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Natural Law: Voegelin and The End of [Legal] Philosophy

Patrick H. Martin

I. INTRODUCTION

What is a natural law philosophy? Having edited (with George Christie) a Jurisprudence casebook that contains several examples of natural law writings,¹ I was confident that I knew the answer to this. Indeed, I thought that there was general agreement as to what would be counted as a natural law philosophy. The reaction to a paper on Eric Voegelin I prepared for a session at the 2001 meeting of the American Political Science Association made clear to me that labeling a scholar as part of the natural law tradition is more controversial than I had thought. The message to me seemed to be that friends do not call friends natural law lawyers, validating Ronald Dworkin’s observation that “one label is particularly dreaded: no one wants to be called a natural lawyer.”² Several who knew him have told me that Voegelin himself rejected the classification for his writing, although he spoke of circumstances in which “natural law has theoretical justification.” In revising that paper on Voegelin for publication, I have thought it best to begin with what I mean by a natural law philosophy. If others disagree that Voegelin is a natural law philosopher, they may similarly take up the general concept of a natural law philosophy.

Writers who locate themselves in, or who are sympathetic to, natural law theory treat natural law as correlated with human nature and a manifestation of order in the world, and as consisting of standards, principles or precepts that will attain goods or ends that are essential to or may facilitate human happiness. John M. Finnis has described natural law as “moral standards which . . . can justify and guide political authority, make legal rules rationally binding, and shape concept formation in even descriptive social theory.”³ He treats

the phrase “natural law” as referring to “true and valid standards of right conduct,” and notes that this way of speaking about such standards can be traced back to Plato. In natural law theory’s seventeenth and eighteenth century appearance, “morality and the law’s basic principles are a matter of ‘conformity to rational nature.’” A more valid understanding, according to Finnis, is to be found in the classic theories of natural law, which understands the correlation between natural law and human nature as running in both directions: human nature can only be adequately understood by understanding human capacities, which in turn can be understood adequately only by understanding the acts that actualize them, which in turn can only be understood adequately by reference to their “objects”—the goods the acting person intends to attain by means of such acts.

The attainment of ends through rational principles of conduct is found also in Randy Barnett’s Law Professor’s Guide to Natural Law and Natural Rights. Barnett analogizes natural law to an end or “given” achieved through “if–then” propositions in relation to physical laws, such as the law of gravity: because of the force of gravity, “if we want a building that will enable persons to live or work inside it, then we need to provide a foundation, walls, and roof of a certain strength.” To illustrate further, he says, “[i]f we want persons to be able to pursue happiness while living in society with each other, then they had best adopt and respect a social structure that reflects these principles.” He summarizes the matter by stating:

Natural law refers to the given-if-then method of analysis where the “given” is the nature of human beings and the world in which they live. This method can be applied to a number of distinct problems, the “if.” When discussing moral virtues and vices, or the problem of distinguishing good from bad behavior, the imperative for which is supposedly based on human nature, natural-law ethics is the appropriate term (though such principles are sometimes referred to simply as natural law).
Ronald Dworkin gives what he calls a "crude description" of natural law: "Natural law insists that what the law is depends in some way on what the law should be."

In the earlier instances of natural law theory, God tended to be at the forefront of the theory, either acting by His command or through the fact that He was co-extensive with Reason. Human nature derived its character from the fact it was created by God with purpose. Many natural law theorists have felt that logic compels the belief that order does not establish itself, that it must be established. Aristotle, who is often considered in the natural law tradition, admits the logical necessity of a First Mover. In more recent versions, God's presence is more likely to be less visible or unseen though perhaps felt, and human nature closer to the front. Jean Dabin, for example, maintained it is possible to regard the natural order as flowing from human nature: "As human nature is identical in all men and does not vary, its precepts have universal and immutable validity, notwithstanding the diversity of individual conditions, historical and geographical environments, civilizations and cultures." Critics of natural law theory (or theories) tend to characterize natural law in ways that make natural law distinctly unattractive and inconsistent. A persistent approach treats natural theory as a sort of statute book or tablet. The entry by Richard Wollheim for "Natural Law" in the Encyclopedia of Philosophy begins by asserting that it seems an "intrinsic part" of natural law "doctrine" that,

the criterion by reference to which positive laws are to be judged should itself possess some of the characteristics of a legal code. In particular, it should exhibit some complexity or be capable of formulation as a comparatively extended set of rules or precepts, against which existing codes can then be matched item by item. Such a natural code, naturally, would be static—written in stone, as it were, and incapable of adapting to new human conditions. Can one find a single well-regarded writer in a natural law tradition who actually posits such a set of rules (as opposed to standards aimed at

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10. Dworkin, supra note 2, at 165. He distances himself from natural law theory by adding, "This seems metaphysical or at least vaguely religious. In any case it seems plainly wrong." Id.
the attainment of human ends or goods)?

