The Natural Law in the Age of Individualism and Rationalism

The so-called age of natural law did not, properly speaking, commence with Hugo Grotius. It began rather with Pufendorf, who undertook to expound the doctrine of Grotius. The net result of the age was a disastrous setback, from the opening of the nineteenth century, for the natural-law idea among the modern philosophers and practitioners of law who were unacquainted with the older Christian tradition.

The new natural law differed in many respects from the traditional one. It represented a peculiar hypertrophy of the older conception. Numerous factors were responsible for this development, and they arose from the intellectual evolution and political circumstances of the period.

Humanism had declined, and with it had gone exaggerated esteem for antiquity in general and, in particular, for Roman law as ratio scripta. Roman law, in its degenerate form of usus modernus and with its many archaic-sounding formulas, could not satisfy this age of reason.

Deism in theology led to a high regard for the element of law in nature. It led also to an abhorrence of all sorcery, of belief in demons, of any supposed mystical influence of the transcendent Deity upon a world that moves in accordance with unalterable laws. A real enlightenment was declared necessary for a clear knowledge of the laws. Not faith, however, but reason was to provide such enlightenment. For the law lies in reason, and speculative reason is able to derive from itself, from contemplation of its own abstract nature, all laws, all morality, and all right in the form of axioms. Indeed this holds good even if there be no God, who thenceforth appears as merely the ultimate source
of morality and law (apart from the continuation of tradition at the hands, for instance, of Leibnitz and the theologians). Whole systems of ethics and law were now worked out in minute detail by scholars who were carried away by a veritable passion for speculation. Such speculation also differed considerably from the prevailing inferior law which still recognized sorcery, belief in demons, and things of a mystical nature.

Furthermore, a jurisprudence adapted to the needs of the administrative machinery of the centralized absolute monarchy seemed, at least in the eyes of the rationalists, out of the question on the basis of the existing law. For this law was split up according to provinces and estates or social classes. Besides, its feudal forms had been rendered antiquated by the rise and growth of capitalism; it had also become rigid and unsuited to the time in the case of privileged guilds, not to mention the monstrosity of imperial law which no less a person than Pufendorf had so thoroughly ridiculed in a work, De statu imperii, that appeared under a pseudonym.

The thesis of the autonomy of human reason, as well as the view that the existing law constituted unwarranted fetters, was closely bound up with the nascent socio-philosophical individualism of the age. The clearest manifestation of this individualistic bent is found in the doctrine of the state of nature, which now became the starting point of natural-law speculation after having been in the Middle Ages but a condition of mankind with theological significance alone. (The difference may be schematized thus: the natural law as the idea of law in and above the necessary positive law—the natural law as law of the state of nature before and above the positive law.)

From the same source stemmed the peculiar methodological starting point of all these systems of natural law. Thinkers did not set out, as in the earlier period, from the essentially social nature of man in which the entire order of social institutions (marriage, family, state, international community) and the basic norms of these exist potentially in such a way that the essence is fulfilled only in the completion and hierarchical ordering of social forms through the various "imperfect" societies up to the "perfect" society. The point of departure was empirical nature discovered by means of abstraction, from whose psychological motive force, viewed as fundamental, the system of ethics and of natural law was deduced in a rationalistic manner. For Hobbes this was selfishness; for Pufendorf, sociableness as mere formal sociality; for Thomasius, happiness, i.e., "praiseworthy, pleasant, carefree life."

In this way a whole detailed system of natural law was in existence, or was considered to have been in force, before social life, with its essential forms and with the historically contingent particularities of such forms, had worked itself out in history, i.e., had evolved after the manner of an enelety. This natural law was held to cover the civil law of contracts, the family, inheritance, and property; it was even made to include procedural law and especially constitutional law. Surrounded with the halo of naturalness and reasonableness, the various natural-law systems accordingly signified, in respect to existing conditions that cried out for reform, an ideal which the codifications of the close of the eighteenth century sought to realize, whether in a revolutionary (Rousseau) or conservative (Hobbes) or reformist manner (enlightened despotism). With all this was now readily combined the ancient Stoic glorification of the pre-political state of mankind, except where this condition was construed by Hobbes, as already indeed by Epicurus, as a war of all against all.

