Introduction

The Concept of the Natural Moral Law as a Legal Theory

Law and the Good

INTRODUCTION

It takes time for belief systems to be lived out and their inadequacy revealed for all to see. The intellectual energy released in the attempt to fuse Aristotle and Christianity characterized the intellectual life for a significant portion of the Medieval Age. The incompatibility of Aristotelianism and Christianity was officially noted in 1276, but the untangling and disengaging of Christian thought from Aristotle required more time in which skeptical attacks on Aristotle's epistemology and metaphysics made known the need for a foundation on which to build anew. Out of this skeptical backdrop the Modern age emerged with thinkers like Descartes and Hobbes seeking to provide a new basis for thinking about what is certain and how the world works. Religious conflicts that retained medieval characteristics were set aside in favor of a division between private beliefs about what cannot be agreed on and public goods required by all.

Nevertheless, Modernity also lived itself out in time for all to see. Like Aristotelianism, it claimed to have provided a foundation for knowledge and a description about the world. Its denouement came in the same way, through skeptical attacks concerning the sufficiency of this foundation. Like the medieval world, the modern world drew to a close in a series of costly and deadly wars. In the aftermath, there is general agreement that the postcolonial, globalized world is a postmodern world, but little agreement about what would constitute a new foundation for rebuilding. It is the skeptical time between the death of one age and the beginning of another.

This atmosphere of skepticism influences all areas of life, not least of which is the area of law. Even the use of that term will immediately raise questions about its manifold meanings and methodological uses. Is law a

description, or is it normative? Is law to be analyzed in terms of the authority from which it proceeds, or in relation to a standard of justice? What is the meaning of normative claims; how is *ought* to be understood? Are *ought* claims making cognitive statements about facts, or are they noncognitive expressions? The first question gets to the similarity or difference between science and legal theory. Scientific laws are said to be describing order in the world, regularity between cause and effect, laying bare the intelligibility and comprehensibility of the universe. Natural law has the benefit of claiming to give a similar description about human life both individual and social.

However, natural law is criticized as relying on metaphysical speculation and outmoded systems of thought about how the universe works. Furthermore, scientific laws are descriptive, whereas natural laws are prescriptive; the world of human choice is full of persons acting contrary to the natural law. In an attempt to arrive at the descriptive aspect of law, the realist traditions claimed to be merely describing law as it is. Law is separated from metaphysical speculation and is expected to follow as closely as possible the scientific method. Natural law seemed too mired in metaphysical assumptions to be of any use to a modern and scientific mind.

As Modernity progressed, scientific thinking increasingly limited all knowledge to the empirical and natural (material). Nevertheless, it rested on assumptions that could not be proven empirically. This empiricism and naturalism encouraged the embrace of nominalism. One implication was the rejection of the idea of a universal "human nature" and instead the study of only particularity and modest induction. Without the idea of a universal human nature, claims about the human good lost their meaning, and any law based on the good and human nature appeared unhelpful. The idea of the highest good was therefore challenged both by the rejection of final causes and by nominalism that denied universal natures in general and human nature more specifically.

In this book I argue that there is the highest good based on human nature and that it is readily knowable, so that the failure to know the good is a form of culpable ignorance. This involves showing how no legal theory can actually disconnect itself from the study of metaphysics (the study of what is real). The argument will be given that it is not possible to avoid resting law on metaphysics where metaphysics means a theory about what is real. Rather, the issue is to what extent given thinkers are aware of the metaphysical assumptions behind their theory of choice. Thus, the change to Modernity marks a shift not away from metaphysics, but from one set of metaphysical assumptions to another. Furthermore, because these

assumptions are used to support the new tools of science, the *novum organon*, science cannot be called on to defend them without creating a circular argument as a result. The following seeks to lay bare for investigation these metaphysical assumptions and in so doing help explain the current skeptical attitude and make progress in a new foundation for the moral law.

