

NATURAL LAW AND NATURAL RIGHTS

MAX RADIN†

THAT there is a moral unity of mankind is not a new idea. But it is, after all, not as old as man himself. It is not an idea inherent in the existence of man. There is reason to believe that as long as three hundred thousand or even five hundred thousand years ago, there were creatures on this earth sufficiently like us to be called men. It is quite possible that they possessed a social instinct, that is to say, that they lived in groups and not as solitary animals, in defiance of Thomas Hobbes. But that they had any idea or ideas about the moral unity of man, I am fairly sure, was not the case, although about things that took place so long ago, one should speak with proper diffidence.

If only those things are natural which men do instinctively, or as conditioned reflexes or in whatever other way we describe the non-deliberate activity of the human body, then to have an idea about the moral unity of man is non-natural. But at various times and places such an idea did develop. To take one example, it can be found at a time which in view of these hundreds of millennia, must be called very recent indeed. The society depicted in the Homeric poems is one in which war is a matter of course and in which indiscriminate slaughter, sacking and burning are incidents of war. But the suppliant stranger whose peaceful intentions are assured by his helplessness or his obvious good faith, may not only not be molested, but must even be protected and sent with gifts on his way. And there is not any indication that this situation is conditioned by community of speech or origin or a previously established formal relationship of guest-friendship, *hospitium*. Accordingly, a man as such, not merely a Greek or the ally or the "guest-friend" of a Greek, had claims upon those Homeric Greeks who asserted that they were civilized. The existence of such claims is enough to establish an incipient world-order in which men, as men, have a place.

Within the next thousand years, there appeared both in the Far East and in the Mediterranean area certain movements which were definitely based on an assumed moral unity of man. We speak of Buddhism as a religion but it was not a religion in the older sense of the term, though it could well be called a religious philosophy. On the other hand, a Hellenistic philosophy like Stoicism had much the function of a religion in the modern sense for the Greeks and Romans. And the Stoic emphasis on world-citizenship was shared in theory by Cynics and Epicureans and had earlier precursors among pre-Hellenistic Greeks. The spread of Christianity and Islam in the West in the millennium after Alexander followed the pattern of the spread of

† Professor of Law, University of California.

Buddhism in the East. All these movements, whether called philosophies or religions, declared as a fundamental doctrine that all men were potential members of a community constituted by those who shared specific ideas about the world and men.

This was a real community, not an ideal one, a community in which men had special relations to each other by reason of belonging to it. To the Stoics and even more to the earlier Christian groups, it took on something of an organized character, the City of Zeus, or the Cosmopolis, for the Stoics, the City of God, the *civitas Dei*, for the Christians. And the *civitas Dei* in medieval times became, as we know, an unmistakably organized state, the Church, which, indeed was the only organized state of that period in Europe which bears comparison with modern state-forms.

But while these movements were based on the idea of the moral unity of man, the actual community created by them never became a world-order in fact but remained only a potential world-order. Neither Buddhism nor Stoicism nor Christianity nor Islam ever gathered all men within its bond, however willing each was to do so, not even all men of the same degree of civilization as Buddhists, Stoics, Christians and Moslems. But the fact that all men could be so gathered, created relations between them, whether or not they were in the bond. In one respect, the more ancient bond between man and man that is typified in the Homeric relation between the suppliant stranger and his host is more to our purpose. It was created, not by the acceptance of a common doctrine, but by the mere fact of humanity. Those who did not recognize the relation were by that fact alone, savages or monsters, Cyclopes or Laestrygones.¹

The relations were expressed by various words of common speech. We shall have to use these words of common speech, remembering that they are exactly that and that they are not precise and scientific terms. Precise terms are simply not available to describe human relations. We shall have to get our words as near to precision as we can, but that will, I fear, not be near enough to satisfy many persons, especially those who have denied the right of any social scientist to call his discipline a science at all.

Human beings have a way of using their words in senses that shift with time and circumstances and they are utterly oblivious of the trouble this will cause lawyers or social scientists generally. Justice Cardozo in attempting to state the law, sighed: "Oh, for a logarithm!"² I cannot offer any legal or social logarithms, but I propose to do something with a few necessary words, which will make up a kind of bastard mathematics, good enough for social scientists, although mathemati-

1. ODYSSEY, IX, 106 *et seq.*, X, 106, 116.

2. CARDOZO, PARADOXES OF LEGAL SCIENCE 1-2 (1928).

cians and exponents of the enviably exact sciences will look at it with deserved contempt.

When I mention groups and the reciprocal relations of the people in the group, I must call attention to one thing. These relations, whatever they are, are not created by the group, nor derived from the group either as a corporate or quasi-corporate entity. On the contrary, the relations taken together constitute the "group". The "group" is itself merely the sum of those relations and has no independent existence outside of them, although as such a sum it has an existence, which is a special sort that would satisfy neither medieval realists nor modern existentialists.

This, I think, holds for all groups, that is, for all collections of human beings who acknowledge relationships to each other which are not the same as those which they have with persons who are not members of the group. The difference in *this* respect between a small and loosely organized group, and the most tightly organized modern monster-state is chiefly a difference of degree, of quantity and intensity, rather than a difference in kind. The relations whose sum *is* the state are somewhat changed, it is true, by being integrated into a system in which there is subordination and interlocking and many kinds of interweaving. I suppose it is a commonplace in modern science that if *m* and *n* are added together, it may happen that neither remains the same. This is what makes it so easy to give to the state a kind of personality, a fact fraught with considerable danger to the much more real personalities of the men whose relations make the state.

All this, of course, is an obiter dictum. My heresies in the matter of dealing with the state are, by all orthodox doctrine, grave and excommunicable. And in any case, if I undertook to set these heresies forth and defend them, I should have a lengthy task. What is important is that the state as I envisage it is neither Austin's nor Hegel's nor Gierke's nor Kelsen's, nor even Duguit's or Laski's state, but a construction of a different sort. If I must choose, I prefer the state of Alcaeus and Sir William Jones which was made up of men, not of walls and battlements, not even of territory.³

Now, among these words of common speech which describe some of the relations of persons within any group, are two words to which I shall have frequent occasion to refer. They are the words "ought" and "may". And it is necessary to deal with them in a somewhat school-masterish fashion. When we are talking of such lofty matters as natural law and the rights of man it seems petty and trivial to give painful attention to words. But there is no help for it.