A concept of "natural law with variable content" seems hopelessly incoherent to a critic who sees law simply as sets of rules—commands.

The stone-tablet model has persisted as a supposed theory of natural law, albeit lacking a principal exponent, and it is this model from which Voegelin sought to distance himself. In the outline and supplementary notes for the Jurisprudence course he taught at LSU, Voegelin made clear that one theory of natural law system was defensible, but the more rigid versions were not. He wrote:

Natural law has theoretical justification insofar as it translates the insights gained by a theory of the nature of man into the language of obligatory purposes . . . Natural law becomes dubious if it erects theoretically justified, paradigmatic rules of order into postulates of revolutionary reform . . . Natural law is worthless if it contains no more than partisan preferences without a basis in a critical theory of the nature of man.

Separating natural law theory from its caricatures, we should then regard Voegelin's theory of law as falling in the natural law tradition if it posits the existence of a natural order (perhaps established by God), that can be known to men and that can be a measure for assessing human or positive law. Voegelin himself would have accepted this criterion while resisting the label.

II. VOEGELIN'S MANUSCRIPT

Eric Voegelin taught a course in Jurisprudence at the LSU Law Center for several years while he was a member of the Political

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14. Wollheim's essay in Natural Law, supra note 13, presents as the "basic texts of natural-law theory": Cicero, De Re Publica De Legibus (Clinton W. Keyes trans., 1977); 2 Thomas Aquinas, Summa Theologica (Dominican Province trans., Christian Classics ed., 1981) (1271); Francisco Suárez, De Legibus, Ac Deo Legislatore (Carnegie Classics 1944) (1612); Samuel von Pufendorf, De Jure Naturae et Gentium (Carnegie ed., 1934) (1688); John Locke, Essays on the Law of Nature (W. Von Leyden ed. 1954); Rudolf Stammier, A Theory of Justice (Isaac Husik trans., 1925); and Readings in Jurisprudence (Jerome Hall ed., 1938). Not one of these writers can remotely be accused of suggesting a natural law approach "being capable of formulation as a comparatively extended set of rules or precepts, against which existing codes can then be matched item by item." See Wollheim, supra note 13, at 450-51.

15. Eric Voegelin, The Nature of the Law 81-82 (Robert A. Pascal et al. eds., 1991) [hereinafter Voegelin]. In the supplementary notes, Voegelin treats as natural law "all attempts at transforming a reaction toward injustice experienced in the concrete case into a body of fundamental, substantive rules which claim authority as expressing the true nature of man and society." Id. at 80.
Science Faculty of the University. He completed a manuscript on The Nature of the Law in 1957. Edited by Robert Pascal, James Lee Babin, and John William Corrington, the manuscript was published, along with several other Voegelin writings, in 1991 as Volume 27 of The Collected Works of Eric Voegelin. Voegelin deserves close study by any student of the subject of natural law and by any person interested in Voegelin's thought. The book is little but weighty, and its value lies in its critique of a century or more of legal positivism as well as its explicit premises that point the way for a more fully realized development of natural law theory, such as we find in John Finnis's 1980 Natural Law and Natural Rights.

With this title I hope to reflect several themes in Voegelin's approach to law and Twentieth Century thought. The word "end" signifies the notion of purpose or goal which also equates to Aristotle's belief in "final cause," telos or finis. Aristotle's four causes are familiar: the material, efficient, formal, and final cause. A failing of the reigning approach in contemporary legal philosophy, positivist, normative jurisprudence was, in Voegelin's opinion, to equate "law" with the process of law making. Using Kelsen's "Pure Theory" as a representative case of normative jurisprudence, Voegelin said: "the lawmaking process acquires the monopoly of the title 'law.'" In the view which he criticizes, the sole criteria for legal analysis is the process for making law: "whatever power establishes itself effectively in a society is the lawmaking power, and whatever rules it makes are the law."

