to the individual existence of any Nusquamian. We may concede that these beliefs are scientifically false, for there is no such thing as a "*Gesamtwille*" or a "*Gesamtperson*" in the world of reality. Yet they have always been held to be the true beliefs in Nusquamia. In this legal and jurisprudential atmosphere the question is raised for the first time whether a corporation may be held responsible for a tort committed by its officers in the course of corporate business, by analogy to the responsibility of a master for the acts of his servant. Let us finally assume that counsel for the corporation had recently become acquainted with the teachings of Kelsen and Hart and learned that there is no such thing as a *Gesamtwille* or a *Gesamtperson*. He now argues that all inhabitants of Nusquamia have for centuries lived under a gross misconception and that, the *Gesamtwille* and the *Gesamtperson* being but fictions, there is no logical

rules nor of these circumstances, but is true in a particular case when they exist, and is used in drawing a conclusion of law from these rules in a particular case.

Certain Scandinavian writers adopt the same method of interpretation. See Alf Ross, *Tû-tû*, 70 HARVARD LAW REVIEW 812 (1957). Professor Ross reports a belief held by a primitive tribe, the Noit-cif, that "in the case of an infringement of certain taboos—for example, if a man encounters his mother-in-law, or if a totem animal is killed, or if someone has eaten of the food prepared for the chief—there arises what is called 'tû-tû,' and that the person who transgresses the taboo must be subjected to a special ceremony of purification." Of course, says Ross, "tû-tû" is a "meaningless word," for the dangerous force or infection which attaches to the guilty person, according to the beliefs of the Noit-cif, does not in fact exist. However, the term has meaning in the sense that it is used to express the following pronouncement: "If a person has eaten of the chief's food he shall be subjected to a ceremony of purification." Ross indicates that the legal rules of modern law are "in a wide measure couched in a 'tû-tû' terminology," e.g., "right," "duty," "ownership." "Tû-tû" and its modern corollaries are useful in Ross' view in that they help to conceptualize various legal rules. Thus, the term "ownership" stands for rules such as:

If a person has lawfully acquired a thing by purchase, judgment for recovery shall be given in favor of the purchaser against other persons retaining the thing in their possession.

If a person has inherited a thing, judgment for damages shall be given in favor of the heir against other persons who culpably damage the thing.

If a person by prescription has acquired a thing and raised a loan that is not repaid at the proper time, the creditor shall be given judgment for satisfaction out of the thing . . .

14. To strengthen the argument, we may further assume that another law of Nusquamia provides that "Every human being is to be considered a person." Such provision is contained in Art. 16 of the Austrian Civil Code.

necessity to decide the case at hand on the basis of the assumption that such concepts have a reality, and that, hence, the judges of Nusquamia are free to decide without regard to these concepts; that is to say, they can in their discretion decide either that the corporation is liable or that it is not liable, the analogy to a liability of an individual for the acts of his servants not being "logically" compelling.

Would judicial adoption of this "positivist" argument imply a positivist or a natural law approach? It is believed that it would imply the latter. Words are means of communication. Their social use is based on a concurrent understanding of the nature and scope of the meaning behind them. As suggested by Mr. Justice Frankfurter,¹⁵ "Words being symbols do not speak without a gloss." In Nusquamia there prevails the scientifically incorrect meaning of the term "corporation." When Nusquamians use that term, they intend to convey the meaning attributed to it by Gierke and not that assigned to it by Hart. Particularly where they use such a term in legislation, they intend not merely to describe but also to regulate. For in law a definition or defining use imports more than a definition in science. It is part of a legal rule and implies a norm or a requirement that it be followed or obeyed. By use of the term "corporation" in the Gierke sense, the legislature of Nusquamia implicitly ordered that this meaning should be in future assumed in interpreting the law.¹⁶ Rejection of this meaning is disobedience to the mandate of the legislature, which is not excused by reliance on the fact that the legislative use is scientifically wrong, for legislators, *qua* legislators, are rulers and not men of science. In asserting that Hart's positivist, scientific interpretation is the only correct one, his disciple actually assumes the existence of a natural law requirement that law be scientific or positivist, regardless of what the common understanding in Nusquamia or the legislative intent in using the term "corporation" may be.

As I have set forth elsewhere,¹⁷ I believe that such erroneous use of the "positivist-scientific" finding that state judicial decisions, like state statutes,

15. *Rochin v. California*, 342 U.S. 165, 169, 96 L. Ed. 183, 188 (1952).

16. This order need not be a conscious one. It is implied in the particular usage of the word which carries such implication. Thus, in Professor Ross' example, "tû-tû" is meaningful not only in the sense of being descriptive of present legal rules concerning taboo-violations but also as a guide for resolution of a hitherto undecided problem of Noît-cif law, should there be such a thing as a case of first impression among the Noît-cifs. It is not possible to substitute for "tû-tû" any neutral symbol, e.g., "old cheese," as Prof. Ross suggests. For "tû-tû" is a word "with a gloss." Both its positivist meaning and its "gloss" suggest law. Given a particular jurisprudential approach of Noît-cif law, that word may serve as a source of law and not merely as a descriptive symbol.