The words "ought" and "may" are harder words than they seem.

3. ALCAEUS, 1 LYRA GRAECA 312 (Edmonds' ed. 1927); quoted in ARISTIDES, OR. II; Sir William Jones, *Ode in Imitation of Alcaeus* in ENGLISH POETS 466 (Johnson's ed. 1810).

They are, I think, so definitely at the basis of group existence, that they cannot be thought away without dissolving the group in our minds, although there are other relations between members of a group. That is true whether the group is an almost unorganized collection of primitive people with little consciousness of their relationships, like some isolated American Indian tribes, or an intricately organized modern state like France or the Prussia before the first World War. They are, therefore, relations that are quite natural since man, so far as we know, is the kind of animal that always is found in groups. I am one of those who think that man is a natural phenomenon, a datum of nature itself, not a creation of political thinkers.

The word "ought" is a completely familiar one, and we say quite correctly that what a person "ought" to do can be expressed by saying that it is his "duty". If I begin with the idea of "duty" rather than that of "right" it is because of the difficulties of the language, and not in the least because duty is a finer and nobler thing than right. In fact, I hope to show that this is not, indeed cannot, be the case. If we try to analyze the term "duty", we are clearly expressing a value judgment. We mean that to do a thing is better than to leave it undone; or if we say "ought not", that to leave it undone is better than to do it.⁴ And by the word "better" we imply a known moral standard; not an arbitrary or whimsical decision of our own but a moral standard that we know to be fairly generally accepted in our community.

So much is pretty well apparent. But it is not always apparent that to use the word "ought" is not merely to render a value judgment of an act, but of an act in relation to some other person. Although this other person is often a determinate and identified human being, at least as often he is indeterminate, that is to say, he is a person, fully imagined as a living human being, but as yet unidentified except as a member of some larger or smaller class. Robinson Crusoe, for example, had no duties because there was no person, identified or unidentified, determinate or indeterminate, to whom he owed any duty. The moment other persons are present, duties arise by their presence, either their duties to us or our duties to them.

Thus duty is a relation. It must, therefore, be possible to look at it from the other end of the relation, namely, the person to whom the duty is owed. What shall we say of him? If *A* has a duty to *B*, what has *B*? It needs no profound analysis to see that *B* has a right to have *A* do what it is his duty to do for him (*B*). Indeed, it can be expressed in no other way.

It is here that people, both lawyers and non-lawyers, should be careful of their words. It is frequently said that *A*'s duty "implies"

4. Felix Cohen, *The Ethical Basis of Legal Criticism*, 41 *YALE L. J.* 201 (1931); cf. MORRIS COHEN in *MY PHILOSOPHY OF LAW* 288-90 (1941).

B's right, or that *A*'s "duty" is "supplemented" by *B*'s right. That is an unfortunate and misleading way of speaking. The terms "duty" and "right" are not supplementary nor do they imply each other. They are the same thing. They are the same relation looked at first from one end and then from another. That is why duties cannot be nobler or better than rights. When we have two aspects of the same thing, one cannot very well be superior to the other in fact, though it may have, as a word, "finer" connotations. To help us visualize this fact it is customary to use metaphors or similes, *e.g.*, the two sides of the same shield, the curved line which is at once convex and concave. These figures of speech are crutches that are helpful in exposition, but they are usually not illuminating, and the fact that a relationship, being merely a statement that two things are connected, must be capable of being viewed from either side, is really no very difficult notion to grasp. If we call the duty and the right the converses of each other, that will be satisfactory enough.⁵

The right-duty relationship is, however, not the only situation in which "right" is used. And here we are once more confronted with the difficulties arising from the fact that people talk as they please and not as analyzers of their ideas would like them to. We frequently use "right" in a wholly different sense. This sense is expressed by that other word I mentioned, the word "may". Just as "ought" means that one course of action is superior to another, so "may" is also a valuation. It means that doing and refraining from a specific act are equal in value, and equal by the same standard which is applied in the determination of a duty. We may express it in still another way. When *A* "may" do something, this fact contradicts or denies the existence of duty in *A* to refrain. When *A* "may" refrain from an act it contradicts a duty in him to do it. And when we say it contradicts *A*'s duty, we are also saying that it contradicts *B*'s right, whether *B* is an identified person or an undetermined member of a class.

It is unfortunate to have a word like "right" used in these two senses. And in most of the Continental languages, the word "right", *droit*, *Recht*, *diritto*, *derecho*, like the Latin word *ius*, which is their model, is used in still another important sense, which sometimes adds to the utter confusion of legal reasoning. The older common law distinguished the two senses in terminology, and we can only regret that the distinction has not been maintained. They called the right expressed by the word "may", the right which is the contradiction or denial of a duty, a "liberty"; and since they used it chiefly in the plural, *i.e.*, "liberties", there was little danger of confusing it with "liberty" in a grander and more important sense. The liberties of an Englishman

5. This analysis is based on that of Wesley N. Hohfeld but in a modified form. Cf. Radin, *A Restatement of Hohfeld*, 51 HARV. L. REV. 1141 (1938).

—the common law was not interested even in Scotsmen—meant those things an Englishman might do or refrain from doing without violating a duty. It is, as a matter of fact, in this sense that the word “right” is chiefly used in those documents which, beginning with the Petition of Right of 1629, culminate in the just promulgated Declaration of Human Rights. There are a great many accretions in the later members of this series, the French Revolutionary *Declaration*, for example, and the more modern restatements of it in a great many formal written constitutions, but the rights that appear in nearly all the restatements are the common law “liberties”, rights which not only are not part of a right-duty relation, but which contradict such a relation.⁶

If we add these two kinds of rights together, we have in each community a portentous sum, and for this sum there is a name. It is the word “law”. But it is law in a larger and older sense than the law which is symbolized by policemen, judges, lawyers or professors of law. Therefore, we must first of all invert the popular conception in the matter. Law originally does not create rights. It is merely the summation of a great number of miscellaneous rights that were created by life in the community. There are more and more of them as life in the community becomes more and more complicated, and they change in content and character as the community changes. They cannot escape history. And when this miscellaneous group of rights gets beyond the capacity of any person to remember in the casual sequence in which it arose, someone puts an order or organization into it, not for scientific, but for mnemonic purposes. This organization, or classification, has never in any community become complete and exhaustive, although in Western Europe thousands of expert classifiers and arrangers have been busy for at least two thousand years trying to get a really orderly and scientifically defensible classification into the law.