To these favorable factors of an ideal order corresponded practical ones that were no less favorable. The Enlightenment was first of all an affair of the ruling class, the nobility and the intellectuals of the age, clerics and men of science. The latter, however, were encouraged by the princes precisely because and so far as these recognized their function of governing as a duty. Enlightened despotism, to use the label current in resentful liberal circles, was a great patron of the natural law or, as it henceforth was usually and quite significantly styled, the law of reason. For this law placed in the hands of the princes the weapons with which to break down the class privileges of the nobility, and perhaps of the guilds and provincial estates as well, which hampered the uniform administration of the state. Furthermore the Enlightenment with its accent on education assigned to the state the task, through the agency of the police, of educating the citizen and of making the state wealthy in the mercantilist sense.
Thus this individualistic natural law was especially adapted to loosen the traditional, hardened social order and to furnish the princes with subjects, not, of course, as mere objects of arbitrary will, but as legal subjects with innate subjective rights. They were then, as objects of education, admirably suited to the higher idea of man that was proper to the Enlightenment. If, therefore, the individualistic root of this natural law was everywhere the same, this was in no way the case regarding the liberalist consequences which resulted from it when deeper thought was given to the matter. These consequences appeared in Rousseau's system and in the French Revolution, as well as in the natural-law doctrines of Locke and of early German liberalism: what was desired was a bourgeois natural law. They were wanting, however, both in Hobbes' doctrine and in the natural-law systems of Pufendorf and Thomasius.

Closely connected with this political consequence, whether of the police-state with its educational function or of the liberal state with its restricted function of guaranteeing individual liberty, was a further break with tradition on natural-law grounds. This newer natural law constituted the first attempt to construct a lay or secularist theory of ethics and politics. Hobbes' purpose in devising his doctrine of natural law was admittedly the destruction of independent ecclesiastical law. His aim was to subordinate the latter to, and incorporate it in, the natural law of the omnipotent and sole person of the state represented by the monarch. Enlightened despotism likewise held the view that the Church, though indeed of importance sociologically and practically, was but a division of the cultural and educational department of the absolute monarchy. The peculiar totalitarian character of the *ius naturae* of that period, identical as it was with moral philosophy, was the means adopted for forcing the Church into the service of the state.

Moreover, rationalism and the Enlightenment had rendered the old, mystical foundation, which had emerged from the semiobscure origin of immediate divine origin, incapable of supporting the state and royal power. Now, however, the doctrine of a state of nature together with the various contract theories concerning the transition to the *status civilis* afforded a new basis, though an insecure and perilous one. The same intellectual device served Hobbes for laying the foundation of state absolutism; it served Pufendorf for laying the foundation of enlightened despotism, which denied the ancient, traditional right of the people to resist; and it served Rousseau for laying the foundation of the sole admissible omnipotence of the democratic state. The French revolutionaries also made use of it for reducing state functions to a minimum; for establishing the rights, acknowledged also on other grounds, of man and of the citizen; and for vindicating the right to resist the power of the state (Constitutions of 1792 and 1793). "The tamest and lamest theories, no less than the preaching of world betterment through the guillotine and the French wars of conquest, were carried out in the name of the law of reason. Natural law was an intellectual trend, not a uniformly expounded doctrine" (Pfaff and Hoffmann).

For social reformers, that is, for enlightened despots and for social revolutionaries like Rousseau, this magnified natural law based on individualism thus became the starting point. It was set down in constitutions as fundamental law. In the comprehensive codifications of the time it served to break down the organization of society by estates and to build up the modern bourgeois social order. As a special science, however, or as a general conviction, it thereupon vanished just as quickly. This outcome was caused either by the achievement of such eminently political aims of a natural law with reformist or revolutionary overtones; or by the fact that after the climactic orgy of 1793–96 the goddess Reason was deposed and History (Haller, De Maistre, Donoso Cortes) or rather Providence, working in history and discernible in its activity, was again enthroned.

What differentiated this newer natural law from the *ius naturale perenne* were not of course its political aims alone; these were merely more conspicuous. The essential distinguishing mark was the importance of the doctrine of the state of nature, which attained, as in Defoe's *Robinson Crusoe* (1719), such unexpected and widespread popularity. Thence stemmed the pregnant ideas of liberty and equality. And fully in keeping with it was also the comprehensive moral philosophy of deism, which concealed itself under the title of *ius naturale* and, after first disregarding the eternal law, finally culminated in the complete moral autonomy of reason (Kant).
The individualist starting point led also to a failure to recognize the necessary forms of social life. If the past had looked upon these as, so to speak, germinally contained in the idea of man, they could now, from the standpoint of the free individual, be regarded only as *status adventicii*, as superadded for various, nonessential reasons: sociality, utility, or mere external perfection. In view of the original freedom, they could no longer be acknowledged as intrinsically necessary; in their contents as well as in their existence they must be founded solely upon free association, upon the free contracts of individuals. For this type of natural law the contractual form is the basis not only for the coming into existence of concrete social forms, but also for their normative contents. The essence of social forms is not something objective; it is rather, like their existence, dependent upon the will of individuals. For the individualist doctrine there exists, as has already been stated, no categorical or a priori sociality of man as such, but only a pure sociability. In keeping with this view was a political theory that manifested itself in the two extremes of Hobbes' omnipotent monarchy and Rousseau's omnipotent democracy: the princely police-state with a maximum of functions and the constitutional state of 1789 and later with a minimum of functions. Individual rights belonging to the state of nature were viewed either as definitively surrendered in the political and governmental contract (Hobbes), or as inviolable and hence to be brought over intact into the *status civilis*.