17. See Silving, *Analogies Extending and Restricting Federal Jurisdiction; Erie R. Co. v. Tompkins and the Law of Conflict*, 31 IOWA LAW REVIEW 330 (1946).

are "law" led to adoption of the rule in *Erie R. Co. v. Tompkins*,¹⁸ which in its result is by no means positivist, although based on the Holmesian positivist conception of "law." The tacit assumption of this case is that there is a "brooding omnipresence" of "science" or positivism in law, which requires statutes to be interpreted in accordance with a contemporary "scientific" meaning of the words used, regardless of the fact that they may have been intended to be used as legal terms of art or of any other intention of legislators or common understanding at the time of enactment. Such interpretation substitutes for the "omnipresence" of natural reason, which the legislators may have intended to convey when using the term "law," an "omnipresence" of positivist legal science, unknown to the legislators. It thus introduces into the law a new type of natural law: positivism.

III. METALEGAL AND LEGAL JURISPRUDENCE

While purporting to be a "science" of law, positivist jurisprudence has for the most part failed to take account of the distinctive character of its subject of inquiry. In its aim at eradicating mythical concepts from the law,¹⁹ it has omitted to consider a vital subject — the "law" itself. This is true both of those jurisprudential trends which disclaim any intent of considering law as it "ought" to be and of those which admit such consideration but assume that the "ought" is the product of facts of experience or an "expediency" discoverable by means of trial and error. When analyzing legal phenomena, such "positivist" doctrines have often used as a pattern the analysis applied by science and the philosophy of science. The sciences used as standards of "legal science" have been mathematics and physics²⁰ as well as sociology and anthropology. The latter are undoubtedly closer to legal science than are the former. As "sciences of man," they share with the "science of law" a characteristic that is most decisive in the context at hand — the object of their cognition is a "thinking" subject, a feature not present in either mathematics or physics. However, the object of legal science is also to be distinguished from that of sociology and anthropology. For it is not merely man "thinking" but is also the product of such thought, e.g., a statute and its meaning, viewed independently from the meaning attributed to it by its originator. The objects of mathematics or physics have no notion of their own regarding their own

18. 304 U.S. 64 (1938).

19. This aim is common to all jurisprudence which claims to be positivistic in any of the several meanings of this term: juristic positivism, pragmatism, realism, and functionalism.

20. See particularly F. S. Cohen, *Transcendental Nonsense and the Functional Approach*, 35 COLUMBIA LAW REVIEW 809 (1935).

meaning. The objects of sociology and anthropology — men — have a notion of “meaning,” e.g., the meaning of language, action, life, man, meaning itself, but that notion is not “creative” in the same sense that a notion expressed, e.g., in a statute, of what “right,” “duty,” “corporation,” or “law” means is “creative.” The latter notion does not merely reflect reality, if any; it produces legal reality.

The law, whether in form of statutes, decisions or conduct, reflects an immanent view of what “law” means. The law has thus a notion not only of the nature of its specific subject matters, such as “right,” “duty,” “corporation,” but also of the ultimate object of jurisprudential inquiry, the “law”; it is itself a “positivist” or a “natural law” adherent. It has a jurisprudence of its own, a “legal jurisprudence,” which is distinct from what may be best described as “metalegal jurisprudence,” the jurisprudence found outside of the law.²¹ This jurisprudence of the law is authoritative, as seen in the *Tompkins* case. In the light of this fact, is it necessarily true, as F. S. Cohen contends, that problems such as “What is the holding or *ratio decidendi* of a case?” or “Which came first — the law or the state?” or “What is the essential distinction between a crime and a tort?” or “Where is a corporation?” are “in fact meaningless” in the same sense as “absolute space and absolute time” in physics or “real and imaginary, rational and irrational, positive and negative numbers” in mathematics are meaningless.²²

Equally questionable is the attempt of sociological jurisprudence to read a particular sociological approach into the law. Auerbach,²³ e.g., professing adherence to this school of jurisprudence and proceeding from a criticism of Hart’s approach, suggests a number of fact groups in consideration of which legal rules ought to be reached in the absence of precedents, the ultimate test of the validity of any resulting rules apparently being “living out the rules themselves.”²⁴ This position may be challenged on ethical grounds. There seems to be something fundamentally immoral in the doctrine of “living out the rules themselves,” when it is not the existentialist legal philosopher but another person who is to be put through the test of experience. This suggests that an experimentally tested expediency is not — as most legal sociologists and utilitarians seem to believe — a necessary philosophy of law. Certainly, positive legal systems do not in fact invariably adopt that philosophy as a

21. On this see Silving [Book Review], 37 IOWA LAW REVIEW 319 (1952).

22. Cohen, *op. cit. supra*, note 20.

23. Auerbach, *On Professor H. L. A. Hart's Definition and Theory in Jurisprudence*, 9 JOURNAL OF LEGAL EDUCATION 39 (1956).

24. Professor Auerbach quotes R. C. Cross, *The Emotive Theory of Ethics*, 22 ARISTOTELIAN SOCIETY, Supplementary Vol. 127 (1948).

source of law, even a residuary one. A legal system may very well adopt a different philosophy as its dominant "legal jurisprudence." In such event, could an approach pointing to the sociological or utilitarian method of interpreting meaning or of deciding cases of first impression or conflicts of rules be deemed "scientific" or positivist?