Just as the law does not create the rights which it merely adds up and ineffectively classifies, so it is important to note once more that the community or group likeness does not create them, not even when the lowly primitive community, the *komē*, becomes a lordly *polis*, or

6. All the “declarations of rights” may be found in the book of AULARD & MINKINE-GUETZEVICH, *LES DÉCLARATIONS DES DROITS DE L'HOMME* (1929), where the French form is especially studied. Cf. FRANCK-ALONGRY, *LA DÉCLARATION DES DROITS DE L'HOMME ET DU CITOYEN* (1901); MARITAIN, *LES DROITS DE L'HOMME ET LA LOI NATURELLE* (1902) (an English translation is available by Doris C. Anson); JELLINEK, *THE DECLARATION OF THE RIGHTS OF MAN AND OF CITIZENS* (Farrand's tr. 1901); MARCAGGI, *LES ORIGINES DE LA DÉCLARATION DES DROITS DE L'HOMME DE 1789* (2d ed. 1912); REES, *DIE ERKLÄRUNG DER MENSCHEN-UND BÜRGERRECHTE VON 1789* (1912); SALANDER, *VOM WERDEN DER MENSCHENRECHTE* (1926) (concerning the Virginia Declaration of 1776); ALVAREZ-TABIO, *ORIGÉN Y EVOLUCIÓN DE LOS DERECHOS DEL HOMBRE* (1942); Friedmann, *Rights of Man* in 24 *GROTIUS SOCIETY* 133-45 (1939); Muirhead, *Rights* in 10 *HASTINGS ENCYC. RELIGION & ETHICS* 770-7 (1919); and Crane Brinton, *Natural Rights* in 11 *ENCYC. SOC. SCI.* 299 (1933).

state. This community also is merely a sum of relations, but the sum of many more relations than the legal relations of "ought" or "may". It cannot grant or give anything to persons whose relations it expresses by such existence as may be predicated of it.

There is another legal relation which I have thus far omitted. It is based on "power" and its converse, "submission" or "subjection."⁷ These are unfortunate words in that they suggest psychological conditions and emotional difficulties which should be eliminated. There is, regrettably, no adequate word for the idea. But, however expressed, the power relation, which is extremely important in law and still more so in politics, involves so many technical matters that I must be excused, if I omit it in this discussion. We must merely remember that it is most decidedly present at all times. I shall briefly define it as the capacity to create or end duties, and therefore rights of both kinds, and similarly to create or end other powers.

I began with the word "duty" because it was convenient, and I deliberately ignored the fact that "duty" suggests to most of us not law at all, in either an old or a modern sense, but morals or ethics. The contrast between law and morals is an all too familiar one, and we often speak of what a man may legally do which he morally ought not to do, and what he legally may refrain from doing which he morally ought most decidedly do. The famous Latin phrase, *summum ius summa iniuria*,⁸ especially in its early form, appearing in the Roman poet Terence where it is almost surely the translation of a phrase of Menander, is merely a statement of this contrast, made into an epigram by the double meaning of *ius*, the equivalent of "right". All the expressions of these contrasts merely say that the same course of conduct may at the same time be a legal liberty and a moral duty.

Previously I said that "ought" and "may" are valuations on a moral standard, and the sum of all the "oughts" and "mays", the rights and liberties, together with the powers, are law. Where does this contrast come from, in which we find a duty in morals where there is a liberty in law? The answer is simple. It is a mere accident of the development of a specialized institution in West European society. What we now call law,—law in a technical sense—is the product of a differentiation in the functions of government, a differentiation that took place not merely casually, but we may say quite unintentionally.

In the older stages of West European communities, the statement that a thing could be legally right and morally wrong, that a man had a legal liberty to act but a moral duty to refrain, would be unintelligible.

7. For "powers", cf. the article already cited, Radin, *A Restatement of Hohfeld*, 51 HARV. L. REV. 1141, 1157-64 (1938).

8. Cf. STROUX, *SUMMUM IUS SUMMA INIURIA: EIN KAPITEL AUS DER GESCHICHTE DER INTERPRETATIO IURIS* (1926). For the original form, see *TERENCE, HEAUTON TIMOUCHEMENOS*.

Communal standards were enforced by communal sanctions. When they exercised their powers, the governing agents or officers of the community, the magistrates, needed communal support. They were never so sure of having this support as when they dealt harshly with persons who had violated duties, any duties, and were never so sure of not having it as when they dealt harshly with one who had violated no duty, but merely exercised his liberty.

But magistrates had other things to do besides enforcing moral duties and refusing to interfere with moral liberties. They were military leaders and priests. When not priests in a religious sense, they were the officiants in political procedures which they thought of as a kind of ritual. In a number of Western communities the function of enforcing communal moral standards came to be the special concern of certain magistrates who either did nothing else or at certain times and places did nothing else, thus leaving other magistrates free for the tasks of administration and war. The institution which we call a "court" arose in this way and like most institutions developed interests and a set of values of its own. This institutional development arrogated to itself the name of "legal" as its peculiar designation and made it possible for moral and legal standards to become divergent. It would be a great error, however, to suppose that those who managed this institution meant to do this or that in the formative stages they knew they were creating such a divergence. The court was thought of as a device, a mechanism, for securing the moral standard—the law in its older sense—which, when a particular application was challenged, called itself justice.