This means that we will need to learn how to think about metaphysics in order to make progress in coming to understand law and achieving unity between legal theories. It is the absence of this that marks the age of skepticism whose function is to call into question the assumptions of a system, but which does not offer anything in replacement. Studying the natural moral law after Modernity requires exposing uncritically held assumptions that give fuel to the fire of skeptics (those who claim we cannot know), but also making progress toward a replacement that answers the challenges of the age. The natural moral law after Modernity is not simply natural law fit into Postmodernity; it is natural moral law understanding the failures of Modernity and answering the challenges of Postmodernity.

The lawyer will regard this book as an essay in critical thinking about jurisprudence for it is concerned with thinking our way backward to presuppositions that mold and shape the general framework of legal thought.[1] This is not the same as a critical-theorist approach that seeks to expose power structures on the way to the goal of addressing alienation (critical legal theory will be one of the legal theories analyzed for presuppositions). Nor is it the same as a criticism of a specific law or legal policy. I rely on a historical method to consider how presuppositions change and how they are hidden from sight through a process of intellectual neglect and avoidance. However, my main purpose is philosophical in that I will critically examine presuppositions for meaning in the hope of making progress toward a growth in meaning. These presuppositions are mainly epistemological and metaphysical; they are the presuppositions that help us understand how one legal theorist can say: "The prophecies of what the courts will do in fact, and nothing more pretentious, are what I mean by the law" and another can say: "An unjust law is no law at all."

The historical sections of this book are not meant to duplicate what can already be found in other, more detailed history books. The purpose of the historical ordering of the book is to illustrate how ideas shift through a process of challenge and response. I want to capture the interplay between the challenges of an age, how the response to these shapes epistemology and is shaped by it, and how this forms the view of the good and what is

[1] Contrast this with H. L. A. Hart's purpose in *The Concept of Law*.

valuable and in turn produces a lived piety. From these relationships we can infer patterns that illustrate why the good is misidentified and therefore not known.

The concept of the good will help provide a fixed point of reference for us as we consider law. Natural law is sometimes distinguished as the legal theory concerned about the good, but I argue that the concept of the good is inescapable. The issue is not whether a given theory posits the good; the issue is what any given theory asserts to be good. A realist who says, "I'm not interested in the good, I'm interested in knowing what counts as the correct procedure for producing law so that society can have stability," is giving us a look at what he/she believes to be the good. Indeed, what any given legal theory believes to be the good is a central part of the foundation of that theory; it is a belief on which the entire theory rests. The extent to which a view of the good has been proven in contrast to its competitors will be the extent to which the foundation is solid. And so we can proceed with this question fixed before us: What is the good?

THE GOOD

This study begins with a clear assertion: Some things can be sought as ends in themselves, and some things cannot be sought as ends in themselves.[2] To say that a concept is clear is to say that it cannot be confused with its opposite. The idea of an end in itself, or the good, is one example of a clear concept. Similarly, it is clear that we make choices, that in making choices we seek to attain a goal or end, and that some goals are sought as a means to yet another goal, whereas there remains the idea of the good as an end in itself. There is a clear distinction between that which is a means, that which is an end, and that which is an effect of attaining the end. To build toward the conclusion that the good is easily knowable, I begin by highlighting views of the good in notable thinkers from the early medieval, late medieval, early modern, and late modern eras. I will use this study to make the case that beliefs about the good are relative to beliefs about human nature and the real. Legal theories are expressions of this relationship, and thus distinctions between notions such as natural law and positive law can mask rather than illuminate such beliefs.

The final goal of this study is to make the case that a global age requires a global law, and that a global law requires a clear statement of the good. There are implications that I draw from this, especially about the

[2] This is consciously different than the beginning of Aristotle's *Nicomachean Ethics*.

responsibility for individuals to know the good and the inexcusability of failing to do so. The idea of coming to unity about answers to basic questions is rarely on the agenda. People appear content with disunity, and with approaching law as a compromise between incommensurable viewpoints. I believe we should work toward a basic unity concerning what is real and what is good, and that until there is a basic unity, there will be no end to our troubles.