While not necessarily more "positivist," in the sense of reflecting legal reality, than other particular jurisprudential theories, the Kelsen-Hart interpretation is useful as a basic or primary interpretation. It supplies the framework for any further legal interpretation and helps to establish the precise scope of what Mr. Justice Frankfurter aptly described as "gloss" in statutory language. In the present writer's understanding, Kelsen has never disputed the ability of any lawmaker, whether legislator or judge, when acting within the scope of his authority, ultimately referable to the *Grundnorm*, to put into a norm any content or meaning of his choice or to do so in any form he pleases. He may, if he chooses, use the term "corporation" in the Gierke sense; and such meaning, however fallacious, will be obligatory within the legal order in issue. The correct interpretation of the term "corporation" is not necessarily the correct *legal* interpretation. It is rather "correct" as *juristic* or scientific interpretation, that is, the interpretation applied to the law from the outside by the jurist or legal philosopher but not necessarily by the legal practitioner, a judge or a lawyer. The juristic interpretation is, nevertheless, believed to form the root of any legal interpretation. The concept of "corporation" stands primarily for the connection of certain facts with certain consequences, as provided by law, even where a specific legal interpretation requires endowing a corporation with a *Gesamt*-personality. For since "*Gesamtpersons*" are not physically encountered in the courtrooms of Nusquamia, there must be some concept to which personality is assigned. That concept is the "corporation" in the juristic sense of a connection of certain facts and certain consequences attached to them by law. The juristic meaning of "corporation" is the ultimate common root of any statements concerning a "corporation," whatever their additional contents may be, e.g., that a "corporation" is a moral person, comparable to the individual moral person or that it rather than the individual members should be held liable.²⁵ The purely juristic meaning of "corporation" is legally, ethically, and politically colorless; it cannot be made the basis of any inferences regarding par-

25. The situation may seem to be different in the case of terms such as "right" which have a meaning in ethics as well as in law, so that it may be possible to claim that a "right" exists apart from the law, whereas no such claim could be made in the case of a "corporation." But upon closer scrutiny, a "right" too, when referred to in a legal context, is primarily a creature of law, indicating a connection of certain facts with certain consequences, whatever other connotations may be added to this legal concept.

ticular legal policies to be followed, although the specific facts and consequences that are being "connected" to form the concept of "corporation" may be used as a basis for such inferences.²⁶

In analyzing a legal concept, it is useful first to establish its purely juristic meaning and proceeding from it, to elaborate the added "gloss." Furthermore, where a word is used "without a gloss," the purely juristic meaning may be the only proper one. But, contrary to Hart's claim, even where a word is used in this manner, the purely juristic meaning is not necessarily the proper one. Rather, whether in such cases the court is or is not justified in adding a gloss, depends on the general philosophy prevailing in the legal system involved. Thus, assuming that identically worded corporation acts are passed in England and in an American jurisdiction, both initially using the term "corporation" in its "correct" juristic sense, the "conservative" philosophy of English law²⁷ may bar adding any new elements to the term as originally used, whereas the liberal policy of the American jurisdiction may tolerate or encourage such additions. A statute is not a detached statement carrying an independent meaning, for it is written for and into an existing legal system. It follows that legal interpretation must ultimately proceed from the reality of the prevailing legal philosophy. That philosophy may be a positivist or a natural law philosophy.

Finally, as seen in *Erie R. Co. v. Tompkins*, legal philosophy may override a legal rule. On the other hand, inconsistent legal philosophies and legal rules may for a long time coexist side by side in one legal system. This may cause considerable difficulty in interpretation. For instance, when a case of first impression arises in a situation where analogy to a rule or group of rules suggests one solution and a conflicting philosophy indicates another, should the former or the latter prevail? It is always tempting to look for an answer to such questions in the "nature of law," as a metalegal concept. If, however, the term "law" is used in a positivist sense, it has a most general meaning, which affords no solution of ultimate policy problems. A positivist approach is necessarily a limited one.

IV. "LAW" AND THE "OUGHT"

Notwithstanding differences of interpretation and of underlying legal philosophies, there is a minimum common understanding among men re-

26. Inferences as to the liability of a corporation may be drawn, e.g., from particular legal requirements of incorporation that a legal system may impose.

27. Auerbach asserts that Hart's positivism is an expression of the fundamentally conservative character of English law. See Auerbach, *op. cit. supra*, note 23 at 46.

garding the symbolic reference of the term "law." Thus, e.g., lawyers representing divergent cultures and legal philosophies meet on an international level and communicate some meaning to each other when referring to the "law" of their respective countries, as for instance, when agreeing on a treaty provision affecting that law. The adherents of Holmes and those of analytical jurisprudence convey meaning to each other when speaking of a "valid" or "correct" meaning of a statute, although the former understand this to refer to a prediction that the meaning thus described will be followed, whereas the latter translate "correct" or "valid" by "ought to be followed." It is, therefore, unnecessary to choose between the schools of jurisprudential thought in order to reach some minimum meaning that may serve the practical purpose of establishing a *prima facie* case for "law." Nor is there any basic disagreement concerning the fact that legal interpretation is to some extent *sui generis*. For instance, an American lawyer may be convinced that the best method of statutory interpretation is search for legislative intent; but he will hardly deny that English lawyers reach "valid" statutory meaning although they do not use this method of interpretation.²⁸ This indicates that there is an "objective" statutory meaning, which is not necessarily identical with the meaning to be reached by the "scientifically" or "logically" best method. "Objective" in this instance signifies the authoritative designation of agencies empowered to declare such meaning. The statute thus means what these agencies will some day say that it means.