How did the divergence come about? We must first note at the outset that the divergence is marginal. For the great body of the ideas expressed and judgments rendered by the court, moral and legal standards were always identical. The divergence is found, first of all, in those matters which the court spun out of itself, the matters dealing with its special ritual-procedures. Rituals, we know, always create in those who perform them, a strong sense of independent value for the ritual, the value derived *ex opere operato*. And since on the other hand, the courts, however differentiated, are part of the machinery of government, those magistrates, who are the court, in certain striking cases fall into the danger of substituting their judgment for what they know is the accepted standard of the community. Their judgments make law, because by them new rights and liberties are created. If the court is arbitrary and headstrong the liberty which is confirmed by technical law may thus be confronted with a duty asserted by law in the larger moral sense.

Another source of divergence was the fact that in all forms of law, the larger as well as the smaller, the standard of value was to some extent a quantitative, not exclusively a qualitative, one. It was a Stoic

paradox that all duties were of equal value, but it is hard to believe that sensible persons, even sensible Stoics, took this seriously. Nearly everybody supposed, and acted on the supposition, that in some duties, it was much better to do a thing than leave it undone, and in other duties it was only a little better.

I have spoken of duties as value-judgments on the basis of a communal moral standard. In many communities, but by no means in all of them, we know that this standard exists by what the community does when it is disregarded. There are extreme cases in which it is a matter of life and death. There are others in which it is merely a matter of ostracism, ranging from total expulsion to the withdrawal of association with the violator, by a number of precisians, for a longer or shorter time. In other cases, it involves a reduction in status or a loss of property. And there are, of course, other forms of expressing communal resentment.

These various forms, which have since John Austin's time received the technical designation of "sanctions",⁹ frequently co-exist and indicate of themselves that duties both to do and to refrain are not of equal value. There are some situations in which in spite of a recognized duty there is no sanction at all, or so mild a sanction that it can be ignored with impunity. You ought not say: "Go up, thou bald-head!" to venerable prophets. But if you do, it is unlikely, after all, that she-bears will come out of the wood to tear you apart, and members of the community will probably merely shake their heads at your bad manners.

Where courts have detached themselves from other governmental agencies, and the power to enforce sanctions needs the initiation of a magistrate, there is a penumbra of situations in which the court is either not certain of the communal standard or not certain of the degree to which an act is disapproved of by the community. This disapproval, being a disapproval expressed by actual living human beings, changes with time and conditions. The court may therefore find itself applying a sanction on which the community no longer insists, or on which it insists less strongly or more strongly than the court knows or—if court-activity has become schematized, as it almost inevitably has—more or less strongly than the court is empowered to act. It is in this penumbra that the divergences between legal and moral duty—which is another way of saying between law and morals, law and justice, law and ethics—are most frequent.

But at all times, the divergence sticks in the crop of the court whenever it is conscious of it. The popular notion that courts are indifferent to it is quite false. In the two communities in which the differentiation

9. "Sanction" as applied to penalties or rewards is already used by Cumberland and Blackstone. It was, however, in connection with Austin's theories that the form became almost technical.

between the court and the other agencies of government was most sharply made, Rome and modern England, judges have at times irritably declared that they were judges and not professors of morals, but that has generally been said in an outburst of peevishness. In the main, courts are extremely ill at ease when their judgments do not reflect communal moral standards, a fact of which they are usually well enough aware, since after all they also are members of the community. Both in Rome and England, when divergences between law and morals became frequent enough or sharp enough to awaken the conscience of the court, correctives were applied in one fashion or another. In Rome it was done by an exercise of magisterial power; in England it was accomplished by the creation of a new court with power of interfering in the operation of existing courts.

The fact that divergences, often in a new form, continued in spite of these correctives cannot be made especially significant. Divergences in the application of purely moral standards by those who profess especial and exclusive competence in such applications and are consciously applying only moral standards also exist, and, so far as our records go, always have existed.

The technical law, the narrower or more schematized law, is thus found in the operation of courts. And I have indicated that courts are a special and more or less accidental development of certain communities, chiefly in Europe. In a great many communities quite as civilized as these others, the differentiation which resulted in courts did not take place or took place only imperfectly. China is one example, Judea another, and many Islamic states show the same picture. In these communities governmental and what we call judicial functions were performed by the same persons, and these persons in most instances had religious functions as well. Developed religions assume the guardianship of morals as their particular task. Clearly under such circumstances, divergences between moral and legal duties would appear chiefly in the form of higher and lower valuations on acts which were in general taken to be of the same sort. But since judicial procedures can scarcely fail to be established, even where there is no differentiated court, whenever controversies arise, the magistrate or elder or imam, who was both judge and moral guide, found himself occasionally under a necessity of rendering a judgment which was morally unsatisfactory to himself. Most of the famous apologies of the "just judge" with which Oriental narratives are filled are based on some ingenious device by which he avoids doing so.

All this it has seemed to me necessary to say, even at this inordinate length, because I cannot imagine law, whatever the adjective which precedes it, to be anything but a sum of rights, both right-duties and liberties, together with powers which for the present I have not undertaken to discuss. And if we make a distinction of kind between the law

that issues from the judicial functions of government and the moral law, we quite mistake the nature of law, and the content of the rights which it sums up. The difference, between the two, is, in the literal sense of the word, a factitious one, although it is natural enough in one sense, since there never have been institutions that did not more or less rapidly schematize themselves.

There is another function of government in Western society, whose operation has even more limited and restricted the notion of law, with extremely bad results to our thinking. This is the function that we now call legislative. The notion that anyone, a man or a group of men, may sit down and "make" a law is quite old indeed, and there is certainly nothing absurd about it. I say this last because a great many theorists trained in the historical school of Savigny and his followers, such as Sir Henry Maine, have been prone to say that law cannot be made that way. I think they are wrong, but it is true that not all the law is made that way, and when it is so made, it often suffers a certain chemical or physical change before it really becomes law.

