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METAPHYSICS, EPISTEMOLOGY, AND NATURAL LAW THEORY

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It is maintained here that the problems that have beset natural law theory actually pertain to the theory's philosophical underpinnings in metaphysics and epistemology. To wit, a Platonistic conception of "the nature of X" and a Cartesian idea of the requirement of knowledge have plagued the theory.

With recent developments in epistemology, which make a contextualist—rather than either idealist/absolutist or relativist/conventionalist—idea of definitions of the natures of things, as well as such a conception of human knowledge, possible, we are, it is argued here, in a position to improve the philosophical underpinnings of natural law theory, perhaps even to the satisfaction of sympathetic but persistent critics, such as Has Kelsen.

INTRODUCTION

RECENTLY WE HAVE WITNESSED A revival of normative political and legal philosophy. Even natural law has returned as a palatable hypothesis on matters of justice and lawfulness. The reigning view of law during the better part of the 20th century, positivism/realism, despite the relentless efforts of Lon Fuller and a few others, has proven to be inadequate for securing some sense of direction with questions of legitimacy pressing at us from everywhere on the globe. John Rawls, Robert Nozick, and, especially, Ronald Dworkin, however, reintroduced normative politics and legal theory into the scholarly community.¹

These developments had not yet sufficed to revive the natural law approach. Rawls' intuitionism is hardly a natural law method of contending with questions of justice and moral or political legitimacy. Nozick is a neo-Hobbesean who employs the "argument from best explanation" approach in his political theorizing.² Dworkin invokes Rawls

1. John Rawls, *A Theory of Justice* (Cambridge: Harvard, 1971); Robert Nozick, *Anarchy, State, and Utopia* (New York: Basic Books, 1974), and Ronald Dworkin, *Taking Rights Seriously* (Cambridge: Harvard, 1977).

2. That is, he assumes about persons that they are inherently self-interested. See Tibor R. Machan, "Nozick's Geometrical Libertarianism," *The Occasional Review*, Vol. 6 (1977). Even Rawls makes this assumption about persons prior to their joining the effort to establish principles of justice behind the veil of ignorance. See James

and contends that this makes his moral grounding for law and justice "objective," yet that is open to serious question, since intuitionism is a long way from satisfying even the most rudimentary requirements for objectivity.

Natural law distinguishes itself from other positions vis-a-vis morality and law via the particular sort of justification it invokes for moral judgments. The term "natural" in "natural law" has, for the bulk of those embracing this approach, tended to mean "derived from the nature of the being to which the law applies."

This dates back to the ethics of an era when it was seen as possible to know *the nature* of this and that, including human nature. Such knowledge was supposed to provide us with awareness of what is necessary and sufficient—or perhaps indispensable—for something to be what it is. And "human nature" would designate the attribute(s) that it takes for something to be human. Natural law then refers to the list of prescriptions or edicts that apply to human beings in virtue of what they are or of their nature.

Today there is a lot of discussion of moral topics among political and legal philosophers. Yet it is doubtful whether these discussions gain some kind of firm intellectual support. Rawls' recent very influential doctrine of the "independence of moral theory" just will not suffice as an approach to normative morality, politics, and law, given the recent legacy of extreme skepticism in the metaethical and metapolitical fields. This view makes moral and political theorizing, including public policy analysis, not much more than sophisticated opinion venting.

We might as well take advantage of the current pluralistic, exploratory atmosphere and reconsider natural law theory. Some of the challenges issued against this tradition appear to be less powerful than had initially been thought, especially in light of some recent developments in epistemology.⁴

Some of those who felt impressed but not quite convinced by the natural law approach suggested where the difficulty with the doctrine under attention lies. Hans Kelsen, for example, admits that moral con-

Buchanan, "A Hobbesian Interpretation of the Rawlsian Difference Principle," *Kyklos*, Vol. 29 (1976).