Conflicts of rules and philosophies are also resolved in this manner. This method of arriving at legal meaning distinguishes that meaning from, let us say, the meaning of a law of physics. This difference may be expressed by use of the copula "ought," indicating a distinctive interpretation. This does not imply impossibility of ultimate reduction of legal propositions to "is" terms, although choice of the copula "ought," which is generally used as suggesting "duty" or "obligation," may be taken as reflecting the claim of laws that they are "obligatory," at least in the sense of purporting to be followed.

But the minimum "ought" thus assumed to express the general meaning of law is only a framework that enables us to understand law as a separate discipline of thought. Within this framework paramount importance must be assigned to the subject of inquiry, the law; and within it paramount im-

28. "We do not inquire what the legislature meant; we ask only what the statute means." HOLMES, *COLLECTED LEGAL PAPERS* 207 (1920); 2 SUTHERLAND, *STATUTORY CONSTRUCTION* c. 45 (2nd ed., 1943); Mr. Justice Frankfurter, *Some Reflections on the Reading of Statutes*, 47 *COLUMBIA LAW REVIEW* 527 (1947). *United States v. Zuskar*, 237 F. 2d 528, 533 (C.C.A. 7th, 1956). Notice also that often the meaning of a statute is accepted by all concerned without necessity of testing it by litigation.

portance must be assigned not merely to legal rules but also to legal jurisprudence. Clearly, "law" and "ought," in this sense, cannot resolve any conflicts between these two types of legal contents. But a particular legal system may have an overall jurisprudence which will generally afford a solution. In this context it becomes important to consider the law's own notion of the nature and scope of its "oughts."

Mostly, though by no means invariably,²⁹ laws express the view that they are obligatory in a normative sense. Their "ought"—as they understand it—is hence a metaphysical concept. But is this "ought" necessarily co-extensive with the "ought" of analytical jurisprudence? Kelsen, for instance, claims that the meaning of the jurisprudential "ought" is not a reflection of that which the law itself may regard as the meaning of its "oughts." This implies that the law "obligates," but not necessarily in the same sense in which it "thinks" it "obligates." Of course, Kelsen's "ought" is a natural law concept, not derived from the law. But it is a natural law concept assumed for the purpose of construing a system of positive law. One might wonder whether a juristic system may be said to be positivist when it is construed in disregard of its subject matter. How does the "ought" of positivist jurisprudence compare with the "ought"—where an "ought" is expressed in law—as conceived by law itself?

The positivist "ought," when understood in a merely logical sense, has a uniform meaning—the meaning of being different from an "is." In the narrower Kelsenian sense of being expressive of the validity of a norm, the "ought" likewise possesses a uniform meaning, for there are no degrees of validity. This uniformity of the "ought" does not reflect legal reality. In law itself the "ought"³⁰ is differentiated in intensity. The probability that a rule will be enforced varies from rule to rule. The force of the censure of law violation may be also expressed in distinctive provisions, applicable to some rules but not to others. Thus, e.g., *mala in se* are treated differently from *mala prohibita*.³¹ There is a legal difference between the binding force

29. There are, in addition to *Erie R. Co. v. Tompkins*, numerous decisions which profess adherence to the Holmesian definition of law. See, e.g., *Long v. State*, 44 Del. 262, 65 A. 2d 489 (1949).

30. By "ought" I understand here any form in which the law may express a meaning different from an "is": an imperative ("Murder not"), a hypothetical sentence ("Whoever steals will be punished"), etc. All such statements may be reduced to the simple formula: by law, one "ought" not to murder, steal, etc. But it is interesting to note that there are languages in which "ought" is expressed by use of the future tense. This is the case, e.g., in the language of the Bible, Hebrew. The "Sollen" of the German language cannot be adequately translated into either Russian, Polish, or Spanish.

31. The difference in intensity is also evidenced by the difference in the legal and

of a statute and that of a judicial decision.³² Beyond that, one might query whether the "ought" has necessarily the same meaning in German and in American law (whether it means the same to the German and to the American legislators or to the German and American public) or in the American law of the eighteenth century and in contemporary American law.³³ All positivists from Hobbes to Kelsen tell us that the "ought" is enforced by the sanction, the force threatened by the State in the event of nonconformance to the "ought." In Kelsen's doctrine the "ought" is indeed *derived* from the sanction imposed. This, to be sure, emphatically does not carry any psychological implications of effective deterrence, at least so far as a particular norm is concerned. But it suggests deterrence *in abstracto*. Culturally, it is oriented to a particular type of "*homo juridicus*," the rational man who is at all times prepared to choose rationally between the pleasure of law violation and the pain of punishment, the law being conceived of as drafted with a view to meeting this anticipated process of weighing the proper amount of pain against the expected amount of pleasure. But how realistic is this concept of "*homo juridicus*" today, when the law itself is becoming increasingly conscious of Freudian psychology, in which the more frequent type is the "criminal impelled by unconscious guilt,"³⁴ yearning for punishment rather than guided by the rational desire to avoid its pain? In the realm of legal philosophy Maine commented on Bentham's hedonistic approach that if happiness and pleasure were the chief ends of men's striving, it was odd that for thousands of years men's aspirations, in the field of law at least, had tended toward a totally different goal in natural law.³⁵

A truly positivist "ought" is one which reflects the minimum meaning of law concerning which there is common agreement. Such "ought" is one compatible with both natural law and positivism, either the juristic positivism

philosophical treatment of rules proscribing conduct believed to belong to the class of *mala in se* and those understood to proscribe *mala prohibita*.