The final end, purpose or cause of a thing is its reason for being. Voegelin's Nature of Law is concerned not with mere analysis of law as to form or content but purpose in the life of man. Law's nature is not verbal construction, i.e., command of a sovereign backed by sanction, nor a substantive collection of rules of contract or property. Rather, its nature is associated with the philosophy of man's being. [Legal] I place in brackets to reflect Voegelin's belief that legal philosophy is not distinct from other aspects of philosophy:

The relations among human beings in a society, thus, to a large extent have legal structure. The legal character of social reality, however, is even more pervasive than it appears to be if we consider nothing more than the specific rules created by members of the society for themselves.

17. See Finnis, Natural Law and Natural Rights, supra note 3.
19. Id.
20. Id. at 23.
He follows this up with his broader reflection that contemporary use of the word law is inadequate to convey a proper concept of law:

[T]he equivocal use of “the law” in the sense of valid rules made by organs of government and “the law” that somehow pervades the existence of man in society. What is preserved in this pale equivocation of our everyday language is the profound insight, rarely to be found in contemporary legal theory, that “the law” is the substance of order in all realms of being.\(^{21}\)

Law’s nature is seen in Voegelin’s careful choice of words to describe certain aspects of law’s elements. Commenting on Plato and Aristotle, he states:

The inquiry into the true order of the polis is the philosopher’s principal task. Specific rules are formulated under the aspect that they articulate the true order in society and, if enacted, will secure it. The lawmaking process is studied under the aspect whether its organization will result in rules that will secure the true order.\(^{22}\)

Specific rules do not make the order of society; rather they articulate the true order. When enacted they are not the order of society; rather, they are a means of securing the true order.

The secondary implication of my use of “end” in association with Voegelin’s work is to suggest downfall or disintegration, a coming to an end—a theme that he returns to several times in The Nature of Law. In Voegelin’s view, legal thought and philosophy were in poor shape in the Western thought of his and our time: “with the progress of secularism and the disintegration of philosophy in the nineteenth and twentieth centuries, the lawmaking process achieves complete autonomy, i.e., its theorists remove from legal theory the question of substantive order.”\(^{23}\) He speaks of the “state of philosophical disintegration that is manifest in normative jurisprudence.”\(^{24}\) Or again: “While the intention of the rule is not cognitive, the rule nevertheless intends a truth. That is the point perhaps most difficult to understand in the contemporary state of philosophical disintegration.”\(^{25}\) Elsewhere, Voegelin spoke even

\(^{21}\) Id. at 24.
\(^{22}\) Id. at 26.
\(^{23}\) Id. at 27.
\(^{24}\) Voegelin, supra note 15, at 29.
\(^{25}\) Id. at 65.
more strongly of the times, saying that "the insane have succeeded in locking the sane in the asylum . . . the political tentacles of scientistic civilization reach into every nook and corner of industrialized society."26

Is there not an inconsistency in a philosophy that posits the existence of an order in society that is reflected in law while at the same timedecrying the disintegration of that philosophical order? I would argue that it is not. The conservative can be an optimist. The optimistic conservative has faith in the wondrous nature of the human being even while lamenting the state of the present population and polity of humans; the natural order is the possible or potential order, not necessarily the present order.

III. VOEGELINIAN THEMES

A. Nature

We may begin with a consideration of the word "nature" from the book's title. In ordinary use, as reflected in the American Heritage Dictionary, it refers to the "intrinsic character of a person or a thing."27 The Oxford English Dictionary defines nature as "[t]he essential qualities or properties of a thing; the inherent and inseparable combination of properties essentially pertaining to anything and giving it its fundamental character."28 When we, and Voegelin, refer to the "nature" of the law, we are looking to its intrinsic character, its essential qualities or properties. Voegelin identifies the use of "nature" as having the same meaning for Aristotle as "form" on occasion, though he notes an inconsistency in usage by Aristotle.29 At the outset of his book, Voegelin raises the possibility:

[T]hat perhaps the law does not have a nature. And since the only reason for a thing not to have a nature is its lack of ontological status—the fact that it is not a self-contained, concrete thing in any realm of being—there arises the unpleasant question whether the law exists.30

His focus then is on the "ontological status" of "the law," whether law has real existence. Nature also refers to the "order, disposition,

30. Id. at 6.
and essence of all entities composing the physical universe.”

If we were to engage in Voegelin's predilection for playful turning words back upon themselves, we would summarize his view by saying: For Voegelin, the nature of law is in the law of nature.