The contradiction of "some things are ends in themselves" is "nothing is an end in itself." If true, this makes choice empty and meaningless. If choices are made to attain an end, and this includes choices made for something that will be used as a means to another end, then choice can only be meaningful if there is an end in itself to choose.[3] Otherwise, choice is confused with not choosing because in neither case can an end in itself be attained, and one may as well not choose as choose. Therefore, choice itself, or the faculty of the will, cannot be that which is good, but instead is that which aims to achieve the good.[4] To claim that there is not end in itself and yet to make choices toward goals is a lack of integrity.

The idea of the good as an end in itself is distinct from happiness, as well as from duty, virtue, and excellence. The latter three are used as a means to an end. One is excellent to ensure one achieves a goal; a person does his/her duty to make sure society runs smoothly, or to have integrity, or some such goal; virtue is defined in relation to the goal it achieves, not the other way around. In each of these cases, the good must first be known, and then duty, virtue, and excellence are defined and understood in relation to the good.

Happiness is an effect of possessing what one believes to be good. Aristotle claimed that all men desire to be happy, but the classical world after him spent centuries debating the nature of happiness and how best to achieve it. How can all men desire it if they are not even sure what it is? Happiness has been understood as pleasure, joy/contentment, and a final blessed state, among others. Each of these is an effect of something else (rather than an end in itself) and is not sought directly as is the good. I argue that the real distinction should be between lasting and not lasting happiness. Our happiness is temporary when it is a result of our possessing something that we believe is the good but is not actually the good. This realization takes away our happiness. If we actually possess the good, we

[3] Aristotle gives an argument in the *Nicomachean Ethics* to show why an infinite regress of goals is not possible.

[4] This distinguishes between the will and that which the will is choosing. Therefore, the will itself cannot be the good, nor can it be the only thing that can be called good without qualification (Kant).

will be lastingly happy. The fact that happiness is an effect of understanding the good means that it is cognitive and mediate, not simply a perception and immediate (as in pleasure or the beatific vision).

Can we know the good at this stage in history? Specifically, can we know the good after the collapse of Modernity and in the age of global pluralism? I study this question by first giving a brief look at conceptions of the good in the early medieval, late medieval, and modern periods, and then looking more closely at views from the early twentieth century. This method likely will open me up to the criticism that I am only giving caricatures of these periods, but I believe this can be avoided if I have done two things: (1) accurately represented the given thinker's view of the good; and (2) showed that it is true either that the thinker shaped the period in a formative way, or that the presented view is an expression of the attitude of the period.

I want to capture the interplay between the challenges of an age, how responses to these challenges shape epistemology and are shaped by it, and how this forms the view of the good and in turn produces a lived piety. From these relationships we can infer patterns that illustrate why the good is not known. I consider a line in history that is described generally and then with greater precision in order to highlight patterns. This is a descriptive work that does not help us know which beliefs about the good are and are not justified. However, it does help us make progress is understanding what has been revealed in history as we contemplate the good.

Philosophically, I want to begin with the Socratic integration of reason and reject the bifurcation of theoretical and practical rationality made by later thinkers and assumed in much contemporary discussion. The Socratic view maintains that knowing is necessary and sufficient for choosing the good. A person does something not for the sake of doing it, but to attain some end. We do not pursue the good for the sake of that which is a means to the good, but rather we do intermediate things for that which is good. "So it's because we pursue what's good that we walk whenever we walk; we suppose that it's better to walk. And conversely, whenever we stand still, we stand still for the sake of the same thing, what's good."[5] Feeling pleasure is not the same as doing well; what is pleasant is different from what is good, because a person could be in pain yet also feel enjoyment.[6] All things are done for the sake of what is good; it is the end of all action

5 Plato, "Gorgias," in *Plato: Complete Works*, ed. John M. Cooper, trans. Donald J. Zeyl (Cambridge: Hackett, 1997), 468b.