32. In law a statute is accorded a different force as a source of law than is a judicial decision, and the relative force of statute and judicial decision varies with the prevailing jurisprudence of legal systems.

33. Even in contemporary jurisprudence of the law there may be differences which bear on the intensity of the "ought" of a legal rule. Thus, the "ought" in *Long v. State*, *supra*, note 29, was rather weak and uncertain and it is on this ground that the court excused error of law. On this see Ryu & Silving, *Error Juris: A Comparative Study*, 24 UNIVERSITY OF CHICAGO LAW REVIEW 421, 459 (1957).

34. See GLOVER, FREUD OR JUNG? 96 (Meridian Books ed. 1956); REIK, GESTÄNDNISZWANG UND STRAFBEDÜRFTNIS, PROBLEME DER PSYCHOANALYSE UND DER KRIMINOLOGIE 151 (1925).

35. Cited in Allen, *Justice and Expediency*, INTERPRETATIONS OF MODERN LEGAL PHILOSOPHIES 15, 22 (ed., Sayre 1947).

of Kelsen or Holmesian "prediction," and consistent with any approach to "law" expressed in law itself.

There is a similar minimum acceptance of "unity" of any given legal system. Lawyers communicate meaning to each other when referring to the "law of the State of New York," the phrase implying that such law constitutes a distinctive unit. Beyond the scope of such common understanding, the concept of "unity" is more or less extensive, depending on the prevailing law and jurisprudence. For example, for some natural law adherents "unity" is tested in terms of some common commitment to "reason." A positivist's "unity" is tested in terms of "jurisdiction." But when thus tested, the "unity" of contemporary legal systems seems to be precarious. For "jurisdiction" has been described as "one of the most deceptive of legal pitfalls,"³⁶ as "a verbal coat of too many colors,"³⁷ and the doctrine of jurisdictional facts has been said to have "earned a deserved repose."³⁸ Paradoxically, inquiry into jurisdiction may be foreclosed by *res adjudicata*.³⁹ As the latter is in turn predicated upon jurisdiction,⁴⁰ the law is obviously moving in a vicious circle.

V. NATURAL LAW OR SOCIOLOGICAL JURISPRUDENCE?

When, frustrated by our inability to establish a more than nominal positivist system, we seek guidance in natural law, do we find real aid, comfort, and peace of mind?

There are, of course, various types of natural law and they are in conflict with each other. The problem varies, depending on the type of natural law that is involved. A distinction must be drawn between well-defined established natural law doctrines, such as those representing specific religious views, and natural law doctrines of a rather inchoate type. Nor should a

36. See Mr. Justice Frankfurter, dissenting in *Yonkers v. United States*, 320 U.S. 685, 692, 695 (1944).

37. See Mr. Justice Frankfurter, dissenting in *United States v. L. A. Tucker Truck Lines*, 344 U.S. 33, 39, 97 L. Ed. 4, 7, 8 (1952).

38. Mr. Justice Frankfurter, concurring in *Estep v. United States*, 327 U.S. 114, 134, at 142 (1946).

39. *Stoll v. Gottlieb*, 305 U.S. 165 (1938); *United States v. Mulcahy*, 169 F. 2d 94 (C.C.A. 2d, 1948).

40. On this see *Res judicata as affected by limitation of jurisdiction of court which rendered judgment*, 147 AMERICAN LAW REPORTER 196 (1943). Actually, within Kelsen's doctrine, juristic unity would seem to be afforded by a single act of recognition of another act which terminates a series of affirmances or invalidations of purportedly legal acts. See Kelsen, *op. cit. supra*, note 8.

mere identity of linguistic use mislead us: e.g., "reason" need not mean the same when used in different contexts or in different periods of history.

Thus, the scope of the controversy between positivist and natural law schools, as reflected in our contemporary constitutional law doctrine,⁴¹ should not be confused with that of the seventeenth century struggle over the finality of a legal judgment.⁴² Even where the nature of the issue is prima facie the same, the operational concepts have a widely different meaning; and this produces a change in the issue. Positivism has taught us that the essence of a judgment is not its "truth" but the fact that it cannot be "set aside."⁴³ "Reason" in Mr. Justice Frankfurter's "considerations deeply rooted in reason"⁴⁴ has a connotation *toto caelo* different from "reason" in "common right and reason" of *Bonham's Case*.⁴⁵ It would be a hopeless undertaking were we, when interpreting the former, to invoke the help of the latter. Our first task then is to reach some understanding of "considerations deeply rooted in reason."