Once more we must deal with the schoolmaster's hobby and the despair of analysts, human speech. Our word "law" is the Latin word *lex* and there never has been a doubt what the Romans thought *lex* was. Its practically inseparable connotations are derived partly from its Roman history and partly from "law" in its most majestic sense, "The Law" given to Moses on Sinai. As far as the history of legal theory goes, it is this latter picture which has overwhelmed imagination. A great many of the difficulties in matters of the utmost modern urgency have been created by what can be flippantly called the deleterious influence of the Ten Commandments, not of their substance, I hasten to add, but of their form, the reverberant "Thou Shalt Not!"

That the Roman *lex* was a command is as undoubted as the imperative character of the Decalogue. The magistrate formally presented to the citizens assembled in military array the question: "*Velitis iubeatis Quirites*"; "Is this, Oh Romans, your will and command?" And in the great Corpus of Justinian after more than three centuries of de facto despotism, it was gravely announced that properly only that is law which the Roman people, duly summoned and formally addressed, had commanded. Everything else was law only by a sort of delegation, or as a figure of speech.¹⁰

But the Romans never thought that *lex* was the only creator of rights, of *iura*. Quite the contrary. And since I have complained of the Continental languages which used their words for "right" ambiguously, I ought to complain even more that in English the word "law" has assumed a meaning which in its Roman origin it did not have. From being a legislative command, it has taken on in English the meaning

10. INSTITUTES 1.2.4.

of the sum of rights and has created the idea among non-lawyers that it is the best or only way of summing up rights. I should say at once that English lawyers, the men of the common law, not only did not think so, but rather reluctantly admitted that legislation could have much to do with law at all. Their word *ley* was sharply distinguished from *estatut* ("statute").

For those who declared the law, both on the Continent and in England, legislation was always only one source of several for determining what communal standards of action are. But for those who discussed theories of law, political philosophers or philosophers in general, the notion of the legislative command assumed a paramount position since it seemed to fit so well into theories of sovereignty on which in the sixteenth and seventeenth centuries national states based their right to exist. After the rise of democracies, it fitted as well into theories which placed sovereignty in the people rather than the prince. Particularly it fitted into the doctrine that reason could perfectly and finally organize the world—a doctrine which, during the Illumination, was implicitly believed by educated persons. The kind of law which was a sum of miscellaneous rights was obviously irrational. Why not put it, as could so easily be done, into an ordered arrangement? But that needed a legislative command.

All these things together, the confusion of terminology in English, the confusion of ideas generally about rights, the rise of concepts of national sovereignty and the apparent simplicity of establishing a systematized code by legislative fiat in place of a disorderly series of rights put together as the need for stating them arose, all these things made the notion that law is a command of governmental authority easily the dominant one even among those who did not call themselves positivists.

This made a new severance, and a far more drastic one, between law and morals. When law, in the technical sense, was merely that sum of rights which were declared and enforced by the judicial side of government, it was only in a penumbra that a contradiction appeared and only there that a moral duty could be a legal liberty. But when law is a command of governmental authority there is a difference of kind. Law is no longer a sum of rights that exist because they cannot help existing, since they are relations between men who must have relations. It is still a sum, but it is a sum consciously made by persons who have the power to make it, a sum that can at any time arbitrarily be increased or diminished. Morality or ethics or justice becomes a sum of wholly different relations which only accidentally coincide with one another, and the law may not be criticized whenever the coincidence is slight.

What happens then to our moral unity of man? The community that is created by that idea has no government. Therefore, under the com-

mand theory it cannot have a law, natural or non-natural. This brings the valuation on which human rights depend down to a lower scale of values. The only scale recognized as legal repudiates a merely moral judgment. Good men ought not to injure others anywhere in the world, but if the persons injured are not co-nationals, who alone are protected by the court, to refrain from injury is only a little better than injury. Communal disapproval can be expressed by a shrug of the shoulders, if at all. The baleful doctrine of law as a command, compounded out of semantic confusions and historical pressures, which are casual in time and place, excludes a law based on a common humanity, and makes the acknowledgment of whatever exiguous duty is admitted to be present little better than a sentimental and slightly disreputable impulse. If law is not a command of a politically organized government, but a sum of duties and liberties, any duties and liberties, the human race, of which the moral unity was to a slight extent already recognized in Homeric society, has a law which is stated in that very phrase, "moral unity". The sum of rights was small indeed three thousand years ago. Its enlargement is both the test and the measure of civilization.

I wish we could speak easily and freely of the "law of mankind", "the law of the human race", "the law of humanity", "the law of the world".¹¹ All those phrases, however, have either a wrong suggestion or have never obtained currency in speech. In place of them, the term likely to be used is "natural law", which has a complicated, not to say a contorted, history of its own.¹² I have avoided the phrase, so far, except by deliberate inadvertence, but it is unfortunately necessary to deal with it directly.

The history of this phrase in Western society is long and intricate, and the literature on the subject is monstrous in size, and not always characterized by clarity of expression, or even, it must be confessed, by complete ingenuousness of approach. I shall not enter into a detailed examination but shall merely call your attention to the fact that what has muddied the waters of this semantic history is the failure to note a double transmission. As far back as Aristotle—and obviously much before him, since he notes the double transmission—there are two systems, two intellectual traditions. One distinguished between what was law by nature and what was law only by "convention", *i.e.*, the agreement of men that this or that rule was to be taken as law. The other tradition declared that only the first was properly law, and the other was improperly so called. It is the second tradition which was emphasized by the Stoics and was taken over, though not consistently, by the Christian Fathers, especially the great Teacher of the West,

11. The term *ius mundi* occurs as early as 1698 in a dissertation of H. von Boden, where it is made equivalent to natural law.

12. For a bibliography on natural law, see Bibliographical Note at end of article.

Augustine, who declared that all law but the "natural law" of reason was properly speaking no law, but an act of force *violentiae magis quam leges*. Through Augustine, this became something of a scholastic commonplace, which, however strange it may seem to us now, was the source of the doctrine that a court may declare a statute unconstitutional.