3. John Rawls, "The Independence of Moral Theory," *Proceedings and Addresses of the American Philosophical Association* (Newark, Delaware: University of Delaware, 1975). Cf., Tibor R. Machan, "A Note on Independence," *Philosophical Studies*, Vol. 30 (1976).

4. These developments are discussed in T. R. Machan, "Epistemology and Moral Knowledge," *The Review of Metaphysics*, Vol. 36 (1982).

victions "determine in the so-called fundamental rights and bills of liberty the content of the law, when they prescribe a minimum of what they should and should not contain." He says that in this manner what he calls the "static principle . . . gains access to the system of positive law."⁶

SOME PROBLEMS IN METAPHYSICS AND EPISTEMOLOGY

The most problematic feature of natural law moralities has been their link to a Platonic or perverted Aristotelian conception of reality and knowledge. Knowing the nature of human beings in this tradition implied having a fixed picture in one's mind of a fixed (abstract) object. To know human nature must then mean that one is in a state of completed awareness of an object. To modify one's understanding of human nature, would then be impossible—if one does know human nature. And if one does require such modification, or if that possibility must be admitted, then the claim to knowledge must be withdrawn. A timeless nature had to be known timelessly! But one encounters clear cases where our "knowledge" of the nature of something must be changed after some additional study. So a view of knowing reality tied to this tradition produced skepticism.⁷

The main problem with natural law theory is the view associated with it that the nature of *X* must be a timeless and fixed metaphysical entity.

The next obstacle the theory faced is that to know something had also been tied to the Platonic tradition. This requires that knowledge—the state or being of it, or the phenomenon of knowledge—has itself to be fixed, timeless, a state of mind that, once attained, would be permanently fixed, unchangeable.

Clearly it is no longer difficult to see what is wrong with that idea. If knowledge were as the view required then we could not know the nature of knowledge either. And then we could only draw the Kantian conclusion that we never know whether we know the nature of anything else at all, given that we cannot really identify any instance of knowing anything. So we do not know very much if anything at all.

There is likely to be hardly anything that when we know it, we know it thoroughly, fully, completely, finally, with all changes ruled out in

5. Hans Kelsen, "The Pure Theory of Law," in M. P. Golding, ed., *The Nature of Law* (New York: Random House, 1966), p. 132.

6. *Ibid.*

7. This may be appreciated from reading Peter Unger, *Ignorance* (Oxford: Oxford, 1975).

what we claim we do know on the topic. So this idealized notion of what knowledge must be has ruled out not only moral and political but scientific knowledge. At best the sciences give us what Karl Popper calls hypothetical knowledge.⁸

For Kelsen, however, such global skepticism was not the problem. His contrast of morality and law implies that if morality were also a dynamic system, then (a) it might be linked more closely to positive law, and (b) it could still qualify for something that can be an object of knowledge and understanding, just the way that he thought law can be. In other words, for Kelsen there seemed to be no problem about knowing dynamic facts such as law, whereas to many others it seems that knowledge requires static things with a static state of mind that somehow reflects them, and in the evident absence of all this, there is no knowledge.

This paper will not attempt to defend fully the idea suggested by Kelsen, to wit, that a dynamic conception of knowledge is available to us, one that can manage dynamic facts, such as the law offers up for consideration. What it aims to argue is that this same idea is not unpalatable as applied to knowledge of morality. And as a result it is not unlikely that the link between morality and law is more intimate than Kelsen had believed. He believed the connection to be weak since he accepted a basic contrast, at the epistemological level, between the two systems. However, if the two systems do not on that count differ, after all, then the link might be far more firm than Kelsen and other positivists believed.