Perhaps one might inquire into the type of relationship that is assumed to exist between such "reason," the complex object to which the "spirit of science" is allegedly directed, and "the community's sense of fair play and decency"—all of these being standards adopted in Mr. Justice Frankfurter's opinion in *Rochin v. California*.⁴⁶ One might be puzzled by the new vistas which use of these symbols has opened. Did Mr. Justice Frankfurter create a new legal "myth" in invoking "the community's sense of fair play and decency"? Who and where is the "community"? Is it the community of "the People" of the United States or the particular community from which a jury might be drawn? How does one establish "a sense of fair play and decency" for legal purposes? Felix Cohen might have said that "community" is a senseless notion, raising "a pseudo-problem devoid of any meaning." Professor Hart might struggle in vain to find either the precise meaning of the term on the basis of the "existing legal system" or, on the other hand,

41. Natural law trends have influenced court decisions in an increasing number of modern cases, both English and American. *In re De Keyser's Royal Hotel* (1919), 2 Ch. 197, affirmed *sub nom. Attorney-General v. De Keyser's Royal Hotel* (1920), A.C. 508; for further cases in England see Allen, *op. cit. supra*, note 35 at 26-28.

42. The Coke-Ellesmere controversy was essentially a dispute over the question whether justice, in the form of equity, could override a final judgment of law. It was thus ultimately a dispute over "natural" versus "positive" law.

43. See Lord Ellesmere in *Earl of Oxford's Case*, 1 Chan. Rep. 1, 21 Eng. Rep. 485 (1615). Obviously, Lord Ellesmere thought that the essence of a judgment lies in its establishing the "truth" rather than in its legal consequences.

44. See Mr. Justice Frankfurter's opinion in *Rochin v. California*, cited *supra*, note 15, at 171.

45. 8 Rep. 115 (1610).

46. *Supra*, note 15 at 171-173.

that no legal standard exists and that the judiciary has complete freedom to decide what constitutes a "community" or what that hypothetical "community" may be presumed, conjectured or somehow judicially found, to regard as fair play and decency. How would Professor Carlos Cossio's doctrine of the "*Plenitud del Ordenamiento Jurídico*"⁴⁷ resolve a problem of that nature? If, however, realizing the difficulties involved in trying to resolve the issue within the flexible notion of "due process," we consider the alternative suggested by Mr. Justice Black and Mr. Justice Douglas, namely, determination of Fourteenth Amendment due process issues wherever possible within the precise guarantees of the Federal Bill of Rights,⁴⁸ we may find that neither does the latter supply as "unequivocal, definite and workable" a rule as might have been expected. For it failed to protect Kahriger⁴⁹ under circumstances which came much more squarely within the meaning of Kahriger's being a "witness against himself" under the Fifth Amendment than were those obtaining in *Rochin*.

A careful analysis of the "natural law" of the *Rochin* case leads to the realization that this term is but a short-cut reference to sociological jurisprudence. The latter, too, is natural law, but one of rather flexible contents. Adoption of such "natural law" is for all practical purposes tantamount to enlargement of the scope of judicial discretion, which though reviewable, is not definable. As compared with the situation which would prevail had the standard suggested by Mr. Justice Black and Mr. Justice Douglas been adopted,⁵⁰ the majority view accepted "natural law" in the sense that its

47. COSSIO, *LA PLENITUD DEL ORDENAMIENTO JURÍDICO* (2nd ed., 1947).

48. In the *Rochin* case Mr. Justice Black and Mr. Justice Douglas concurred in the result, but thought that reversal of the conviction (based on evidence secured by use of a stomach pump) should be based on the ground that the accused's privilege against self-incrimination had been violated. As he had done in *Adamson v. California*, 332 U.S. 46 (1947), Mr. Justice Black stressed that the reliance on "due process," as interpreted by Mr. Justice Frankfurter, implied assumption of an uncertain natural law standard. See *Rochin v. California*, Mr. Justice Black concurring, *supra*, note 15 at 174-177. Mr. Justice Douglas concurring, *supra*, note 15 at 177, at 179, stressed the fact that the standard of the privilege against self-incrimination affords an "unequivocal definite and workable rule." Mr. Justice Frankfurter again defined "due process" in "natural law" terms in *Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U.S. 123, 162 (1951).

49. *United States v. Kahriger*, 345 U.S. 22 (1953). In this case not minor officers, as in *Rochin*, but the Sovereign, speaking through a duly enacted Act of Congress, compelled the accused to incriminate himself. Kahriger was required by federal statute to report his gambling activities in purchasing a gambling tax stamp. A further aggravating factor in *Kahriger*, as compared with *Rochin*, lies in the fact that Kahriger was a "witness against himself" by what he was forced to do himself, whereas *Rochin* was subjected not to psychological but merely to physical compulsion. *Rochin* was not placed into a situation of a conflict of conscience, to which the privilege against self-incrimination was historically geared.

50. *Supra*, note 48.

solution affords more discretion and less legal security than that preferred by the minority. In foreign countries a high degree of discretion and corresponding reduction of legal security have been often referred to as "natural law."⁵¹ Since no legal system can operate without resort to some natural law, in the sense of a reservoir of potential rules from which positive law may derive its future rules, the "natural law" invoked in the *Rochin* case is by no means *sui generis*.⁵² The difference between accepting and rejecting "natural law" is ultimately one of degree rather than of kind.