These natural-law doctrines displayed little understanding of the graduated order of the forms of social life that resides in the nature of man as a social animal. They showed no appreciation for the family as a social institution with an essential end of its own (they dealt only with marriage and the parental relationship). They showed no concern for the occupational-group or corporative structure, hence for the multifarious social forms that in all domains of life lie between the state and the individual. They showed no regard for the well-known principle of subsidiarity, according to which the highest community, the state, should leave to other associations the functions and ends which these should and can fulfill. They knew, in effect, only the harsh antithesis of individual and state. They likewise lacked an understanding of the particular nature of the Church as a "perfect" society: it became either a department of the state or a spiritual free fellowship, not an institution.

These specific types of the newer natural law, so varied in their consequences, manifested themselves most clearly in Hobbes, with his pessimistic view of man; in Rousseau, who took an optimistic view of human nature; in Pufendorf and Thomasius, who lived in the shadow of enlightened despotism; and, finally, to say nothing of the numerous mixed forms, in Kant.

It was here that the definite break with tradition took place. From the time of Pufendorf fun began to be poked at the "fancies of the Scholastics." From here on, an anti-Aristotelian nominalism became, expressly or tacitly, the basis of philosophy. And it is permissible to believe that this disdain for tradition was later avenged when, in the nineteenth century, this natural-law thinking came in turn to be disapproved. Indeed, the same failure to understand tradition then led the nineteenth century to assume that, by refuting this natural-law doctrine of the seventeenth and eighteenth centuries, it had overthrown the natural law itself with its philosophical tradition of over two thousand years.

The entire theory of Thomas Hobbes (1588–1679) amounts at bottom to a denial of the natural law. The English thinker, who stands forth as a gloomy fellow-traveler of Epicurus, the cheerful ancient, pictured the state of nature as a savage, lawless condition of war of all against all, as chaos. Here we have another illustration of the relationship that exists between epistemology and moral philosophy. Hobbes, the nominalist of Occam's school, held that reason is utterly unable to know universals, i.e., ideas. Words denoting universal concepts are mere names. Reason finds itself obliged to devise and assign them arbitrarily, without any foundation in fact and reality, for the purpose of introducing order into the chaos of sense impressions. In moral philosophy, too, the passions hold first place. Man in the depths of his being is what the state of nature shows him to be: a wolf, wicked, devoted solely to self. In the state of nature, consequently, there exist only lawless individuals, in whom is found no natural tendency to live
in society; and man's life is "solitary, poore, nasty, brutish, and short." ¹ The war of all against all is the reverse side of the widely cherished and taught right of all to all things. In reality, no law of the status naturalis exists, as we find it in the dreams of Rousseau and in the fanciful deductions of Pufendorf and many of his disciples.

The same selfishness and the dictates of right reason, that is, the consideration of one's greater advantage and of peace, determine the individuals to enter by way of a covenant into the status civilis and to give up as many of their rights to everything as may make peace possible. But, that peace may be possible, all contracting parties must yield their rights to the Sovereign, the state personified, whether this be organized through the covenant in a monarchical manner or in a more or less democratic manner; either form is admissible, according to Hobbes.²


2. Hobbes argues as follows: Whereas the agreement of irrational creatures is natural, "that of men, is by Covenant only, which is Artificial: and therefore it is no wonder if there be somewhat else required (besides Covenant) to make their Agreement constant and lasting; which is a Common Power, to keep them in awe, and to direct their actions to the Common Benefit.

"The only way to erect such a Common Power, as may be able to define them from the invasion of Forraigners, and the injuries of one another, and thereby to secure them in such sort, as that by their own industrie, and by the fruities of the Earth, they may nourish themselves and live contentedly; is, to conferre all their power and strength upon one Man, or upon one Assembly of men, that may reduce all their Wills, by plurality of voices, unto one Will: which is as much as to say, to appoint one Man, or Assembly of men, to bear their Person; and every one to owe, and acknowledge himselfe to be Author of whatsoever he that so bareth their Person, shall Act, or cause to be Acted, in those things which concern the Common Peace and Safety; and therein to submit their Wills, every one to his Will, and their Judgements, to his Judgment. This is more than Consent, or Concord; it is a reall Unite of them all, in one and the same Person, made by Covenant of every man with every man, in such manner, as if every man should say to every man, I Authorise and give up my Right of Governing my selfe, to this Man, or to this Assembly of men, on this condition, that thou give up thy Right to him, and Authorise all his Actions in like manner. This done, the Multitude so united in one Person, is called a COMMON-WEALTH, in latin CIVITAS. This is the Generation of that great LEVIATHAN, or rather (to speak more reverently) of that Mortall God, to which wee owe under the Immortall God, our peace and defence. For by this Authoritie, given him by every particular man in the Common-Wealth, he hath the use of so much Power and Strength conferred on him,