6 Ibid., 497a.

and pursued for its own sake.[7] The lawful and the law are descriptions of states of organization and order, which lead people to the good.[8]

For Socrates, the goal of discussion and persuasion is knowledge. There are two types of persuasion: one providing conviction without knowledge, the other providing knowledge.[9] Socrates proceeds with a method of attempting to make the subject clear through discovering meaning rather than attempting to win the argument through persuasion.[10] To produce conviction with knowledge, the orator must know that about which he speaks – for instance, health, justice, or the good. In the matter of choices we are asking what can be pursued as an end, what is a means, and what, if anything, is an end in itself, which is sought for its own sake.

This also helps us understand what is meant by "law." A law describes what must be done to achieve the good. It is therefore both an "is" and an "ought." To achieve the good, a person must do this, and because the good is desired by all, a person ought to do this. The reality of false beliefs about the good helps explain why people act in competing ways (either different people or the same person at different times) – namely because of conflicting beliefs about what is good. Different societies enact different laws, and this is an expression of how they understand the good and the means to the good.

ATTEMPTS TO AVOID CONNECTING LAW AND THE GOOD

There are notable attempts to avoid connecting the law to what is good. These are also considered further in this study as we consider particular thinkers. However, it is worth thinking about some of them now in relation to the Socratic viewpoint.

Law Is the Command of an Authoritative Will

This view has been influential in a number of otherwise different legal theories. For instance, it is the definition of law used by divine command theorists like William of Ockham. It is also the theory of law used by Thomas Hobbes at the beginning of Modernity. Because of this, some scholars, like Brian Tierney, trace the origins of Modernity into the thirteenth and

[7] Ibid., 500a.
[8] Ibid., 504d.
[9] Ibid., 454e.
[10] Ibid., 457e.

fourteenth centuries. It is also the view shared by some contemporary legal positivists who seek to trace the origins of law to the correct procedure in a given society for enacting laws.

In an important way, this view of law promotes a division between the intellect and the will, which has been, and continues to be, influential in Western thought. It was not present in Socrates, as I discussed earlier, but it is seen in some aspects of Plato and in Aristotle. It is in Aquinas, and it is behind the debate about whether it is the intellect or the will that is the basis for law. The intellectualists and the voluntarists assume this division. It fueled the argument between Thomists and Ockham about the omnipotence of God, and it is related to the Euthyphro dilemma about God and the good.

Taking the Socratic approach, I argue that a law is not valid because it is commanded by the valid authority, but that a law has authority because it is an accurate description of how to attain the good. In the case of God, what is good for a being is based on the nature of that being, and so what is good for a human is based on the nature of a human. God, as creator of human nature, is the determiner of good and evil for humans. So the moral law commanded by God is given not apart from human nature as an imposition (heteronomy), but in unison with God creating human nature.

With relation to a human authority (monarch or legislator), what is willed as law is an expression of what the authority believes to be the good and how to achieve that good. Therefore, if the authority is incorrect about what is good, then its laws will describe inaccurate means to the good (although perhaps accurate means to what is falsely believed to be the good). This calls into question what it means for this lawgiver to be an authority.

If someone in authority is not ruling for the good, then this rule is either for evil or it is amoral. There are serious problems in saying that someone knowingly rules for evil. Or perhaps they rule for the evil of their citizens but for their own good. Nevertheless, evil will bring about the end of their citizens and leave them with nothing to rule and no way to rule for their own good. The claim that rule is amoral might be another form of skepticism about knowing the good, but it might also be a claim about the inapplicability of the good to most of the kinds of laws a government needs to enact. I consider this in the next session.

