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Strauss: Natural Right and History; Wild: Plato's Modern Enemies and the Theory of Natural Law

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Since World War II there has been a revival of interest in natural law by legal thinkers. These two books show that the same phenomenon has occurred among philosophers and political scientists.

Their reasons for this reappraisal of the 19th and early 20th Centuries' rejection of natural law are clear. Legal positivism leaves one with no basis for judging between the positive law of one political party or society and the positive law of another. Sociological jurisprudence similarly provides no criterion for criticizing or reforming the living law \(^1\) of a given society or for judging between the living law of one society, say that of Hitler's Germany, and the living law of another society, such as that of the United States. In short, both legal positivism and sociological jurisprudence leave one in the position of having to affirm that the ethical and legal norms of a rival party or society are as valid as those of one's own. No legal theorist has been able to stay with such a consequence in practice, however much some may be inclined to assert it in theory. Inevitably, therefore, with the appearance of the positive and living law methods of Hitler before World War II and with the incompatibility between the positive and living law norms of the Communist nations and those of the free democracies following World War II, the restriction of legal science to legal positivism or to sociological jurisprudence became impossible in theory as well as in practice.

Professor Strauss, in his analysis of the legal and social theory of Max Weber, spells out a second reason. Those social and legal scientists, like Weber, who attempted to be ethically neutral with respect to the diverse legal norms of different parties and societies were unable to maintain their ethical neutralism even in working out their own theory as applied to specific societies. While purporting to be ethically neutral, the legal positivists and sociological jurists inevitably expressed value judgments in their choice of the particular statutes, decisions, and behavioral phenomena which they picked out to study. Professor Strauss maintains also that Weber in fact found it necessary, in treating the religious norms of a given society, to bring to his study a deep religious sensitivity of his own which he used as a standard; otherwise Weber would not have been able to distinguish between the more perfect and the more corrupted forms of the religion of that society.

One reservation is to be noted with respect to this contention of Professor Strauss. It is not to be denied that in the pursuit of the method of sociological jurisprudence the social scientist must be able to distinguish in a given society

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1. Living law is used throughout this review in the sense of Ehrlich in his Fundamental Principles of the Sociology of Law (1936).
between the more pure and the more corrupted versions of that society's ethical, religious or legal norms. It does not follow from this, however, that this criterion must, as Professor Strauss suggests, be that of the religious value judgment of the observing scientist. This reviewer has had experience in studying the religious and legal norms of Buddhist and Hindu societies in Thailand, Ceylon, and India. This experience shows that the criterion for distinguishing the corrupt forms, which appear on the surface and strike the eye of the observer immediately, from the underlying purer and more perfect forms of the religious and legal norms is to be found in the religious and legal classics of the society in question and in those practicing priests and lawyers who know the basic theory and philosophy of the law and the religion, as compared with those practitioners who, without understanding, mumble mechanically its past, outward forms. In short, the living law of a given society does provide sociological jurisprudence with the criterion for distinguishing the more perfect from the more corrupted manifestations of the norms of a given society.

It is to be noted, however, that this is true only of philosophical sociological jurisprudence, i.e., of a sociological jurisprudence which identifies the living law of any society with the philosophy of culture of that society as revealed in its traditional thinkers and classics. For a purely inductive sociological jurist, approaching the living law of the society by examining only its observable data and paying no attention to the mentality of its people, the corrupted forms of its norms are more evident than the purer beliefs; there is no criterion for distinguishing the latter from the former, other than one which the observing, supposedly inductive, scientist smuggles in surreptitiously. It is one of the merits of sociological jurisprudence, which determines the living law of a given political party, group of people or society by reading its philosophical, ethical, religious, and legal classics and by checking these against the inductively observed behavior, that it can meet the criticism made by Professor Strauss at this point.²

Even so, sociological jurisprudence reveals its inadequacy when one is forced to ask the question, as all Asians are now doing, whether even the ideal norms of a given society's classics may not be in error or incomplete and hence in need of supplementation or reform. The need for supplementing legal positivism and sociological jurisprudence becomes even more evident when one seeks the norms for judging the positive or living law beliefs of a rival party or a rival nation, such as Hitler's Germany or Communist Russia. It is the thesis of both the philosopher Professor Wild and the political scientist Professor Strauss that at this point one must turn to natural law. In other words, the criterion for judging the diverse positive and living laws of the many

political parties, religious groups, and societies of the world must be nature rather than society or culture.