Moreover, properly speaking, only this covenant, which springs from the basic natural-law norm of self-preservation, is natural law. For Hobbes, then, the natural law, despite all the formulas he adopts and cites from time to time, is wholly comprised in the axiom, "Agreements must be kept." Upon this fundamental principle is based the will of the omnipotent state, so that henceforward all law is but public authority; it is but the positive law of the state, inclusive of Church law. The political aim of the Hobbesian natural law, the ideological justification of absolute government (especially of the Stuart kings), becomes exceedingly plain here. Hobbes, whose individualism led him to insist that contract affords the sole possible basis of rights, derived from the principle that agreements must be kept even a son's duty to obey his father, and so on. The reckless rationalism of the man found expression both here and in his demand that in speculation one must start by viewing men as beings that have shot forth from the earth like mushrooms, as at once full-grown.³ From his individualism sprang likewise his antagonism toward corporative organizations like the guilds and other self-governing economic and social groups. As sharers in the absolute power of the sovereign or limitations upon it, he considered such bodies directly opposed to the natural law: they are "like worms in the entrayles of a natural man." ⁴

In the hands of Hobbes, therefore, the natural law became, paradoxically enough, a useless law, compressed into the single legal form of that by terror thereof, he is enabled to forme the wills of them all, to Peace at home, and mutuell ayd against their enemies abroad. And in him consisteth the Essence of the Common-wealth; which (to define it,) is One Person, of whose Acts a great Multitude, by mutuell Covenants one with another, have made themselves every one the Author, to the end he may use the strength and means of them all, as he shall think expedient, for their Peace and Common Defence.

"And he that causeth this Person, is called SOVERAINNE, and said to have Sovereigne Power; and every one besides, his SUBJECT" (Leviathan, Part II, chap. 17).


4. Leviathan, Part II, chap. 29.
the social and governmental contract of subjection. The natural law effectively comprises only the basic norm, "agreements must be kept," if one disregards the still more paradoxical natural law of the state of nature with its norm of selfishness. All else is pure will. Hobbes' doctrine is the theodicy of Occam secularized, and the extreme consequence of the proposition that law is will.

Thus Hobbes altered the meaning of the words "nature" and "natural," a process that characterizes the entire period of modern philosophy from the time of Descartes. "Nature" and "natural" become the opposite of civitas, "reason," and "order." In the philosophy of Hobbes and Baruch Spinoza (1632–77) human nature is at bottom governed by the passions and not by reason. The status naturalis is a condition without any obligation or duty. It is a state in which, as Spinoza repeatedly asserts, might is right. This natural state of man is ruled by two things: fear of the might of others and power to instill fear into others. Hobbes denied that man has a natural inclination toward mutual help and love, which St. Thomas speaks of so frequently. Hence law and the order of law cannot be derived from human nature; they become the work of the sovereign. What remains of the older conception of human nature as the source of natural law is the contention that the state originated in the fear of violent death and in the urge to render life and property secure. The state, together with its law which has its source in the absolute will of the sovereign, is the savior of man from the natural law of "might is right"; it affords security and protection by monopolizing all power; and it demands as a price strict obedience and subordination through identification of natural law with positive law.

The older idea of natural law as an ethical system with material contents thus loses all its functions: namely, to serve as a moral basis for positive law; to give men a standard and critical norm for the justice of positive law; to represent the eternal ideal for which the historical state, as lawgiver and protector of justice, ought to strive. As a consequence the state, unlimited because even the revealed divine law is authoritatively interpreted by it, becomes, in Hobbes' phrase, the "Mortall God." No appeal from this all-powerful being to natural law is possible, because the state is law in all its plentitude. In reading Hobbes we can feel the solemnity with which he invests the state, the sovereign power, a solemnity which earlier centuries reserved for God Almighty. What Hegel later says of the idea of the state, Hobbes, the nominalist denier of ideas, asserted of the individual historical state. The consequence of this change in the meaning of "nature" is thus clear. Since nature is bad, and since the status naturalis is a condition of "warre of every man against every man," the state becomes good, and its positive will becomes the supreme norm of justice, admitting of no appeal. The phrase "Mortall God" is to be taken literally, not as a mere figure of speech.

The philosophy of René Descartes underlay another shift in the meaning of human nature. From this shift sprang, as from its source, the individualist and starkly rationalist strains of the newer natural law. According to St. Thomas, it is, properly speaking, neither the intellect nor the senses that understand, but man through both; the natural law is a participation in the eternal law; and the moral law is objectively "given" in human nature and in the essential order of things. For Descartes, on the other hand, man is a res cogitans, a being that thinks. It has indeed been pointed out by Jacques Maritain that Descartes gives man the intellectual power of an angel, that his is an angelic epistemology. Descartes holds that man, from his innate ideas, from the ideas present in his consciousness, can construct the world along the lines of mathematical reasoning, the ideal of science. All that man needs to do is constructively to develop what is in human reason, that is, the innate ideas. The individual intellect or reason thus becomes self-sufficient. It does not need the educative cooperation of other minds. Thus the very spiritual root of sociability is denied. Through his "angelism," therefore, Descartes became the father of the individualist conception of human nature.