B. Human nature

_Human nature_ is of considerable importance in Voegelin's schema of law. Where Voegelin is unacceptable to contemporary legal thought is precisely where he is most Aristotelian—his view of law proceeds from a belief in “human nature.” It is that nature of man, his Logos, that is the center of social order, political science, and we may assume also, law. The telling verb that he uses reveals much: “unfold.” As he discusses Aristotle, he provides his view of law:

The nature of human community unfolds fully in the polis because it provides the social environment for the full unfolding of human nature:

“The inquiry into the true order of society, regardless of the question whether the surrounding society is a suitable field for its realization, develops, in the classic philosophers, into an autonomous occupation of the human mind—an enterprise that can be successful only because the true order of society is the order in which man can unfold fully the potentialities of his nature. The nature of man, his Logos, becomes the central theme of a science of social order; the science of human nature, philosophical anthropology, becomes the centerpiece of political science; and the nature of man, as it unfolds in the existence of the philosopher, as well as in the disordered human existence of the surrounding society, becomes the empirical material for the inquiry.”

The Aristotelian point of view is seen also in his borrowing of the term: the _bios theoretikos_. “Aristotle insisted that a society was ordered truly only when it made possible the _bios theoretikos_”—“the contemplative life” as Voegelin identifies it in the Supplementary Notes that are reprinted with _The Nature of the Law_. Or again as he puts it,

32. Id. at 52.
33. Id. at 74.
Natural law has theoretical justification insofar as it translates the insights gained by a theory of the nature of man into the language of obligatory purposes. As example may serve the Aristotelian translation: By theoretical insight the \textit{bios theoretikos} is the full unfolding of human potentiality. Translated into a moral rule: man should strive to find this fulfillment in his personal existence. Rule of natural justice: society should be organized in such a manner that the fulfillment of the purpose is possible, at least for those who wish to attain it.\textsuperscript{34}

The end to be attained by law and society is the completion of the unfolding in the mature man: the \textit{spoudaios}.\textsuperscript{35} Although he expresses it as a conditional form, Voegelin believes “the purpose of human existence to bring this [human] nature to its full realization.”\textsuperscript{36}

Such a view of the nature of man is distinctly at odds with a society intensely focused on physical pleasure and contemptuous of the idea that the law or the state has anything to do with the soul. Richard Posner declares in \textit{The Problems of Jurisprudence}:

> The law is not interested in the soul or even the mind. It has adopted a severely behaviorist concept of human activity as sufficient to its ends and tractable to its means. It has yet to be shown that law changes people's attitudes toward compliance with social norms, as distinct from altering their incentives.\textsuperscript{37}

In this view, man is little more than ragged claws, responding to external stimuli; the law is stimulus, using pleasure and pain—or money (dollar value)—as incentive. In contrast, Voegelin describes punishment as having a larger, more complete function:

> While punishment, for example, certainly has the function of protecting the members of a society against the disorganization of their lives by the disturbing actions of their fellow members, it also has the purpose of restoring the personal order in the soul of the delinquent and, as far as that is possible, of reconstructing him as a person. A utilitarian “philosophy” of criminal law would obscure the problem that, in the order and disorder of society, the Ought in the ontological sense is at stake and that this Ought has its seat in the person of every single man.\textsuperscript{38}

\textsuperscript{34} Id. at 81-82.
\textsuperscript{35} Id. at 74.
\textsuperscript{36} Id. at 66.
\textsuperscript{37} Christie & Martin, \textit{supra} note 1, at 1038.
\textsuperscript{38} Voegelin, \textit{supra} note 15, at 64. That such a function is a common feature
C. Validity