In judging Professors Wild and Strauss, or any theory of natural law, one question must be kept continuously in mind: Does one mean by nature the brute "given-ness" of human experience before it is brought under concepts in scientific theory and description, or does one mean described and theoretically conceptualized nature? Only nature in the latter sense gives science or natural philosophy. But the moment that one means by "nature" scientifically and philosophically described and conceptualized nature, that moment one has as many theories of natural law as there are different reasonable scientific and philosophical theories for conceptualizing nature. In other words, is there not as much relativity of norms in natural law jurisprudence as occurs in legal positivism or in sociological jurisprudence?

Professor Strauss faces this question more adequately than does Professor Wild. This is the case because Professor Strauss notes that the doctrine of natural law takes on different content in the history of Western civilization with different natural law thinkers, whereas Professor Wild tends to identify natural law with but one particular philosophy—that namely of Professor Wild and the Greek classical tradition as interpreted by him. This forces Professor Wild, in his exposition of Locke for example, to distinguish between the "authentic" and the unauthentic representatives of natural law philosophy. By this verbal distinction he hopes to leave the reader with the impression that the doctrine of natural law gives an absolute moral standard for judging the relative moral judgments of different individuals and societies. He succeeds in this aim only to the extent that the reader accepts Professor Wild's particular metaphysical natural philosophy as the only reasonable or true one for conceptualizing natural phenomena. Professor Strauss' book convinces this reviewer, at least, that there are other natural philosophies as plausible as Professor Wild's neo-Aristotelian metaphysics of "potency" and "tendency."

Professor Wild's book does have the merit, however, of attempting to work out a fresh contemporary natural philosophy. It also shows that many of the recent criticisms of the classical Greek natural law philosophers as Fascist are misguided. Professor Strauss' book makes it clear, however, that Plato and Aristotle were probably more aristocratic in their social ethics, and less democratic, than Professor Wild attempts to make out. Certainly if democracy is, as Professor Wild maintains, the correct natural law doctrine, then his unauthentic natural law philosopher Locke was nearer the truth than were his "authentic" philosophers of natural law.

But if the doctrine of natural law has the diversity of content which Professor Strauss' study reveals, what justification is there for the belief, expressed in his criticism of the sociological jurists and Max Weber, that natural law overcomes the insufficiencies of legal positivism and the sociologi-

cal approach to law? Although Professor Strauss does not explicitly say so, his practice in this volume suggests one answer. He does more than expound the diverse doctrines and ethical and social norms of the different natural law philosophers; he also comes to terms with them. Thus the suggestion is that it is only by finding a satisfactory natural law philosophy oneself, after facing the diverse formulations of the doctrine of natural law, that any hope of a criterion for judging the positive and living law is to be found. Even so, his volume concludes with the thesis that modern natural right, instead of presenting us with an answer to our query, confronts us with a crisis.

This crisis arises out of the conflict between the modern and the classical theories of the content of natural law. Near the end of his critique of Max Weber’s approach to ethical and social norms, Professor Strauss refers to a method which, although he does not pursue it, might resolve this conflict. He points out that “the originators of modern thought still agreed with the classics in so far as they conceived of philosophy or science as the perfection of man’s natural understanding of the natural world. They differed from the classics in so far as they opposed the new philosophy or science [i.e., of Galilei and Newton] . . . to the perverted understanding of the world . . . [of] classical and medieval philosophy or science. . . .”4 One weakness in Professor Strauss’ otherwise excellent study of the diverse Western natural law thinkers is that he restricts himself almost entirely to their political philosophy and does not go beneath their moral and political theories to the diverse empirically verifiable scientific theories of natural phenomena which they took for granted.