But this is not all. The doctrine of the res cogitans, of self-sufficient human reason that has now become the nature of man, led to a passion

for systematic constructions so typical of rationalism. According to St. Thomas, human reason was never the criterion of truth. The ordo rerum, of which man's nature is a part, is the measure of man's knowledge. Things themselves, as objective data, measure the human mind. But the angelic qualities of Descartes' res cogitans, as well as the view that all truth exists germinally in the mind, render the objective ordo rerum superfluous. Suarez' prediction of what would happen should human reason be made the source of the natural law now came true. Rationalism soon made human reason and its innate ideas the measure of what is. Human reason could now indulge in the uncontrolled construction of systems that has ever characterized the natural law of rationalism.

This process reached its climax in Kant. Human reason now becomes the sovereign architect of the order of knowledge; it becomes the measure of things. The objective basis of natural law, the ordo rerum and the eternal law, has vanished. What was termed natural law is a series of conclusions drawn from the categorical imperative and from the regulative ideas of practical reason, not from the objective and constitutive ordo rerum. These regulative ideas received their somewhat dubious validity from the feeling that without their validity human moral life would be impossible. The ensuing materialism, however, proved only too quickly that this argument lacks force, and that man can live, at least when human nature becomes a purely biological entity, without such regulative ideas. What a fall of the angels! At the beginning of the development lay Descartes' "angelism"; at the end emerged materialist naturalism: man the angel became man the higher animal. From a being whose reason is the supreme source of morality man became a powerless agent governed by the conditions of economic production.

John Locke (1632–1704) was as individualist in his social philosophy as was Hobbes, though he rejected Hobbes' glorification of the state as the "Mortall God" and denied that the Leviathan is the exclusive source of law. Although Locke, in opposition to Hobbes and Spinoza, depicts the state of nature as idyllic, as a condition of peace, good will and mutual help, he contends that the state, or rather government, is in practice indispensable. For Hobbes the function of the status naturalis and of the idea of natural law is merely to furnish a basis for the institution of the status civilis and the positive law, whereupon the natural law disappears. For Locke, on the other hand, the function of the state of nature and of the idea of natural law is to establish as inalienable the rights of the individual. But these rights by no means vanish in the status civilis; indeed, the true purpose of the latter is the more perfect preservation and development of such rights. Thus these innate and indefeasible rights of individuals afford an ultimate criterion for judging all acts of the government and all laws of the state. The rights to life, liberty, and estate or property make the law; the law does not create them.

Locke's philosophy of law does not view the law as an objective order of norms out of which individual rights flow by intrinsic necessity; the rights of the individual are prior, and in them originates whatever order exists. Order is consequently the product of contracts between individuals, who are induced by their rather selfish interests to enter into these contractual relations. The status civilis is thus not the objective result of man's social nature itself: it is not a realization, through man's moral actions, of the natural order in the universe. The state is the utilitarian product of individual self-interest, cloaked in the solemn and venerable language of the traditional philosophy of natural law. Locke substitutes for the traditional idea of the natural law as an order of human affairs, as a moral reflex of the metaphysical order of the universe revealed to human reason in the creation as God's will, the conception of natural law as a rather nominalistic symbol for a catalogue or bundle of individual rights that stem from individual self-interest. Any order of law is accordingly the product of the contractual will of the individuals concerned, and it has for its object the protection and promotion of individual self-interest. The characteristic note of individualism (the preponderance of commutative justice and of self-interest over distributive and legal justice and the common good) is obvious in Locke's thinking.

The hidden root of this position is, of course, an overconfidence, born of optimism, in the typically individualist presumption that the common good is nothing real, that it is merely the sum of the particular goods or interests of individuals. If this is true, the free pursuit of self-
interest on the part of individuals who are restricted only by the like freedom of others must work like the "invisible hand" of Adam Smith and produce, as it were automatically, a sort of social harmony.

The concept of natural law had thus degenerated from an objective metaphysical idea into a political theory which sought to justify and promote definite political changes. But the uselessness of such a degenerate concept, once these political changes had been effected and consolidated, is evident. The idea of natural law, once the eternal objective norm of all social life, served Hobbes as a means of establishing the absolute rule of the state as the "Mortall God." It served Locke as a means of vindicating the "Glorious Revolution" of 1688–89 and of laying the juridical foundations of bourgeois society. It served rationalism as a means of promoting the codifications of law at the hands of princely absolutism, which was the destroyer of feudalism and medieval constitutionalism, and hence as a means of strengthening the bases of bourgeois society.