MORALITY AND EPISTEMOLOGY

Morality arises from asking "How ought I to live my life?" It is a natural concern, pertaining to our world, just as do most other fields of inquiry. It is sometimes held that ethics or morality deals with the question of social relations, namely, "How ought we to deal with others, treat other people, or what duties do we have toward others?" The view that morality is a social concern stems from the fact that the most publicized aspects of morality are its social dimensions.⁹ Yet ethics in fact stems from the concern an individual has with how a good human

8. Karl Popper has advanced this thesis in virtually all his works. That he has done this may be gleaned most clearly from his own autobiographical work, *Unending Quest* (Glasgow, Scotland: Fontana/Collins, 1974).

9. W. D. Falk, "Morality, Self, and Others," in Hector-Neri Castaneda and G. Nakhnikian, eds., *Morality and the Language of Conduct* (Detroit: Wayne State, 1965).

life ought to be lived, which is broader in scope than social morality.

Karl Popper has noted that the concern with values arises from the presence of problems and it is life, which is a fact of the natural world, that gives rise to problems:

I think that values enter the world with life; and if there is life without consciousness (as I think there may well be, even in animals and man, for there appears to be such a thing as dreamless sleep) then, I suggest, there will also be objective values, even without consciousness.¹⁰

It is not difficult to defend this idea. After all, it is only to beings that have the alternative between life and death that there can be a problem—namely, what to do to further life and avoid death? To get from here to the development of a more viable approach to natural law theory requires a few steps, but they are not mysterious at all.

First, an idea of “the nature of X” has to be formed that does not fall prey to several skeptical challenges, including (a) the view that anything timelessly fixed cannot be known, and (b) any system resting on such timelessly fixed natures would not help for purposes of guiding us in a dynamic context.

Now, first of all, if values depend upon the emergence of life, clearly values cannot be said to rest on something timelessly fixed. Life is a process which we have found out is subject to development, evolution, modification. So if, as it seems to make sense to do, we locate the source of norms in the character of life, then we are not bound to the view that these norms rest on static features of reality.

And next, a theory of nature is more likely without the doctrine embracing the fixedness of these natures. If by “the nature of X” no metaphysical essence or timelessly fixed entity is meant, but what Ayn Rand has called “a device of man’s method of cognition—a means of classifying, condensing and integrating an ever-growing body of knowledge,”¹¹ then the basis for a natural law viewpoint is present.

Second, another main point is that natural law theories of morality are not theories of value or goodness and need to go farther than Popper, who proposes the existence of values to be a function of the emergence of life. But we must now consider what accounts for the introduction of moral values.

There can be values without moral values. Value judgments can be appropriate in, say, botany or zoology, where living beings encounter

10. Popper, *op. cit.*, p. 194.

11. Ayn Rand, *Introduction to Objectivist Epistemology* (New York: New American Library, 1979), p. 50.

hazards or supports and thus may do better or worse, well or badly. Turning to moral values more is involved. Here individual responsibility is attached to producing or accepting hazards or supports. Morality embodies individual responsibility for doing good or bad deeds, acting rightly or wrongly. The failure of plants or saplings to grow well is not their fault. Nor do they receive credit for flourishing. In the case of persons such matters are properly attributed to their choices and thus they could well be held responsible: in short, credited or blamed.

Taking the idea further than Popper does, moral values emerge with the kind of life of which it is correct to say that it possesses a free will or the capacity for self-determination. This is worth noting because much confusion exists about these issues. Often mere value theories are mistaken for moralities.¹²

A RECOVERY OF NATURES

Having noted the special status of moral values—which natural law theories aim to identify—let us now consider the possibility of a conception of the nature of *X* that would enable us to recover the naturalist part of natural law theories. It will be recalled that what is needed is some viable theory of the nature of *X*. And the first clue we gained from Rand to the effect that to reconceive natures or essences we need to see them “as epistemological—in the sense that the classification of ‘essential characteristic’ is a device of man’s method of cognition. . . .”¹³

To rejuvenate the relevant type of naturalism we need to find a firm basis for a conceptual framework that embodies the classifications in which we have arrived within the various sciences; showing that there is stability within the framework of classifications without precluding that modifications of the classifications are also possible in the light of a better understanding of reality; securing the theory against the charge that by allowing the changing of definitions, it has fallen prey to being entirely unstable and thus being unable to provide any lasting guidance in such practical fields as engineering, morality, and law.