VI. LIMITS OF NATURAL LAW

A more clear-cut problem arises when political positivist doctrine clashes

51. On this see Silving, *The Twilight Zone of Positive and Natural Law*, *supra*, note 1 at 505-509.

52. For discussion of the various rules and institutions under the guise of which new rules are admitted sometimes into allegedly "closed" legal systems see Silving, *supra*, note 1 at 506-507.

The ease with which such rules develop or with which judicial legislation is frankly accepted depends to a large extent on the prevailing view regarding so-called "gaps in the law." In civil law countries, the issue of gaps in the law is mostly considered to be a jurisprudential problem, and writers diverge as to its resolution. Some maintain that if there is no provision in the code creating a right of action in the plaintiff, judgment must be for the defendant, for the civil code is a "closed system." Where the code itself delegates to judges the authority to create law (as, e.g., in the famous article 1 of the Swiss Civil Code), the judges merely act as an arm of the legislature. See KELSEN, *REINE RECHTSLEHRE* 100-106 (1934). Other writers maintain that there are gaps in the law.

It is believed that whether or not there are "gaps in the law" depends not only on the provisions of a particular legal system but also on the jurisprudence of such system. The opinions of commentators, essentially constituting metalegal jurisprudence, are deemed in countries of the civil law an important part of the law, and such opinions are thus authoritative as legal jurisprudence.

The "theory of gaps" is conspicuously shunned by Anglo-American jurisprudence. The reason is obvious. The common law is a law of gaps. It has developed on the tacit assumption that there is such a thing as a case of first impression, that is, a case which has not been resolved by prior law or which has been only theoretically resolved, the rule remaining undiscovered. The philosophical view that there are "gaps in the law" is thus unconsciously assumed in common law countries, and that view is so firmly rooted in these countries that no need has been felt to formulate a "theory of gaps."

Note, for instance, that in the jurisprudential dispute over the problem of whether in the absence of a rule a judge must decide in accordance with community views or rather follow his own hunch or predilection, lawyers trained in the common law tradition hardly consider the possibility that this problem may have been resolved by the statute at issue in the case. On this see Barna Horvath's Comment on Cahn, *Authority and Responsibility*, in *FREEDOM AND AUTHORITY IN OUR TIME* 213-214 (Twelfth Symposium of the Conference on Science, Philosophy and Religion, 1953). This attitude of common law lawyers is not erroneous, so long as it is embedded in the legal jurisprudence of our law. For this jurisprudence is part of our law, in a broader sense. This has been completely misunderstood by some civil law writers. Notice, for instance, the following passage in

with absolute natural law. Nor is the difficulty limited to mutual intolerance of opposing doctrines. There is a deeply rooted ambiguity in such natural law itself. It lies in the fact that to the extent that it professes to be more than ethics, absolute natural law depends upon positive law for realization and that such law is, at the same time, not fully compatible with realization in the forms of positive law.

Observation of law at work shows that in law, in contrast to ethics, preservation of certain forms is the best, and at times the only, safeguard of substantive justice.⁵³ Indeed, in the light of the limitations of the processes of both law and fact finding, proper formal safeguards often prove to be more significant than mere substantive rules. But natural law must stand ever ready to sacrifice form to substance. Thus, e.g., even when supporting the ideal of *nulla poena sine lege*, it cannot maintain this ideal against a claim of substantive injustice. Natural law, though the original source of the legality principle, has also often rendered it nugatory.⁵⁴

Natural law is weakened, if not frustrated, when it appeals to positive law for fulfillment of its rule. For the highest, purest, most sublime ideals prove self-defeating when an attempt is made to incorporate them into human laws. This has been best expressed by Romano Guardini:

The Sermon on the Mount is the most sublime moral document which mankind possesses; but, notice, a moral document in a strict sense. For if instead of regarding it as a source of purely moral inspiration, we were

COSSIO, *PLENITUD DEL ORDENAMIENTO JURÍDICO* 26, in which the author censures so-called "realism" for contradicting itself in assuming the existence of gaps:

It contradicts itself because a judgment rendered on the margin of the logics of the ought to be is a judgment that ought not to be. And it contradicts itself because juristic theory asserts the priority of the general norm with regard to the judgment, so that the contrary occurring in the hypothesis (assumed by that theory), the facts would remain without theoretical-juridical conceptual formulation, that is, it would be impossible to think of them scientifically. In fact, the mere assumption, evolving (from such a notion), of a juridical dogmatic science which places general norms a posteriori of individual norms is a logical self-contradiction for it destroys the possibility of subsumption which characterizes all dogmatic construction.

With this, it seems, the learned writer has ruled the common law out of existence.

53. Of course, without determining what is justice, it is possible to answer the teleological issue of what are the best means of achieving a particular ideal of justice. This involves an ethical decision only if, in determining what are the best means, consideration is also given to the ethical value of the available means.