But Locke's empiricism in epistemology undermined the philosophical bases of the natural law at least as much as this political theory endangered its very idea. Thus Locke prepared the way for the destructive criticism of Hume and Bentham. Basically a skeptic in metaphysics, Locke could not attain to certainty in moral philosophy, a prolongation of metaphysics. His moral philosophy, had he ever worked it out, would have ended in a barren utilitarianism of the Benthamite type. But Locke, quite unaware of the implications of epistemological empiricism and oblivious of the consequences of his skepticism concerning metaphysics as the basis of any valid theory of natural law, contented himself with a belief in natural law as a dictate of common sense. His feeling for political realities, as well as the fact that the English common law retained many of the traditional concepts of the natural law, prevented him from drawing the conclusions to which Hume's acid criticism would later lead. In Locke, therefore, we have an excellent example of the revenge which common sense so frequently takes upon empiricists and philosophical skeptics. Locke allowed his common sense to affirm in practice what his philosophy implicitly denied. In this he was like Karl Marx, the most typical instance of such behavior. Marx was wholly intent upon destroying, as a merely instrumental ideology, the ideas of justice and truth. Yet at the same time he thundered like an Old Testament prophet against the injustices and deceits of bourgeois society and philosophy. He thereby implicitly affirmed justice and truth as objective and transcendent, and not as merely relative to and immanent in the conditions of socio-economic production.

The doctrine of Jean Jacques Rousseau (1712–78) stands almost diametrically opposed to Hobbes and his conception of the natural law. Hobbes' theory glorifying absolutism had aroused a strong reaction. Although this reaction, led by such thinkers as Locke, Montesquieu, and Hume, did not go so far as democracy, it was transforming the freedom of subjects in the unlimited monarchy into constitutionally guaranteed natural rights (power checks power and creates the condition of freedom). This line of thought attained its harshest expression in Rousseau.

Whereas for Hobbes the state of nature was a "warre of every man against every man," the Geneva dreamer preached a state of nature that resembled the biblical Paradise. For Hobbes the state, the legal order, and consequently goodness, are, in the interest of mere order, the goal of an historical philosophical movement that wishes to be rid of nature, of the status naturalis, and to attain to the status civilis in which the ruinous liberty of human wolves comes to an end. For Rousseau, on the contrary, the status civilis and the objective, enforced order of unfreedom in the state constitute precisely the condition of corrupt human nature, whereas the state of nature is, taking an optimistic view of man's nature, exactly what it ought to be. "Back to nature" was, in Rousseau's teaching, something more than a game played by a bored and snobbish nobility. Civilization, in the literal sense of becoming a civis (citizen), only then does not spell ruin when the original, natural rights of liberty and equality form the essential reservations of the social contract. Men do not have to enter into the social contract. They enter into it freely; they are driven by no mysterious impulse out of the war of all against all into the enforced peace of absolutism. But they can enter into it because it is their will, the will of everyone in the general will that now comes into being.

At bottom, for Rousseau the historical status civilis is the world
after man's fall, whereas the status naturalis was the garden of Eden. Consequently, the state as such, as ordo rerum humanarum, is not a necessary, ethical institution; it is but the minister of human rights. It is for this reason that the right of revolution exists, if natural rights are violated by the positive law. Rousseau's fanatical passion for liberty, virtue, and right lived on in the men responsible for the Reign of Terror of 1793–94, in men like Robespierre. The highly emotional way Rousseau treated of liberty and man's unalterable rights accomplished more in this respect than the specific doctrinal passages of his books. Besides, he had less influence upon the thought of the age of natural law, upon the countless treatises of ius naturae et gentium, than upon the publicists and political writers of the time.

The era of natural law as a homogeneous epoch in the history of ideas was determined far more by the jurists and philosophers and their systems than by Rousseau's emotional philosophizings that were becoming the daily reading matter of the educated classes. Therefore the historical school of law directed its attacks chiefly against the former, whereas the conservative school and the writers inspired by the romantic movement (e.g., Burke, De Maistre, De Bonald, Goerres, Arndt) were more concerned with refuting Rousseau.

This period, celebrated in the history of ideas and of science as par excellence the age of natural law, is chiefly associated with the names of Pufendorf, Thomasius, and Kant. Side by side with these, however, innumerable scholars of lesser renown were active in the professorial chairs established at that time for the ius naturae et gentium. They were filling the libraries of educated people, government officials, and judges with numberless systematic but conflicting expositions of natural law. With few exceptions (e.g., Wolff, Zallinger, Schwarz) these men claimed that they were the first to discover the natural law or to free it from the fancies and verbiage of the Scholastics. It was precisely this break with tradition that was responsible for the confounding of this doctrine of natural law with the perennial idea of the natural law. So it was, then, that the nineteenth century could believe that, with the refutation of this doctrine, the natural law itself had been proved a chimera. This was an extremely fateful fact in the history of the philosophy of law as well as in the history of philosophy in general. Or was it not fateful that Pufendorf was well acquainted with scarcely a single Greek or Scholastic, and that Kant, the watershed from which flow so many and such varied streams of modern thought, knew Aristotle and St. Thomas only from a very imperfect history of philosophy?