Voegelin uses the term validity in several senses. First is the straightforward positivist sense, validity as signifying duly enacted. A law is valid if it has been enacted or promulgated in conformity with a positive rule, say the Constitution. For example, a statute on discharges of substances into waters subject to Federal jurisdiction would be valid if it were approved by a majority of both houses of Congress and not vetoed by the President. No positivist would find fault with this use of validity. He expands upon it by observing that validity comes and goes as statutes are enacted and then repealed. The law is in part a flowing stream of these rules moving in and out of validity; a legal order is an aggregate of valid rules. He introduces the uncertainty over the law's content by recognizing that the law may not be known until it is declared by a judge in a particular case. However, Voegelin goes beyond positivism in his use of validity. For Kelsen, the top of the legal hierarchy was the human-norm-beyond-which-there-is-no-norm, which he termed the grundnorm or basic norm. Voegelin seems to approve the construction represented by Bodin in the sixteenth century in which the hierarchy continues to God:

The hierarchy of valid rules has as its top stratum the divine and natural law; under this stratum move the statutes of the prince; then follows customary law insofar as it is not in conflict with the royal statutes; next come the decisions of the magistrates, moving within the law as fixed by the higher strata; and at the bottom come the legal transactions of the subjects—their buying and selling, their labor contracts, marriages, wills, and so forth. The hierarchy of lawmaking authorities, in reverse order, begins with the subjects, rises through magistrates and the king, and culminates in God.39

Voegelin's critique of positivism, as positivism was reflected in Kelsen, is that it cuts off the hierarchy before it reaches its pinnacle. With the constitutional procedures, however, we have reached the top of the hierarchy of rules. There is no constitution above the

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of a natural law theory is suggested by comparing a similar statement by Finnis:

[W]e are bound by our whole analysis of human good to say that one who defies or contems the law harms not only others but also himself... The punitive sanction ought therefore to be adapted so that... it may work to restore reasonable personality in the offender, reforming him for the sake not only of others but of himself: 'to lead a good and useful life.'

Christie & Martin, supra note 1, at 212-13.

constitution that would link a series of constitutional aggregates into one legal order in the manner in which the statutory sub-aggregates are linked by the constitution. We have arrived at the border at which the problem of validity no longer can be solved intra-systematically through regress to a procedurally higher aggregate of rules. We are faced with the phenomenon that the validity of the law has its origin in extralegal sources.  

D. Ontological

The term “ontology” has been put to a variety of tasks in philosophy, principally embracing a concept of being. It has moved from being a synonym of metaphysics to Christian Wolff’s essences of beings to Kant’s analysis of existence to other treatments in Heidegger and Quine. Voegelin uses “ontological” in a somewhat special way suggesting to me that he wishes to confirm his belief in the existence of the thing to which “ontological” attaches, as we might speak of the ontological object as opposed to the epistemological object; or perhaps the point at which the Idea is instantiated (we might think for example of Beauty being instantiated in a sculpture). Thus, he speaks of “The Ought in the Ontological Sense.” By this I think he means the “ontological Ought,” the ought that has a genuine existence. And he goes on to state:

The norms, thus, acquired the character of projects for the concrete order of society; and at the core of this order we found the Ought in the ontological sense, the tension in society that requires the elaborate efforts to create and maintain the order and, with the order, the very existence of society.

If now we position ourselves at the ontological center of the tension, we see that the lawmaking process is only one among several types of efforts to project and realize the order of society.

Observe that he does not speak of the creation or establishment of order in society but rather the projection and realization of the order of society, as earlier we noted he speaks of law as articulating the true order.

40. Id. at 31. Voegelin goes on to discuss this in a subsection entitled The Components of Validity.
41. Voegelin, supra note 15, at 42.
42. Id. at 48-49.
E. The Ought

With this term, we again find a Voegelin adaptation of a word used in philosophy. He gives it his own special meaning, perhaps. The classic problem of natural law thought is the difficulty of moving from “ought” to “is.” In Part I, Of Virtue and Vice in General, of Book III, David Hume makes his well-known distinction between “is” and “ought.” At the end of Section I of Part I, Book III, where Hume argues that moral distinctions are not derived from reason, and before moving on to argue that they are also not derived from a moral sense, Hume declares:

I cannot forbear adding to these reasonings an observation, which may, perhaps, be found of some importance. In every system of morality, which I have hitherto met with, I have always remark’d, that the author proceeds for some time in the ordinary way of reasoning, and establishes the being of a God, or makes observations concerning human affairs; when of a sudden I am surpriz’d to find, that instead of the usual copulations of propositions, is, and is not, I meet with no proposition that is not connected with an ought, or an ought not. This change is imperceptible; but is, however, of the last consequence. For as this ought, or ought not, expresses some new relation or affirmation, ‘tis necessary that it shou’d be observ’d and explain’d; and at the same time that a reason should be given, for what seems altogether inconceivable, how this new relation can be a deduction from others, which are entirely different from it. But as authors do not commonly use this precaution, I shall presume to recommend it to the readers; and am persuaded, that this small attention wou’d subvert all the vulgar systems of morality, and let us see, that the distinction of vice and virtue is not founded merely on the relations of objects, nor is perceiv’d by reason.43

Hume follows Hobbes in the separation of law and morality by sharply differentiating “is” and “ought;” never do the two meet. Both writers display another characteristic of legal positivism by stressing the absolute need for all real things to be found in sense experience. In this they are empiricists. Empirical or scientific knowledge is the only genuine form of knowledge. The claimed existence of a thing beyond sense experience can have no bearing upon what people accept as real. With Bentham, we see this

43. Christie & Martin, supra note 1, at 475 n.48.
attitude most pithily expressed in his famous declaration that natural rights are nonsense, "nonsense on stilts."  

Rejecting these positivists, Voegelin declares the existence of the Ought. This Ought is the order underlying man’s existence. It is much like the Natural Law for Aquinas in the Summa Theologiae:

**QUESTION 91—SECOND ARTICLE**

Wherefore, since all things subject to Divine providence are ruled and measured by the eternal law, as was stated above (A. 1); it is evident that all things partake somewhat of the eternal law, in so far as, namely, from its being imprinted on them, they derive their respective inclinations to their proper acts and ends. Now among all others, the rational creature is subject to Divine providence in the most excellent way, in so far as it partakes of a share of providence, by being provident both for itself and for others. Wherefore it has a share of the Eternal Reason, whereby it has a natural inclination to its proper act and end: and this participation of the eternal law in the rational creature is called the natural law. Hence the Psalmist after saying (Ps. iv. 6): Offer up the sacrifice of justice, as though someone asked what the works of justice are, adds: Many say, Who showeth us good things? In answer to which question he says: The light of Thy countenance, O Lord, is signed upon us: thus implying that the light of natural reason, whereby we discern what is good and what is evil, which is the function of the natural law, is nothing else than an imprint on us of the Divine light. It is therefore evident that the natural law is nothing else than the rational creature’s participation of the eternal law.  

Voegelin takes up the same theme:

Man has the experience of participating, through his existence, in an order of being that embraces not only himself, but also God, the world, and society. This is the experience which can become articulate in the creation of symbols of the pervasive order of being, such as the previously indicated Egyptian maat, or Chinese tao, or Greek nomos. He furthermore experiences the anxiety of the possible fall from this order of being, with the consequence of his annihilation in the partnership of being; and, correspondingly, he experiences an obligation to attune the order of his existence with the order of being. Finally, he experiences the possible

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45. Christie & Martin, *supra* note 1, at 139.
fall from, and the attunement with, the order of being as
dependent on his action, that is, he experiences the order of
his own existence as a problem for his freedom and
responsibility. Within the range of society, the realization of
the order of being is experienced as the burden of man. When
we refer to the “tension” in social order, we envisage this
class of experiences. In order to link them more closely with
the problem of “normativity” in legal rules, we can speak of
them as the Ought in the ontological sense.\footnote{Voegelin,
\textit{supra} note 15, at 43-44.}

One could argue that the central problem of philosophy is whether
universals have existence. And here we perhaps get the significance
of Voegelin’s phrase, “the Ought in the ontological sense,” for we can
append the statement I have just made with Voegelin’s phrase: “the
central problem of philosophy is whether universals have existence,
in the ontological sense.” Let us take the universal “beauty.” Does
“beauty” have a real existence or is the use of the term “beauty”
merely an expression of one’s feelings and reflecting no actual quality
of the object prompting the feelings? If I say a painting or a flower
is beautiful, am I describing a quality of the painting or am I merely
describing my own state of mind, an affection rather than a
perception? In the same way, we ask whether just or unjust is
actually a quality of an act or event, or is the use of the term just or
unjust merely a statement of an opinion that is personal or
conventional in that it is shared by a number of persons? If right and
wrong, just and unjust are merely personal and conventional, then we
are free to change our mind, our attitude, about a matter—from say
fear of flying to love of flying. Voegelin would have rejected this.