Then there was another double transmission. In one tradition there was a dichotomy. Civil law, the law of a particular community, was contrasted only with the law of mankind, *ius gentium*, which earned its right to be so called from the fact that it was founded in the nature of man. This is closely related to the Aristotelian contrast between law by nature and law by convention. Against this classification was the Roman-Stoic classification which had a triple division: first, civil law, the law of a particular community, next the *ius gentium*, which was the law of mankind, as discoverable by observation, and, finally, natural law, which was derived from reason. Both the double and the triple classifications were parts of the Roman legal tradition, and they hopelessly confused each other.

We must spend a few minutes on the second and third member of the Stoic-Roman trichotomy. They are really two ways in which an attempt has been made to discover "natural law".

Those to whom natural law was identical with the *ius gentium* could have justified their doctrine on what we should now call unimpeachable scientific grounds. What all men did, they must evidently be doing because it was their nature so to act. What all men did could be learned by inquiry. There were always some persons in ancient times who were insatiably curious about what people did, not only their own people but other peoples. But what struck these ancient anthropologists was not the similarity of men's practices in various communities, but their differences. This is especially evident in Herodotus, who knew more of how men lived in the world around him, Thracians and Scythians and Egyptians and Syrians and Phrygians and what not, than most of his contemporaries. The differences were above all marked in what seemed to the Greeks the fundamental matters of sex-relations, burial customs, religious rituals, as well as in the minor and trivial—at any rate, non-moral—matters of costume and speech. And that the "customs" or "laws" of various peoples were so strikingly, even shockingly, divergent would of itself have ruled out a "natural law" in the sense of an observed common law of mankind. The early Christian fathers, those called pre-Nicene, who lived in the atmosphere of controversy with rival religions, the Church militant in the later terminology, stressed the differences partly to show the corruption of those peoples who were removed from direct contact with God and partly as a weapon against what was in effect the rival religion of astrology. If men were governed by the stars, how could the

practices of men born under the same constellations, configurations and "houses" be so different?

Many modern anthropologists who are in a position to make an induction from a range of observation immeasurably wider than that of Herodotus have in most instances, if we omit Bastian's *Elementargedanken*,¹³ equally emphasized diversity, although for other purposes they are likely to find similarities where at first blush wide discrepancies seem to exist. It is on their reports that modern critics of natural law in any sense often base their arguments. It has often been declared that no relation of law, no right-duty or right-liberty, exists which is found among all peoples of the earth. Moreover, what is the strongest and most emphatic duty among us, for example, the duty not to kill, is not merely a liberty elsewhere but its disregard is often a duty, and those of our duties which are connected with marriage relations, and the prohibition of various forms of incest are similarly contradicted by duties and liberties elsewhere.¹⁴

A certain small number of common relations have, however, been noted. Our type of forbidden homicide, which we call murder, does not prevail in some societies, chiefly in Polynesia. But there is no society in which some form of homicide is not a violation of an accepted standard of duty. Sex-regulation is widely different even among civilized groups, but no promiscuous society has ever been found. Some property-relations are recognized everywhere, although not in relation to the same things. Even more specifically we can find a few, although a very few, cases in which the same rule is established everywhere. The life of members of the same community is protected by what we must call law, even among headhunters. And no community has been found which has not placed the mother-son relationship generally within the incest taboo. The Roman belief that it was not so among the Persian *magi* is probably a calumny directed against the priests of their hereditary enemies.

Added up, it is not a great deal that would be natural law in the sense of the *ius gentium* of the Stoic trichotomy, or natural law derived from the observation of human social relations throughout the world. But we can easily see how this meagre list could be the germ of a regulation of property, of family and of penology which might become as complicated as that of any modern Western state. It is the determination of rights in these fields which is the basis of the laws of most communities.

There are two fields in which the *ius gentium*, in this sense of a law actually observed by all or nearly all nations, has been realized in modern times. There is first of all the law of commerce. There are

13. BASTIAN, ALLGEMEINE GRUNDZÜGE DER ETHNOLOGIE (1884); cf., also, his DER MENSCHHEITSGEDANKE DURCH RAUM UND ZEIT (1901).

14. Cf. WESTERMARCK, HISTORY OF HUMAN MARRIAGE 290 *et seq.* (2d ed. 1876).

certain well-known commercial institutions like negotiable instruments, of which the commonest are the check and the promissory note. These seem to have originated in the cities of Northern Italy during the early Middle Ages, and spread through mercantile practice throughout Europe as the special rule of merchants, which group constituted a special class with special privileges in feudal Europe. The "law merchant" was taken over into the common law of England in the seventeenth and eighteenth centuries and has always been a general law in Europe side by side with the civil law of Roman origin on the Continent. Besides negotiable paper, other mercantile customs, such as partnership, agency and corporations and the buying and selling of merchandise in large quantities, were regulated by rules of the law merchant. To this must be added the sea-law which has a development of its own that goes far back into Mediterranean history, but which, whether kept in a separate group or not, is generally taken together with commercial law.

All this body of law is technical law. It will actually be enforced by the courts of each particular community and in most American and European states has been put in the form of a code, that is to say, of a statute, a *lex* in the proper sense. It therefore belongs to the first member of the Stoic triple division, as well as of the older double division. It is *ius civile*. In modern times all countries which engage in foreign commerce will be found to have commercial codes so nearly like each other that deviations come as a sort of surprise and are often removed by international agreement.

In this respect, therefore, we have a *ius gentium* which does not quite cover all nations but certainly covers all the important ones. As international communications increase, this commercial *ius gentium* tends to include more and more of the peoples of the world. International commerce has demonstrably applied moral sanctions in at least one case of diversity between the commercial laws of the world. The common law, it is well known, had a rule in the buying and selling of merchandise known as *caveat emptor*, which placed the burden of a bargain on the buyer. The Roman law had abolished this rule before the birth of Christ. When in the nineteenth century commercial relations between the nations of the common law and of the civil law became more and more frequent, the application of *caveat emptor* to sales of goods abroad met with increasing resistance which was openly based on the dubious morality of the rule. The result has been that both in England and in practically all the United States, the rule has practically been abrogated by statute, although not in set terms, and the civil law rule has been adopted with the result that the seller must guarantee the fact that the goods are what the buyer might be reasonably supposed to have ordered.