The decisive differences between this newer natural law and that of the Scholastics are three in number. The first is the individualistic trait manifesting itself in the predominance of the doctrine of the state of nature as the proper place in which to find the natural law. The second is the nominalist attitude which found expression in the separation of eternal law and natural moral law, of God's essence and existence, of morality and law. The third is the resultant doctrine of the autonomy of human reason which, in conjunction with the rationalism of this school, led straight to an extravagance of syllogistic reasoning, of deductively constructed systems that served to regulate all legal institutions down to the minutest detail: the civil law governing debts, property, the family, and inheritances as well as constitutional and international law. And, in contrast with the imperfect historical law, these legal systems possessed the inestimable merit and value of emanating from the pure rational nature of man.

These differences especially characterized the leading figures of the new school of natural law, Pufendorf and Thomasius. The latter was particularly concerned with separating morality and law. He thereby stands out in the history of philosophy as a precursor of Kant.

Samuel von Pufendorf (1632–94), in his concept of man's nature, did not take man in his teleologically determined totality of human nature. Man is not essentially social, so that, as earlier thinkers had held, the essential forms of community living evolve by inherent necessity out of his natural tendency for society. On the contrary, he should develop sociality because it is of advantage to him. Man is an animal sociabile, not sociale. What had for earlier thinkers been but a sign of man's internal and natural tendency, a realization of his nature itself in time, became in the newer natural law mere capability, mere impulse. Accordingly, empirical nature and any impulse or capacity whatever (sociality or, as in the case of Thomasius, felicity) formed the starting point of
speculation. The presupposition of such natural-law thinking is the individual as an isolated being in the state of nature, hence abstracting from the essential forms of human nature as such that find expression in the historical forms of state, law, marriage, and family. Therefore Pufendorf proceeded to set forth how man in the original state of nature, abstracting from the historical status civilis, from positive law and from the legal order, has as an individual to behave toward God, toward himself, and toward his fellow men.

Pufendorf first draws up a list of duties toward God, i.e., principles of natural religion, and then, in a most exhaustive fashion, a catalogue of duties toward oneself and toward others. Such duties toward others are, for instance, that everyone must keep his word, must not swear falsely, must be sincere in speech. He shows what norms for the acquisition and use of property, for marriage, the family, and inheritance, can and must be deduced from reason alone. He describes the procedural law in the state of nature, and he indicates the norms of distrust which must find application in that state. Thus in reality the entire positive law, so far as it has to do with the civil law and its procedure in lawsuits, is straightway transformed into natural law. It logically becomes superhistorical or prehistorical (in Pufendorf’s case) and in itself unalterable. But the status civilis is a superadded status with laws that in final analysis are only formal.

Because of its revolutionary possibilities, however, the basically critical attitude shifted at once to a conservative one: the existing law is in itself good, and is merely in need of reform. The law of the state of nature is an ideal law, a model law; it is not a law that is actually in force. This follows from the determination of the relationship between positive law and natural law. The former is needed on account of the sinful propensities of men, who cannot adequately be kept in order through mere knowledge of the natural law and solely out of reverence for it. Hence the public authorities enact positive laws in order that the natural law may be observed. As soon, then, as the state is founded as status adventicus in virtue of the original contract, and as soon as a sovereign authority is set up by means of the governmental contract, man must comply with the positive laws by reason of the fundamental principle of natural law, “agreements must be kept.” The distinction between the prescriptions which pertain to the prohibitive and directly binding natural law and the further norms of the hypothetical natural law (the ius naturale permissivum of the older writers) made it possible for Pufendorf to explain all positive laws as hypothetical natural law. In this way the whole body of concrete civil laws (the laws concerning debt, property, the family, and inheritance, in particular the modes of acquiring ownership, conveyance by will and succession, the monetary system and contracts involving monetary considerations), i.e., the entire contents of those positive laws which were viewed as necessary, became natural law. The preceding age, on the other hand, had conceded to only a few basic norms (Decalogue) the dignity and grandeur of natural law.

Pufendorf’s theory of international law throws light on his doctrine of natural law. Princes and states live in the status naturalis, since no status adventicus, no civitas maxima, as yet exists. Hence international law consists merely of natural law. There is no positive international law because there is no sovereign authority. Measured by the contributions of Grotius and the Late Scholastics, this view marks a great stride backward along the path which Hobbes had already taken.