Law Is the Power to Change Behavior

This definition is related to the law while bearing some distinctions in focus. It moves even further from the intellect into the realm of pure force. It rests on the intuition that if there is not an ability to enforce a law, then

it is not really a law; or, if a law has no consequences, then it is not really a law. There is some truth in this. However, this particular view rests on the same division of the intellect and the will. Furthermore, this division of the intellect and the will rests on skepticism about our ability to know the good and the reality of the good. Because humans cannot know what is actually good, or because there is no good, only desires, laws are expressions of individual or group preference. To make the step from preference to actual law, there must be an ability to enforce the law. This, in turn, changes behavior. Therefore, authority most simply is that which has the power to enforce laws.

This viewpoint also rests on the claim that most laws have little or nothing to do with what is good. Laws about what color of light means "stop," what side of the road to drive on, regulations on public water or electricity, kinds of zoning permits, and so forth seem like the real day-to-day business of government and also seem far removed from the discussion about what is good. This is another kind of skepticism: a skepticism about the applicability of the good to the ins and outs of life. It is indeed true that historically, much discussion about the good has promoted the viewpoint that the good cannot be known or attained until the afterlife. Thus, the challenge is about how the good applies in this life.

Initially, we can respond by pointing out that the kinds of "mundane" laws just considered collectively represent an attempt to have order and safety in society. Different societies can have different laws about what side of the road to drive on, but there must be some consensus about this, otherwise serious problems will occur. Therefore, even though these laws are not directly related to the good, they are indirectly related through the proximate goals of order and safety. Order and safety are themselves a means to humans having the ability to live their lives unmolested and unharmed in order to achieve other goals, including the good. So I do not believe we can claim there are laws that have nothing whatsoever to do with the good. However, it does remain a serious problem for the postmodern world to reject otherworldliness in relation to the good and to understand how the good can be achieved presently in this world.

Finally, this view and its skepticism about the possibility of knowledge reduce humans to appetites and actions. The phrase "brute force" describes this idea of law as the force used by brutes, not by creatures with intellects and knowledge. Because postmodern thinkers share this skepticism, their analysis of history often revolves around arbitrary power systems rooted in one group's desires and achieved through the oppression of another group whose desires go unfulfilled. What I question is the

shared skepticism about our ability to know what is good, and the shared skepticism about there being a good (epistemological and metaphysical skepticism).

Positivism

These attempts to avoid relating the law with the good overlap. Positivism can be found in the previous two sections. However, it is worth considering it in more detail because of its importance. Most basically, positivism relies on empiricism. Empiricism claims that all knowledge is through sense data. This modern form of empiricism claims that a good researcher is one who describes events and seeks to find their meaning within what was experienced, not by imposing an external order from presupposed metaphysical assumptions. Because of the limits of empiricism, the adherent to this view claims that only the experienceable world (the material world, the natural world, the physical world) exists, or perhaps that only such a world can be known. Everything else is opinion and, more often than not, a hindrance to knowledge, and should therefore be jettisoned. Thus, for instance, H. L. A. Hart argues that nothing is gained by claiming that law and the natural law (or moral law) are necessarily connected, and so we should reject such an approach as unenlightening.

Once again we find that this rests on an epistemological skepticism. Has the positivist succeeded in avoiding all epistemological and metaphysical assumptions? Clearly not. Rather, what is happening is the positivist saying that only his/her assumptions can be permitted, whereas all others are dubious. Why should we accept this? An appeal to the marvels of science is not sufficient as these marvels are consistent with other presuppositions beside empiricism and naturalism (for instance, theism). Similarly, an appeal to the overextended use of superstition in the past, and all of the harms it produced, is insufficient as that only tells us to avoid superstition, not to become empiricists and reject all that is nonmaterial (supernatural). Empiricism has dogmas, and these are not provable by empirical methods.

Hart's criticism rests on the belief that there are some very general concepts, like justice, that inform law, but that natural law itself is unhelpful in giving particular laws. The idea of justice is sufficient to get us going, being a kind of intuition of sorts that is shared by all. Disagreements arise in relation to what justice looks like "on the ground," in a given circumstance.

In relation to what came before (in terms of natural law theorists), Hart has an important point. It has been difficult for natural law theorists to show