Let us touch the base of each of these problem areas although we

12. Tibor R. Machan, “Ethics in an Age of Science” (unpublished). The view that free will is inconsistent with modern science is contested most cogently, in light of the scientific findings of neurophysics, by Roger W. Sperry, “Changing Concepts of Consciousness and Free Will,” *Perspectives in Biology and Medicine*, Vol. 9 (1976). See, also, Tibor R. Machan, *The Pseudo-Science of B. F. Skinner* (New Rochelle, New York: Arlington House, 1974).

13. Rand, *op cit.*, p. 50.

values

- moral

→ v.v.

↓

responsibility

↓

choice
(free will)

□

will not be doing full justice to them. The degree of our treatment should, however, help to suggest the direction of the full position that would emerge from a comprehensive discussion.

The major objection to a firm grounding for a conceptual scheme that would establish epistemological categories with an objective base comes from the neo-Kantian critique well expressed by Stuart Hampshire:

It seems that we can set no theoretical limit to the number of ways in which reality could be divided into recurrent elements for the purposes of thought and action; for there is no sense in 'could' or 'could not' as they are used here, unless we have first given the rules or principles that would exclude certain methods of differentiation as impossible. But to give such rules or principles for singling out and differentiating elements in reality is precisely to explain the structure of a possible or actual language. In order to show that elements of reality could only be distinguished for the purposes of language in one familiar way, we would have to show that nothing else could count as 'distinguishing elements in reality for the purposes of language. . . . Even less can we suppose that there must be some independently identifiable ground in reality, independent of the conditions of reference to reality.'¹⁴

This challenge assumes that (a) the rules of language come from language itself, not from a source outside, imposing standards on language itself so that it can serve to discuss reality successfully; that (b) one must take on the burden of proving that "nothing else would count as 'distinguishing elements of reality for the purposes of language' "; and that (c) an "independently identifiable ground in reality" refers to a ground that is known independently of the conditions of reference to reality—i.e. independent of human consciousness. The last is an impossible task: without the faculty of awareness of something one cannot be aware of it. The Kantian view that the nature of the faculty of awareness is an obstacle to its very task is self-defeating and thus unsound. It assumes (b), i.e., that to show that something is the actual ground of reality one must prove that no other ground is possible—that some negative existential proof is required. That assumption, in turn, rests on the dubious (Cartesian) claim (d), that to know that something is the case, one must prove first that one could not be wrong about the matter, that is, that one's consciousness is infallible, incorrigible, perfect. The entire project involves accomplishing what by its characterization is a task suitable only to a god.

14. Stuart Hampshire, *Thought and Action* (London: Chatto and Windus, 1959), pp. 12, 13.

Regarding (a) the rules of language are not invented; rather they are gradually developed on the basis of the success we have in expressing ourselves about the world, a success that we are able to judge by reference to meeting our life needs consistently and with relative constancy, just as we judge success anywhere else, regarding any other tools.

To view these rules as Hampshire does then treats language as a mere game, with an option to play or not to play it in human life. Language is a basic tool for us, not a playful artifact. Its rules or principles are not like those of chess or Trivial Pursuit—it is not enough for them to be consistent. (And why must they be that at least?) The rules of language are like those of photosynthesis, except that the last are not breachable, whereas the former, since they apply to thinking agents—not to inanimate matter—can be breached by those to whom they apply.¹⁵ We should pace Hampshire, regard the rules or principles of language the way Aristotle and not how Kant did: “It won’t be possible for the same thing to be and not to be [not] just [as] a matter of the word—but where it’s a matter of the thing.”¹⁶

The strength of the Kantian and neo-Kantian critiques comes from their acceptance of what it takes to know something. The Platonic/Cartesian legacy infects them completely when knowledge is understood as a kind of timeless, changeless mutual entailment relation. Thus Keith Lehrer explains that it is with the “conditions necessary and sufficient for man to have knowledge” that a philosopher concerns himself.¹⁷ But that introduces a bias. It prejudices that knowledge must meet some “logically” necessary and sufficient conditions, since such conditions are conceived, within most of a great deal of but especially analytic philosophy as timeless and unchanging. No such requirement of knowledge will succeed since this is a fantastic requirement. The nature of any natural phenomenon, such as knowledge, simply cannot be required to live up to this “ideal.”

