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The following excerpt from the Law School Record of the University of Chicago (Vol. 3, No. 3, 1954) is part of a lecture which Professor Katz delivered at a meeting of the Guild Scholars in the Episcopal Church. It is printed here as some evidence of the revived interest in the natural law which is to be found among non-Catholic as well as Catholic scholars.

NATURAL LAW AND HUMAN NATURE

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WHAT IS IT THAT a teacher of corporation law can bring to a discussion of natural law? Perhaps it is principally his concern with the problem of the criticism of rules of law. I am awed, of course, by the mass of learning which has accumulated around varying concepts of natural law — learning which I have not even systematically sampled. But twenty years of teaching law have so heightened my concern over lawless debates about justice and law as to remove many inhibitions. Without apology, therefore, I may discuss the utility of a concept of natural law as a basis for the criticism of rules and institutions of positive law. But first let me summarize the change which these twenty years have brought about in the law schools in attitudes toward natural law.

I received my professional training in the twenties when natural law was all but eclipsed, except in the Roman Catholic law schools. The dominant legal philosophy was a positivism in which law was merely the word for what the officers of the State would enforce. Criticism of legal rules, except in terms of their internal consistency, was viewed as merely the assertion of the critic's personal opinion. I remember the classmate who insisted on an ethical point in our class in property law. In a withering tone, the instructor advised him to transfer to the divinity school if he was interested in such questions. And when Morris Cohen wrote in defense of natural law philosophy, he said that he expected his effort to have the kind of reception which would be accorded to a defense of belief in witchcraft.

It should not be overlooked that part of the hostility to the concept of natural law was due to its abuse, particularly in the history of the federal due process clause. Mr. Justice Brewer had said in an address that the demands of natural law "prevent that any private property . . . should be subordinated . . . in the interests of public health, morals, or welfare without compensation." And it was on similar grounds that legislation such as workmen's compensation was first held unconstitutional.

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By the middle forties the general attitude toward natural law had strikingly changed. Perhaps the turning point was the perversion of the legal order in Nazi Germany. Legal relativism suddenly became ludicrous. Faced with the Aryan laws, one could hardly comment that the National Socialists merely had a different view of justice from ours. Books and articles were published giving new and respectful attention to the natural law tradition. To be sure, one of these was ridiculed by a reviewer as "firing feather barrages" and as "reconciling science and God and calling it law." But the reviewer himself later published his own "brief statement of democratic morals" in terms most of which a natural law philosopher could easily accept.

My own introduction to natural law was largely at the hands of my then colleague Mortimer Adler. In this introduction I confess I was not deeply impressed with the utility of the classic formulations of natural law principles. But I owe to Mr. Adler the clue which has led me to the position taken in this paper. Mr. Adler gave a course called *Law and the Nature of Man*, an introduction to philosophical psychology. Participation in this course convinced me that inquiry into the nature of man is the most promising source of useful natural law criteria. Nor was this conviction shaken when a student librettist lampooned the course with the parody: "*Law and the Nature of Man, tra la, has nothing to do with the law.*"

Let me first use the criminal law to illustrate how analysis of legal problems brings one to basic questions as to the nature of man. In my generation it has been fashionable to take the position that criminal responsibility is imposed either to deter (or prevent) further crime or to reform the offender. Emphasis on one or the other of these purposes usually reflects a distinct view of human nature. To speak of reformation presupposes a nature capable of moral development. To speak of deterrence presupposes only a nature capable of conditioning. When advocates of deterrence are faced with evidence that the deterrent effect of punishment

on the criminal is very doubtful, they usually shift to the point that others, potential criminals, are more effectively deterred. This is highly probable, but it raises the question of the justice of punishing one man for the purpose of conditioning others. This point would not be serious if it were recognized that punishment is justified as retribution, but retributory theories have generally been rejected in recent decades. They have been dismissed as mere rationalizations of vengeance and as utterly unacceptable in view of evidence as to the extent to which crime is traceable to social and family conditions.

This confusion as to the basis of criminal responsibility is not merely of academic concern. It has led to confusion and vacillation as to the severity and type of penalties imposed and as to the handling of borderline cases of mental incompetence. And it mirrors an unhealthy confusion in the public attitudes toward crime and punishment.

A natural law approach to criminal law would require the facing of questions such as these: Are criminal tendencies unique to a criminal class or are they similar to tendencies common to all men? Have men a freedom of choice and a moral responsibility resting upon such freedom or on some other basis? Are men capable of moral development and under what general conditions does moral development take place? Is it important in this connection that men are treated as responsible for their acts?

Here let me sketch very briefly the doctrine of man in which Christians find answers to such questions. With this view of the nature of man, I will comment further on the criminal law and then consider some aspects of the law of economic organization. A thumbnail sketch of the nature of man in the Judeo-Christian tradition must include: first, man's capacity for creative life in society; secondly, his tendency toward defensive retreat from the frustrations of his limited creativity; and thirdly, his freedom and responsibility with respect to these tendencies. Inferences may then be drawn as to man's proper good and as to conditions

necessary for his development toward this goal, conditions which legal institutions may help to establish and maintain.