Whether we think of Voegelin as accepting Plato’s \textit{universalia
ante rem} (before the thing) or Aristotle’s \textit{universalia in rebus} (in
things) Voegelin was a Realist, and a central feature of his legal
thought was the Reality of the Ought: “the Ought is a reality in the
experiences we have outlined.”\footnote{Id. at 66.}

One commentator (on the 2001 program) has observed that \textit{The
Nature of the Law} does not take up the subject of ethics, with ethics
being concerned with the order of the soul. Perhaps. But I would
offer the proposition that this was neither oversight nor neglect on the
part of Voegelin. Rather, it perhaps reflects his quarrel with
positivism. The positivists and most modern legal scholars would
demand a sharp demarcation of law and morality or law and ethics,
the one binding, the other only a matter of conscience. They do this
to separate \textit{law} from \textit{not-law}. And they do this because they often are
exceedingly skeptical about the genuine existence of rules of ethics
or morality, indicating instead that expressions of moral principles are merely expressions of personal liking or disliking.

Hobbes perhaps is the figure who first took us down this path:

But whatsoever is the object of any man's Appetite or Desire; that is it, which he for his part calleth Good: And the object of his Hate, and Aversion, Evill: And of his Contempt, Vile and Inconsiderable. For these words of Good, Evill, and Contemptible, are ever used with relation to the person that useth them: There being nothing simply and absolutely so; nor any common Rule of Good and Evill, to be taken from the nature of the objects themselves; but from the Person of the man (where there is no Common-wealth;) or, (in a Common-wealth), from the Person that representeth it; or from an Arbitrator or Judge, whom men disagreeing shall by consent set up, and make his sentence the Rule thereof.58

For Hobbes the terms just and unjust only signified what the state had declared just or unjust: "Lawes are the Rules of Just, and Unjust; nothing being reputed Unjust, that is not contrary to some Law." As he also stated: "before the names of Just, and Unjust can have place, there must be some coercive Power . . . where there is no Common-wealth, there nothing is Unjust."59 Is this not identical to saying that a painting or poem or musical work is beautiful only if the state (or other authoritative group) declares it to be beautiful or defines the criteria by which beauty is to be measured?

More recently, we find the words of John Austin, who wrote:

Now, moral obligation is an obligation imposed by opinion, or an obligation imposed by God: that is, moral obligation is anything which we choose to call so, for the precepts of positive morality are infinitely varying, and the will of God, whether indicated by utility or by a moral sense, is equally matter of dispute. This decision of Lord Mansfield, which assumes that the judge is to enforce morality, enables the judge to enforce just whatever he pleases.60

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49. Thomas Hobbes, Leviathan, excerpted in Christie & Martin, supra note 1, at 441.
50. Id. at 416.
51. Christie & Martin, supra note 1, at 583.
In this perspective, to separate law and morality (or ethics) is to separate empirical or positive law, i.e., human law, binding law, from non-law.

Now the further agenda of the positivists and many modern legal philosophers is not only to separate law and morality into separate spheres for analytical purposes and to determine what is binding and to be applied by judge and jury, but also to say what cannot or should not become law. Once a subject is identified as a matter only of morality (and not harm to another person), it is said to be off-limits to positive law; rather, it should be a matter only of conscience.

For Voegelin, human law and morality draw from the same underlying source, the true order in which human potential unfolds and is fulfilled. This is seen in his statement:

'The true order of society is the order in which man can unfold fully the potentialities of his nature. The nature of man, his Logos, becomes the central theme of a science of social order; the science of human nature, philosophical anthropology, becomes the centerpiece of political science; and the nature of man, as it unfolds in the existence of the philosopher, as well as in the disordered human existence of the surrounding society, becomes the empirical material for the inquiry. The true order of society is living reality in the well-ordered soul of the philosopher, brought to sharp consciousness by the philosopher’s refusal to succumb to the disorder of his environment.'