The *ius gentium* can be traced in detail and its rules are as precise

as any parts of the civil law of any community. It may well be said that except for the last illustration, few of the rules of commercial law could be discovered by reason or by moral considerations. They could not by any stretch of the term be included under "natural law", even if every nation of the world adopts the identical commercial code.

There is now, however, a *ius gentium* among most of the nations of the world which has a different origin. Reference has been made to the shock that observers of the customs of foreigners received during the last twenty five hundred years when they discovered that customs which among themselves were nothing short of holy were openly and flagrantly violated by other nations. The absence of penalites for certain kinds of homicide, of incest and of theft in some countries, whereas in others those very kinds were severely punished, seemed to rule out a common law of mankind, a *ius gentium* learned from observation. Within the last fifteen hundred years in Christian Europe and for about the same time in Moslem Africa and Asia, certain rules guaranteeing security of life, of property, of person and of family relations have been accepted as binding generally without being put in the form of a statute, and these rules are sufficiently alike to make it possible to say in advance that certain acts of aggression of man against man would be punishable everywhere.

Christianity and Islam have been in contact, generally hostile, ever since the spread of the latter. Although this did not prevent a mutual influence, the common features of their penal law were not derived from this mutual influence. The contact of both religions with Buddhism was later and, in the course of this contact, it appeared clearly enough that most of the acts punished as crimes in the Christian and Moslem world were also punished in the Indies, in China and Japan. There are, it is true, a great many disparities both in the acts punishable, the severity of punishment and the procedure, but nowhere in these three groups which, with non-Buddhist India, make up nearly the whole civilized world, is there any shocking difference between permitted and prohibited acts, either from our point of view or from the point of view of other members of this group.

The names, Christian, Moslem, Buddhist, are convenient terms to gather large groups of nations. There is no doubt that these religions added a religious sanction to what had been established as rules of conduct in these matters of penal law. But the rules were not created by the religions which have assumed their guardianship. Nearly all the large groups of punishable acts which have been mentioned were already punishable under the Roman Empire before the Christian era and in China and India before Buddha.

We may say therefore that this body of law, or at least its kernel, was derived from a moral sense that somehow developed with or through the process of becoming civilized. And since morality, justice

and reason have been treated as interchangeable in discussions of natural law, this limited branch of the law may well be identified with the third branch of the Stoic trichotomy, provided we are sure of our reasonableness and confident of our moral values. But as a *ius gentium* in the sense of an actual world law, it still falls short of embracing all mankind.

The third term of the trichotomy, the natural law derived from reason, is a different matter from the *ius gentium*. Natural law—the only law properly so-called, for the Stoics—was, according to them, right reason emanating from Zeus, commanding what was good and forbidding the opposite. And the Stoic Zeus was not the lusty Olympian, but an almost abstract godhead, the World-Soul, symbolized by the flame of reason in the human soul. What all men did or did not do was irrelevant to what Reason, if obeyed, would impel them to do.

As a practical application, they could point to the fact that slavery was an institution of all men and therefore of the *ius gentium*, since no community was known without slaves, and yet was a violation of natural law, because it was irrational. And slavery, we must remember, was not for most communities merely one social institution among many, but seemed to be the foundation of society.

Natural law could, therefore, be arrived at by thinking about it. There were, of course, suppressed premises, and these could be nothing else than the generally accepted moral standards of a society that was rapidly becoming cosmopolitan, although in a different sense from that of membership in the Stoic Cosmopolis. Nor were these moral standards very different from those which under Christianity the Western-World has been taught to regard as fundamental. The Stoic, or semi-Stoic, Ulpian formulated them in two famous phrases: "Give each man his due" and "Injure no one."¹⁵ Both unfortunately begged the question, since they did not guide men in discovering what was an injury or what was a man's due. But their essence was a qualified altruism. The primary consideration was the right of the other man and not one's own exclusive advantage, and under them there could be no right of the stronger and no status of a superman.

The medieval concept of natural law was closely allied to that of the Stoics. Canon law and theology both rejected more emphatically than did the Stoics a natural law derived from the practices of mankind whose impulses were by definition all evil whether they coincided among themselves or were divergent. But reason is divinely implanted in the human mind and in most instances denies and rejects the desires of the fleshly body. This divine reason could be discovered, first of all, by its similarity to the revealed Reason of God in his Scriptures, as expounded by their continuously inspired interpreters; but

15. Cf. INSTITUTES 1.1.3; and DIGEST 1.1.10. pr.

where Revelation was silent, the rule of reason had to be discovered as the Stoics discovered it, by inference from premises, usually suppressed, based on general moral considerations.

We have, therefore, come back to the moral unity of man. The sum of the relations which made that moral unity in Homeric times was perhaps pitifully small. All we can be certain about its content is that if you were cast shipwrecked on a foreign shore, you had a right to protection by those who lived there, and if it was refused, you could at least exclaim:

Quod genus hoc hominum quaeve hunc tam barbara morem
Permittit patria?¹⁶

It is not much but it is a beginning. Where and when it was recognized, it could not be true that a man as such had no rights at all. And certainly, the rights he had did not come from political authority or from a tradition within a specific community.

The development of this idea has not been a steady, if slow, forward movement. Its course has been marked by frequent retrogressions and is at best broken and irregular. At the time of the British colonization of North America, Sir Edward Coke, the "Oracle of the Law," declared that the pagan Indians had no rights against Christians, for which two generations later the assembled judges of the three benches sharply reproved him. But recognition by the courts of Westminster, or other courts, did not save hapless "primitives" from extermination by British, French, Dutch, Spanish and American conquerors. And we need not do more than mention the disaster to humanity, Naziism, which was for ten years tolerated, and sometimes more than tolerated, by civilized nations.

But, while it is idle to attempt to see a line of continuous progress in respect of this recognition of human rights, I think it is clear that however broken and irregular the development is and however uncertain the future is, the area in which such rights are recognized is greater than ever before. More men than ever before would think it impossible to deny that men as men have rights, and by admitting that they have, they would be asserting the kind of law for which "natural law" is a bad name, but still a name.