15. Here it is assumed that the free will thesis, in the form of a theory of human self-determination, spelled out by Sperry, *op cit.*, can be established and shown to be wholly consistent with the findings of modern science. The main reason why morality requires this is that to hold someone responsible, as morality proposes to do, for what he or she does, it is a prerequisite that the person can choose either to do or not to do the thing in question. In short, the act must be up to the agent, not merely something the agent would be party to as a link in a chain of event-to-event causations. Furthermore, it is to rational life that moral values are connected, since it is (conceptually) conscious agents that are capable of forming judgments that govern actions that lead to life enhancement or destruction—judged on the basic kind of being they are—and distinguish them from behavior.

16. Aristotle, *Metaphysics* 3. 1006b 18-24.

17. Keith Lehrer, *Knowledge* (Oxford: Oxford, 1974), p. 6.

As to (b), again the model of knowledge Hampshire invokes is the same as Lehrer's, drawn from Descartes, for whom "to know that p" means "to be unalterably, forever certain, beyond a shadow of conceivable doubt about p."¹⁸ This has led to Hume's *reductio ad absurdum* radical empiricism and to Kant's impressive efforts to recast "knowledge" in his famous Copernican revolution. If to know something one must be consciously related to it in the fashion envisioned by Descartes, then, of course, Kant is right and we cannot know things in themselves and metaphysical knowledge, especially, is impossible. Only if to know "p" requires also having proven that it is impossible that "-p", does the Kantian or neo-Kantian skeptical result follow. This knowledge, even of knowledge, is fantastic to expect.¹⁹

Now, concerning (c), to doubt our ability to know reality or the ground in reality because the conditions of referring to reality may be obstacles to knowing it is a grand confusion. Why may what enables us to know reality also amount to such an obstacle?

Here (d) enters with the now familiar view that, presumably, nothing counts as knowing which does not logically guarantee against the absence of any possible obstacles to knowing reality. But this is just another rendition of the earlier absurd requirement made upon knowledge, namely: to know that "p" means having proven "-p" logically impossible. But knowing something is not knowing, also, that it is impossible that the denial of this be true. (This reminds one of the absurd idea that the defendant ought to demonstrate that he is not guilty, rather than the prosecution that he is!)

The above should suggest how one can respond to the Kantian and neo-Kantian objections to metaphysics. It does not yet tell us what the content of a sound metaphysics is, although that is suggested from the reference to Aristotle. We received from him the best argument showing us the first principles of being—what is being qua being. And if one does not impose on oneself the requirement of meeting a fantastic Platonic/Cartesian model of knowledge in offering one's answer, then it seems clear enough that the Aristotelian reply to what the basic principles of reality are make very good sense: they are the principles of the Law of Identity, Law of Non-Contradiction, and Law of Ex-

18. This is my characterization, following Wittgenstein who distinguishes, in *On Certainty* (New York: J. & J. Harper, 1969) between reasonable and unreasonable doubt. Here the eminently apt distinction applicable in courts of law—namely, between certainty beyond a reasonable and beyond a shadow of doubt—would appear to be warranted.

19. For a statement of this see John Tienson, "On Analyzing Knowledge," *Philosophical Studies*, Vol. 25 (1974).

cluded Middle, understood in a substantive rather than purely formal sense. (That means, also, that the purely mathematical objections to the Law of the Excluded Middle do not serve to deny Aristotle's basic metaphysical position.)