Positivists must still have an organizing principle to provide a basis for law. They have their own self-evident propositions. For Hobbes, it was the keeping of Covenant. For John Stuart Mill and many contemporary law scholars, law is to forbid that which causes harm to others. Relatively few people today have actually read John Stuart Mill. But his perspective holds sway. In On Liberty he asserts:

The object of this Essay is to assert one very simple principle, as entitled to govern absolutely the dealings of society with the individual in the way of compulsion and control, whether the means used be physical force in the form of legal penalties, or the moral coercion of public opinion. That principle is, that the sole end for which mankind are warranted, individually or collectively, in interfering with the liberty of action of any of their number, is self-protection. That the only purpose for which power can be rightfully

52. Voegelin, supra note 15, at 52.
exercised over any member of a civilised community, against his will, is to prevent harm to others. His own good, either physical or moral, is not a sufficient warrant. He cannot rightfully be compelled to do or forbear because it will be better for him to do so, because it will make him happier, because, in the opinions of others, to do so would be wise, or even right. These are good reasons for remonstrating with him, or reasoning with him, or persuading him, or entreating him, but not for compelling him, or visiting him with any evil in case he do otherwise. To justify that, the conduct from which it is desired to deter him must be calculated to produce evil to some one else. The only part of the conduct of any one, for which he is amenable to society, is that which concerns others. In the part which merely concerns himself, his independence is, of right, absolute. Over himself, over his own body and mind, the individual is sovereign.\textsuperscript{53}

Modern libertarians seem to take as a natural corollary of Mill's proposition of individual sovereignty that society may not prohibit those things that people do together through consent. The basis for all this is the underlying concept that all notions of right and wrong (of "ought"), except as it pertains to harm to others, have existence only in the affections, though perhaps Mill himself never intended such a conclusion. In After Virtue, Alasdair Maclntyre has observed that today "all moral judgments are nothing but expression of preference, expressions of attitudes or feelings."\textsuperscript{54} Voegelin's The Nature of Law preceded many of the legal developments that reflect this rather widely held view of moral judgments, but we may with confidence surmise what his reaction would have been. The editors' introduction observes: "The Nature of the Law may be characterized as a reasoned invitation to restore holiness to the legal order."

IV. CONCLUSION

The profound difference between Voegelin (and many other adherents to the natural law tradition) and the positivists is the view of the nature of man and his place in nature. The argument over the nature of law is an argument over the nature of man and whether man has a place in an ordered creation that distinguishes him from a cow or a cockroach. For Voegelin, law is part of an order that permits and guides the fulfillment of human potential, both rational and spiritual. For that order to have temporal efficacy, it must work through human


\textsuperscript{54} Alisdair Maclntyre, After Virtue 12 (2d ed. 1984).
instruments, including positive law. The philosopher's special role is in developing the standards from the true order by which the empirical law can be measured. Those of us who teach legal philosophy may find much to admire in Voegelin's belief that we philosophers are as much lawgivers as those in the legislature or on the bench.

The philosophers develop projects of order that they do not expect to be enacted as valid rules through the lawmaking process of their society. The work is done when the dialogue or treatise is written; the projection of the true order is finished. If conditions should arise historically under which such an order could be enacted by an empirical society, all the better, though neither Plato nor Aristotle expects to see these conditions fulfilled. The philosopher, thus, becomes the lawmaker of the true order in his own right, rivalling the lawmaker of the empirical society with its order of dubious truth.\(^5\)

According to Voegelin, Plato and Aristotle were unsuccessful, as their own societies disintegrated around them, even as Voegelin saw society disintegrate around himself. The philosopher is a Promethean figure, the bringer of Order, who finds himself rejected by society and in the end rather solitary: "The true order of society is living reality in the well-ordered soul of the philosopher, brought to sharp consciousness by the philosopher's refusal to succumb to the disorder of his environment."\(^6\) One calls to mind another figure engaged in heroic struggle, Hamlet, no doubt reflecting the contemplative frustration of his creator:

\begin{quote}
What a piece of work is a man! how noble in reason! how infinite in faculties! in form and moving how express and admirable! in action how like an angel! in apprehension how like a god! the beauty of the world, the paragon of animals! And yet to me what is this quintessence of dust?\(^7\)
\end{quote}

\(^{55.}\) Voegelin, supra note 15, at 53.
\(^{56.}\) Id. at 52.
\(^{57.}\) William Shakespeare, Hamlet act 2, sc. 2.