We begin thus with the capacities in virtue of which man is said to be created in God's image. I shall only suggest some of the items in the complex: man's power of transcendence, his capacity for objective understanding and appreciation, his critical intelligence, his creative imagination. These powers are developed and exercised in a process of social interaction and in the context of man's need for others and his capacity for creative interpersonal relations.

But these human capacities are finite and their limits involve disappointment and frustration. Men do not readily accept their limitations in trustful dependence on the providence of God. They attempt in varying ways to escape these limitations and the pain incident to them, either in aggressive and pretentious rebellion against the limitations or in weak and slothful withdrawal from the exercise of their powers. At the conscious level and in relation to God these tendencies are called sin, but they are recognized more or less clearly under other categories in secular philosophies and in clinical science. And these reactions become habitual and to a large extent unconscious. As in the case of man's creativity, the context for these tendencies is social and man's defensiveness typically appears in patterns of domination and submission.

Has man freedom and responsibility in relation to these tendencies? The answer of moral theology is yes, but what more can be said? Here one approaches the limit of human understanding. How am I to avoid the alternate temptations to prideful assertion of some pseudo-explanation or to slothful avoidance of a necessary point in my paper?

Does it help to note that men do three things in relation to evil (*i.e.*, defensiveness) in the world?

1. What they do predominantly is to transmit it. Equipped with defensive habits largely caused by the self-protectiveness of parents and others who influenced their development,

they meet defensiveness (whether of the aggressive or submissive type) with counter defense (again either aggressive or submissive). This is the predominant pattern of human action, and in considering what legal institutions are suitable to man's condition, it is well not to lose sight of this fact. For this chain of defensive reactions man's responsibility is primarily communal; it rests upon the race as a whole.

2. But man not only transmits evil, he increases it. His freedom to do so is a mystery. Its exercise involves responsibility in a different sense. It is individual responsibility, though the presence of Satan in the Genesis story warns against prideful insistence on exclusive guilt.

3. Man need not merely transmit or increase evil; he may decrease it, not, to be sure, by his own power but through the redemptive power of God. He is free to be or not to be the channel of this power and he is responsible for the exercise of this freedom. The cost of accepting this role is the pain of enduring without self-protectiveness his share of the world's evil. And his share includes primarily his own defensive tendencies. To participate in God's redemptive work man must accept painful self-knowledge and assume full and painful responsibility for his own acts regardless of how completely they may have been determined by defensive acts of others.

This view of man's powers suggests that his proper good is the freeing and exercise of his capacity for creative and loving response to the world and its inhabitants. And man's advance to this end ordinarily requires external conditions, conditions in which individuals are enabled to take the painful steps which this advance requires. Certainly a measure of peace and security is required if individuals are to learn to control their defensive impulses. The environment also must have such stability that it does not overtax man's nascent and limited capacity for creative co-operation. Men require also an environment which treats them as persons, persons accorded freedom and held to re-

sponsibility. But finally it must be an environment not devoid of forgiveness.

With this rough summary of man's nature and temporal goal, we may return briefly to our consideration of the criminal law. If there is any validity to our view of the natural law of man's present state, it should follow that the law must somehow teach the sober fact of responsibility and that in this sense criminal penalties must be considered as retributory. And if the propriety of retribution is thus granted, criminals are not unjustly used if their punishment serves to promote peace and order primarily by deterring others.

At the same time the criminal law may aim at reformation which, in the terms I have used, is a matter of voluntary assumption of responsibility. Here, as well as in mediating forgiveness, there are dangers of confusing justice and mercy, but there is clearly room for devices such as probation, parole, and individual and group therapy.

In drawing the line as to mental incompetency, the classical rules in Anglo-American law run in terms of capacity to understand the character of one's act and the

distinction between right and wrong. The perennial debate is over expanding the category of irresponsibles to include those who have acted with this understanding but pursuant to so-called "irresistible impulse." One difficulty with this change is that medical experts often disclaim any ability to discriminate in criminal cases between resistible and irresistible impulses and insist that all criminals should be treated as sick and all criminal acts considered as irresistibly impelled.

I will not say that the traditional rules have always reached desirable results, but a natural law approach indicates that the capacity to distinguish right from wrong is not an element which should hastily be abandoned as a criterion of legal responsibility. To say that law is retributive does not mean, of course, that legal retribution should always be imposed where moral responsibility exists. Even the clearly insane may bear in the sight of God a measure of responsibility for their condition and their acts, but only the most primitive law treats them as legally responsible. Similar legal immunity for those with certain types of emotional illness may well be justified without weakening the force of the moral teaching of the law.***