I began by saying that if only that is natural which is part of the inherent character of man, this law is non-natural because it did not develop till hundreds of millennia after earliest man is known to have existed. If only that is natural which fulfils the conditions of St. Vincent of Lerins, *quod semper quod ubique quod ab omnibus*, this law is woefully deficient. But as Vico pointed out long ago, all law, even elaborate codes, are natural, since they are outgrowths of man's social

16. VERGIL, AENEID, I, 539-40.

needs, the needs of a perfectly natural creature. This law, therefore, which satisfied some need—a later need, to be sure, and one that perhaps must be called an emotional need as well—is quite natural, after all. Human emotions are natural.

Evidently we should not now be satisfied with a “natural law” so poor in content as that on which Ulysses, and the Trojans wrecked in Africa, based their right to have their persons respected. Very recently, indeed as recently as December 10, 1948, the General Assembly of the United Nations “passed and proclaimed” a “Universal Declaration of Human Rights”, which, to say the least, is greater in quantity than the slight beginning of three thousand years ago. There are thirty articles, but with subdivisions there are thirty-nine and many of them are groups rather than assertions of a single right. Most, not quite all, are liberties.

We must remember that this is a “Declaration”, not a “Bill of Rights”—which, as a matter of fact, is now being prepared. This Declaration professes no statutory authority. Our Bill of Rights, and its forerunners back to Magna Carta, as well as the *Declaration* of the French Revolution and its many restatements all over the world, did claim and have received statutory, and more than statutory, effect, although like other and more specific statutes they have often been flagrantly disobeyed.

The Declaration consequently is not a law in the sense of the Roman *lex*. But since it is a summation of rights it is very much a law in a wider sense. To what extent the judicial authorities of the United Nations will give effect to it will depend on future developments, even if the Bill of Rights now in preparation is never drafted or never accepted by the member nations. And to what extent the judicial and political authorities of the individual nations will, within the sphere of their own activities, equip the Declaration with sanctions is an equally uncertain thing.

The Declaration is in other words a set of moral standards which a representative body, literally drawn from the whole surface of the earth, has formulated in definite words, a thing that rarely happens to moral standards. Undoubtedly, as has generally been the case in the history of law, any body endowed with governmental function, legislative, administrative or judicial, may disregard this set of moral standards with impunity, but not with equanimity. Those who do so will be uneasy unless they are prepared to challenge not merely the legal obligation but the moral obligation as well of the Rights formulated in the Declaration.

It is possible that for some of these almost one hundred individual rights, even the moral obligation may successfully be challenged. The Declaration was long a-borning. Like all such documents, it is a series

of compromises. There are repetitions in it and vague and clumsy expressions. But there are only one or two cases in which the right declared is so far out of the range of a judicial sanction that it must be taken to be a merely rhetorical expression.

The rights declared are nearly all in relation to indeterminate persons. If this term seems strange, it may be explained in a concrete case. Article 3 of the Declaration runs: "Everyone has the right to life, liberty and the security of person". Between whom is this a relation? Between any particular person and nearly every other person. The latter is indeterminate but will become determinate in specific instances, when the right is in question. Since it is a relation, it is not an absolute right. The term "everyone" is excessive. A person convicted of a capital crime has none of the rights here stated against the lawful authorities of the state, but even he has them against every one else. He may not be lynched, to take an obvious illustration. A person about to commit a murder or any one of several other serious felonies may be killed lawfully by his intended victim or anyone authorized to protect the latter, but if his victim escapes, the aggressor may not be killed by the authorities of the state, unless he resists arrest.

Any one of the rights may similarly be analyzed out into these qualified terms that make up a sort of mathematics, but are quite capable, as I hope has been evident, of being applied to concrete situations. As we go to the other rights of the Declaration, the analysis sometimes becomes difficult, but generally it is simple enough if we remember as in the illustration above that there are no absolutes, and that when law comes into action, a specific person will have to be confronted with another specific person, not a shadowy "Everybody" with an abstract body corporate.

The Declaration, *i.e.*, this set of communal valuations, cannot help being within the contemplation of the many judicial and quasi-judicial agencies which have been differentiated out of general governmental functions. Much will depend on the extent to which it is a fact that the valuation in any specific instance is a valuation accepted by the community, or that part of the community which looms largest in the mind of the judicial organ, wherever one exists. Much will equally depend on the matter of quantity to which I alluded some time ago. How much does the community insist on the valuation expressed? How much better does it estimate the doing of the act claimed as a right is than the not doing of it? Will it actively resist a violation or merely mildly show disapproval?

We can be sure that in the case of some, it will insist with vehemence, as in the case of Article 9: "No one shall be subjected to arbitrary arrest, detention or exile." And on others the degree of valuation will vary with different groups. Some will insist strongly on such pro-

visions as Article 13 (1), "Everyone has the right to freedom of movement and residence within the borders of each state," and Article 14 (1), "Everyone has the right to seek and to enjoy in other countries asylum from persecution." Others will think them desirable, if they occasion no trouble. Some in general or in special cases may think them quite undesirable.

The absorption of these moral valuations into a system of technical legal valuations that equips them with special legal or political sanctions will necessarily be gradual. Please note that a great many of them are already well within the compass of legal valuation and have been so for many years. Perhaps we shall find that new political constructs as well as new judicial organs will be needed in order both to actualize and to systematize these new sanctions.

It is easy to let one's imagination run to a world-law, a "natural law" of which in this way the declaration will be the foundation. But it is equally necessary to realize soberly that a foundation, even if we are sure that there is stone and not sand beneath it, is not yet a habitable dwelling, especially in bad political weather. Long before the law of humanity summed up in this Declaration is regularly and formally used as a series of premises for judgments carried out by sheriffs and marshals and policemen, it will have suffered changes in content and expression. And when it is so used, there will have been developed a penumbra of further moral standards that are not quite ready to be so used, but are sufficiently present to disturb the calm of judicial operation. By that time we shall, I trust, have found a better word than "natural law" or "natural rights" to express the law that seeks to do no more than recognize the moral unity of man.

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