54. Thus, the legality principle has been nullified where it conflicted with "morality," the court declaring "morality" to be "a part of the common law of England." *H.M. Advocate v. Greenhuff and Others* (1838), 2 Swin. 236 (Scotland). For discussion of this case and present Scottish law see W. A. Elliott, *Nulla Poena Sine Lege*, 1 *THE JURIDICAL REVIEW* 22 (1956).

to attempt using it as a directive for a legal or political organization, it would lose its grandeur and appear to be a proof of cowardice.⁵⁵

Moreover, the ethics of the Sermon on the Mount is — to use Max Weber's terminology⁵⁶ — an "ethics of attitude" (*Gesinnungsethik*), oriented to purity of intention rather than to responsibility for the results of action: "The Christian does right and leaves the result up to God." But positive law must concern itself with the effects of action. Often it cannot evaluate the intention except as it appears from outward conduct and its results. Its ethics is an "ethics of responsibility." The minimum requirement it imposes is that man exert his conscience to find the legally correct decision in situations involving grave moral conflicts of values.⁵⁷

The attempt here has been to show that the relation of positive to natural law is not one of "either positive or natural law," but rather one of "more positive and less natural law" or vice versa. However positivist its initial conception, positive law cannot remain self-sufficient. It must draw its vitality from the facts it purports to pass upon and from the human beings whom it endows with legal personality. It must ultimately depend for application on language and meet the pitfalls of its daily development and change. No positivist system can exclude the natural law supplied by its unique facts, its human subjects, and its language. Nor can any legal system exclude the natural law of jurisprudence, for even positivist jurisprudence may turn out to be its natural law. Completeness of a legal system, particularly *nulla poena sine lege*, is a valid ideal; but it can never be completely fulfilled. On the other hand, natural law, meaning something more than ethics, is predicated upon the existence of a positive legal system.

Coexistence of positive law and natural law is inherent in law. But the frequent coexistence of conflicting ideals of natural law and positivism in historical legal systems is not dictated by logical necessity. It is rather explainable by an inconsistency in the approach of those who ultimately make and suffer laws, namely, men. This inconsistency is the result of men's unresolved conflicts of desires. It is reflected most clearly in those cases where ethically significant legal rules do not conform to the dominant legal philosophy. Thus, it may be observed that where the prevailing legal philosophy is that of absolute ethics, certain legal rules are strangely utilitarian and vitalistic. On the other hand, where the prevailing ethics is utilitarian,

55. Translated from Spanish quotation in RECASÉNS SICHES, *VIDA HUMANA, SOCIEDAD Y DERECHO* 148 (2nd enlarged ed., 1945).

56. WEBER, *POLITIK ALS BERUF, GEISTIGE ARBEIT ALS BERUF* 54 (1919).

57. Ethics of responsibility is the basis of the present German approach to error of law in criminal law. On this see Ryu & Silving, *op. cit. supra*, note 33.

legal rules frequently follow absolutist lines. In Kant's own country, Germany, necessity killing is excused and, beyond the area of permissible necessity killing,⁵⁸ the law will excuse man's reasonable mistaken belief that killing was allowed.⁵⁹ Also extralegal necessity is recognized as a judicial concept. In countries of predominantly utilitarian ideology, England and the United States, the law adheres rigidly to the sanctity of life; nor is an erroneous belief in the lawfulness of killing ever excused.⁶⁰ In Kant's own country, an accused has a right to lie,⁶¹ and a witness's responsibility for perjury is reduced where the latter was induced to commit it by a state of necessity.⁶² In common law countries there is no right to lie, and there are no special statutes expressly authorizing judges to reduce punishment of a witness who perjures himself in a state of necessity.

These strange inconsistencies may lead to difficulties of legal interpretation in cases of first impression involving a potential conflict between the prevailing philosophy and analogy to a particular legal rule that is inconsistent with such philosophy. In such situations it might be helpful to know more about the nature of the psychological conflict which is reflected in the legal conflict.⁶³ For unless the former is resolved, the latter can hardly be expected to be eliminated. Nor can such conflict be eliminated by mere legal fiat.

The law might also turn to modern psychology for assistance in resolving other problems arising in the borderline area between positive and natural law. One such problem is posed by Judge Learned Hand as follows: In applying the community standard to test man's moral character, should the judge assume such standard to mean the community's moral judgment or the actual mores of its members?⁶⁴ These two tests may differ to such an extent as to render doubtful the applicability of either. Perhaps the correct standard should be a constructive one, drafted on the hypothetical assumption of the existence of a sane society in which morality and mores are as far as possible reconciled. This may suggest the emergence of a new idea of natural law, based on the deeper understanding of man which Freud's discoveries have made possible.

58. On this see Silving, *Euthanasia: A Study in Comparative Criminal Law*, 103 UNIVERSITY OF PENNSYLVANIA LAW REVIEW 350 (1954).

59. On this see Ryu & Silving, *op. cit. supra*, note 33 at 456.

60. On this see Silving, *Euthanasia, op. cit. supra*, note 58.

61. On this see Eb. Schmidt, *Zur Frage der Eunarkon-Versuche in der gerichtlichen Praxis*, 4 SÜDDEUTSCHE JURISTEN-ZEITUNG 450, 451 (1949).

62. Section 157, Penal Code.

63. Psychoanalytical studies with this end in view should be encouraged. On this see Kessler, *In Memoriam of Jerome Frank*, 2 NATURAL LAW FORUM 1 (1957).

64. Schmidt v. United States, 177 F. 2d 450, 452 (C.C.A. 2d 1949).