A "language" or system of concepts that rests on the three principles we learned from Aristotle—and is confirmed repeatedly, by implication, in all thought and action—and on the processes of sensory perception, would appear to be adequate to account for what grounds our conceptual structure within which we can produce correct statements of the nature of something, including human nature. In showing that not only does such a structure rest on something firm enough but also enjoys a satisfactory degree of stability, let me simply call to mind a point made by Barry Stroud in connection with discussing Wittgenstein's idea of "logical necessity":

Logical necessity . . . is not like rails that stretch to infinity and compel us to go in one and only one way; but neither is it the case that we are not compelled at all. Rather, there are the rails we have already traveled, and we can extend them beyond the present point only be depending on those that already exist. In order for the rails to be navigable they must be extended in smooth and natural ways: how they are to be continued is to that extent determined by the route of those rails which are already there. . . .²⁰

This line of analysis of the nature of definitions—for "logical necessity" here refers to what emerges from considering the nature of something—recalls, also, what J. L. Austin says about knowledge in his "Other Minds,"²¹ a paper that suddenly has—yet should not have—lost its previous fame. This is that when we know what something—e.g., a goldfinch—is, we are not in some timeless state of mind so that the future cannot manage to inform us any further about the nature of goldfinches. Rather we did in fact have knowledge and we are in need of updating this knowledge in the light of new information.

Not only does this point apply to our knowledge of the nature of goldfinches but of the nature of knowledge itself! In other words, just as the nature of goldfinches—what it is to be a goldfinch or what the correct definition of a goldfinch is—is capable of "being extended in smooth and natural ways," so is the nature of knowledge. So long as we do not insist that the nature of *X* needs to be some timelessly fixed, unchanging metaphysical entity, and our knowing of reality not

20. Barry Stroud, "Wittgenstein and Logical Necessity," in G. Pitcher, ed., *Wittgenstein* (Garden City, NY: Anchor, 1966), p. 496.

21. J. L. Austin, *Philosophical Papers* (Oxford: Oxford, 1961).

involve some kind of complete photocopy of the object of knowledge, the prospect is good of knowing a dynamic reality such as human life without making this knowledge useless for purposes of offering standards for human conduct (because it supposedly lacks sufficient stability). A sensible firmness or stability, that does not aim at some nonsensical absolutely, timelessly finished concept, is then in our grasp. This may provide the mean between the extremes of absolutism and relativism.

Of course, here is where the claim may be advanced that by having defended the theory of definitions against the charge of offering unsupported fixity for definitions, we have relativized definitions to the point that it is no longer possible to say of them in any serious sense that they can be true versus false. From Platonic (and unjustifiably firm) essences we have moved to Heraclidean floating conventional definitions.

In response let us direct our attention again to the point made by Stroud that any change in a well supported definition—in what we know to be the nature of something—must be “smooth and natural.” It must be defended by argument and evidence, not merely made to rest on the imaginability of something—e.g., the nature of human beings—being different from what it has been. Despite the well known allegations of Thomas Kuhn about the revolutionary nature of changes in the sciences, this is exactly how one can conceive of the changes of the natures of things as understood in science.²² When we rid the history of science of the radical moves that were necessitated by stubbornness, obstinacy, or lags in progress, the violent moves of science smoothen into a rather steady process of development and improvement in the knowledge of understanding that will be the reward of sustained attention to reality.