By pursuing natural law ethics in the latter direction, the possibility is opened of shifting one’s judgment of the diverse doctrines of natural law from a subjective to an objective, empirically verifiable basis. That doctrine of the content of natural law is the correct one which assumes the way of conceptualizing nature in natural science that the empirical methods of natural science confirm as most adequate to all the experimental and inductively observable data. In fact, the physics of Einstein and the philosophy of physics of Whitehead have shown that the way of conceptualizing nature in physics assumed by modern natural law philosophers like Hobbes, Locke, and Kant is as erroneous and inadequate as is the way of conceptualizing nature that was taken for granted by Plato and Aristotle.

Two things seem to follow: The first is that legal positivism must be supplemented with sociological jurisprudence and that sociological jurisprudence leads, through the way of conceptualizing nature which its living law assumes, to natural law jurisprudence. Second, the natural law jurisprudence for the contemporary natural scientist’s way of conceptualizing natural phenomena is yet to be constructed. Whitehead has perhaps gone further than anyone else in outlining its form and content.

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4. Strauss, Natural Right and History 78 (1953).
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This large, handsome volume marks the initial publication in a formidable project which, the Preface tells us, was commenced before the war and was further delayed by publishing difficulties. However, the material in it generally is current to the end of 1951. Whether or not it reflects present law in Eastern European countries is hard to tell, though bibliographic references suggest that those nations maintain at least a facade of recognition of private rights in literary property.

Since the Encyclopedia is truly world-wide in scope, and contains some material on every country from Albania to Yugoslavia, including Monaco and the Sudan, the present reviewer professes no competence to appraise its accuracy. The credentials of the editors, the Advisory Board, and the contributors, are impressive; the articles that I have dipped into have an atmosphere of authority; and the American material seems reliable.

The plan of the work is as follows: first there is a "Survey of Countries," which gives the statutory references, a brief description of the sources of judicial or administrative interpretation, and a selected general bibliography, for each country. Then begin the various articles, in the present volume, from "Abandonment of Copyright" to "Civil Remedies for Infringement of Copyright." Each article contains a statement of the law of each country; there is no attempt to make an over-all summary on any topic. A brief scope-note at the beginning of each article would have been helpful.

The result is not bedside reading; but it is not intended to be. This does not mean that individual contributions are devoid of criticism or independent analysis. On the contrary. Take for example the article on "Applied Art, or Artistic Craftsmanship." On this vexatious and unsettled subject—vexatious because of the uncertain scope of copyright protection of utilitarian objects that may also be covered by patent law or by specific legislation, unsettled because of the relative recency of the claims of industrial designers to a place among the arts—the essays on French, English, and Italian law are frankly doubtful of the validity of certain old cases, and illuminating on the legal categories other than copyright that are brought to bear on the status, say, of a streamlined baby-carriage. The United States essay under this heading is rather pallid by comparison. It relegates pretty much the whole problem to the field of design patent, which is assumed to be out-of-bounds in a work on copyright. It is true that this contribution was written before the domestic conflict between copyright and design patent was brought to a head in the Stein case recently before the Supreme Court. At the same time, the American section of this article typifies many others: to this reviewer it is adequate, and no more. Perhaps an Italian student would find the Italian essays thin, and so on.

But for the insular American, who profits initially by the hairline decision of the editors to publish in English rather than French, there seems to be a wealth of comparative material here. Furthermore, the "International Regime" of treaty law is informingly dealt with. Thus, in this volume there is a solid historical account of the Berne Convention by the present director of the Berne Union, Dr. Mentha.

*World Copyright* is massive evidence of a surge of interest in questions of intellectual property. Other manifestations are three new journals since the war (*Unesco Copyright Bulletin, Bulletin of the Copyright Society of the U.S.A., Revue Internationale du Droit d'Auteur*), the proposed International Convention, and a freshet of symposia and articles. I await the next volume with interest, among other reasons because it will resolve a puzzling cross-reference in the present volume: Blocks, see Clichés.2

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2. This cryptic notation may refer to some mechanical aspect of stereotypes, and not to the figurative kind; it is a sudden awareness of the latter that brings this review to an abrupt close.

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