FROM NATURES TO MORALITY AND LAW

There is so much wrong with the kind of skepticism that comes from the past two centuries of epistemology that one can hardly consider it all in a few pages. There is always that apparently naive but quite telling observation that with all this skepticism it is a wonder that so

22. See Tibor R. Machan, “On the Possibility of Objectivity and Moral Determinants in Scientific Change,” in K. Knorr, et al., eds., *Determinants and Controls of Scientific Development* (Dordrecht, Holland: D. Reidel, 1975) and “Kuhn’s Impossibility Proof and the Moral Element in Scientific Explanations,” *Theory and Decision*, Vol. 5 (1974).

much is being said by philosophers about human knowledge. It calls to mind a point made by a recent dissenter from the skeptical mainstream, Laszlo Versenyi:

If human nature is unknowable then so is human good and it is impossible to talk about human excellence in general. Indeed it is impossible to talk about man as such, since man as such could not even be identified. Barring all knowledge of human nature—that which makes man a man—the word man would mean nothing and we could not even conceive of man as a definite being distinguishable from all other beings. Consequently anything we might say about man would be necessarily meaningless, including the statement that human nature as such is unknowable to man.²³



It seems that this kind of insight gave the older philosophers the confidence that if enough work is done they could make progress in the direction of understanding human nature and, subsequently also human excellence as well as what counts for an excellent or just human community. It is difficult to imagine how we can continue to criticize institutions, practices, and acts of human beings as most members of the intellectual community clearly and continuously do, without this confidence, and why, if we disallow it, we don't retreat to the doctrine of quietism and practice it conscientiously.

As to the relevance of these points to positivist objections to natural law theory, that should not be difficult to appreciate. If human nature can be identified but not in a way that commits one to some doctrine of its unchangeable, timelessly fixed nature, we can have a non-static foundation for morality. If this is possible, then there is a congruence between the character of morality and that of law, at least by Hans Kelsen's understanding. And this would seem to be a sensible way to see the matter: morality applies to how one ought to conduct oneself in general—it aims at identifying the basic principles of good human conduct. Law, in turn, applies to the *interaction* of human beings as such—it aims at identifying the minimum conditions of living a good human life within a community context. When someone violates a principle of morality, he or she fails in some measure at living a good human life. And if some regime or system of community rules fails to abide by the basic principles of law, to that extent it fails at measuring up to the conditions of being a valid regime. Exactly what the limits are at which one must conclude that a person has become a worthless human being needs to be determined with extensive attention to the

23. Laszlo Versenyi, "Virtue as a Self-Directed Art," *The Personalist*, Vol. 53 (1972), p. 282.

details of his or her life. A similar point may apply to communities—just when they have lost any claim to validity or lawfulness may vary, but that there can be such a point and that such a finding can be defended seems quite a plausible thesis, based on the above considerations. Natural law theory requires no more, as Bruce Goldberg has argued so cogently.²⁴ There can be positive laws that are bad but do not take a community so low as to lose for it its claim to legitimacy. But there can also be positive laws so far beyond the pale that any system that embodies these would fail to be a valid one, period. For most of us it is not so difficult to pick regimes, ancient and contemporary, that would amount to no more than lawless gangs, however much some semblance of legality is retained by them. Other regimes come close but hover on the brink. Then there are the mediocre ones, as well as the exceptionally worthy ones. This is not so different from the familiar distinction of those concerned with medical health as good physicians, mediocre and bad ones, and finally quacks, not worthy of the name of medical doctor.

It is not necessary here to spell out which regime is which, although few would hesitate in picking and choosing. What is at issue is that morality and law are not some radically distinct fields but differ mainly in their scope of applicability. Persons may be judged as morally good, mediocre and bad, and a community may be judged as having a good, mediocre, or bad legal system, as well as having lost any valid claim to legality.

This would not depart very far from what Kelsen or even Hart was admitting. Their reluctance in invoking natural law theory in their normative points seems to have been based on the view that there is something about natural law morality that makes it otherworldly, static, not suitable to guide men and women confronted with a reality that does not remain fixed for long. As we have seen, this is not itself a problem of substantive natural law theories but of their metaphysical and epistemological underpinnings, ones we have reason to be suspicious of and can modify to suit natural law metaethics and legal theory.

24. Bruce Goldberg, "Natural Law: Some Considerations," *Modern Age*, Vol. 10 (1966).