Those of his contemporaries who had not succumbed to the rationalist temper of the period charged Pufendorf with being “not much of a jurist, and a philosopher not at all” (Leibnitz) and with having totally abandoned tradition.7 As a matter of fact, Pufendorf had never understood the traditional view that moral philosophy with its partial content, the ius naturale, is a continuation of metaphysics, the science of being, which, when applied to the free will of rational man, becomes the science of oughtness. But his unrestrained and unhistorical rationalism arises precisely from this fact. The doctrine of the eternal law he had never grasped. It is true that he encumbers his writings with formulas culled from his readings. Yet they have there a different meaning, because they are torn from their proper intellectual setting. The ius naturale, therefore, is not related to God’s essence as a participation of the eternal law. It is rather, in typically nominalist fashion, placed in

God's will. It has to do with the external order of sociability as an actual fact. It is in force because God has so willed to create man; it was not in force, it did not exist, when man did not as yet exist. It is thus not a participation in the divine law, eternally present in God's essence. It is "eternal" only so far as it is of the same age as man; hence it has only been in force since man has been in existence, since God created him. This position is diametrically opposed to the view of Arriaga and Grotius, that the natural law would still possess some validity even if there were no God.

This position, however, formed the basis of extreme rationalism. For henceforth not God's essence, but human nature, viewed existentially as well as merely in the abstract, would be regarded as the source of natural law. Thence also originated the abstruse intellectual sport of a logically deduced law for man in the state of nature, as well as the widespread unhistorical attitude and the inability to comprehend Aristotle's everlasting true proposition, that outside the state (not society) man is either a beast or a god. For this line of thinkers the idea of law does not live in the historical legal systems, nor was the eternally valid natural moral law recognized as the essential norm from its exemplification in the legal forms. Rather, the natural law was derived from a purely imaginary state of nature, or from a state of nature that was supposed to have once existed (theoretically and without regard for concrete historical exemplifications). In practice, indeed, the improvements and reforms of the historical positive legislation that were deemed good, useful, and necessary assumed the guise of natural law. That explains the significant politico-legal function of this brand of natural-law philosophy of the Enlightenment.

At the hands of Christian Thomasius (1655–1728) the sociality of Pufendorf received a utilitarian interpretation. The aim of ethics is mastery of the passions, because these endanger the temporal happiness, i.e., the peaceful existence, of the individual. The supreme, central principle is therefore this: "Whatever renders the life of men long and happy is to be done, but whatever makes life unhappy and hastens death is to be avoided." It is no longer sociality or an appetitus socialis that is the source of natural law, but rather, after the manner typical of the Enlightenment, it is the happiness of the individual. Instead, the forms of community life appear as mere status adventicii, not as essential perfections of man. Happiness consists in a pleasant, carefree life; and evidently it is attainable only through a virtuous, respectable, and just life. A man should live virtuously in order to preserve inner peace; respectfully, in order that others may come to his assistance; justly, lest others be provoked and external peace be disturbed. Law is therefore something external and is unrelated to the honestum, to the morally good. It produces only external obligations, whereas morality produces only internal ones. Legal duties are enforceable duties; moral duties are subject to compulsion solely through one's own conscience.

This conception reacted unfavorably upon the doctrine of the state of nature. The latter was interpreted in a pessimistic sense: legal force can be exerted only by means of self-help and self-defense. Hence the state arose by way of contract, merely out of considerations of individual utility. An external power is a more effective guarantor of external peace than is the individual's right of self-help. Thus the absurdities mount.

The grandiose pessimism of a Hobbes possesses, by comparison, a consistency that is refreshing. Besides, Thomasius also drags in the old formulas, such as that of God as the ultimate foundation of the natural law. For him, however, this merely means that even the natural law owes its existence to God as the Creator of all things. But the ground of its validity is not God's will, since in particular cases we know what God's will is through revelation alone, not by means of natural reason. The principle of the natural law thus remains temporal happiness understood in a highly subjective sense.

The metaphysics of the natural law was by now altogether lost to sight. Deductive, autonomous reason could henceforth, without let or hindrance, evolve natural and detailed systems of law. Into such legal systems were admitted, of course, as unalterable and supreme postulates all those parts of the positive law which the individualistic spirit of the Enlightenment regarded as good, as well as whatever it considered worthy of enactment into law.

In the course of this evolution the individualistic trait grew steadily more pronounced. Pufendorf had already conceived of sociality, not as a category bound up with the nature of man, but as a capacity, a mere
potency, a tendency. Marriage, the family, property, and the state are not institutions, derived from natural-law social forms, germinally present in the idea of social animal and proceeding of necessity therefrom (and hence in their essence independent of the will). They were viewed from the standpoint either of the advantage accruing to the individual or of their utility for a happy temporal life taken subjectively. As a consequence, too, it was not the family but marriage “relations” and the relations between parents and children, viewed as relations between individual and individual, that received attention. Such an approach was, of course, incapable of appreciating the position that the institution alone, considered in its essence, possesses natural-law character, whereas the juridical regulation of individual relations can be discovered in various ways from the evolution of society, and the positive law in turn from the whole complex environment; as in the case of paternal authority, forms of ownership, property rights in marriage.

Immanuel Kant (1724–1804) exhibits in his philosophy the individualist natural law in its final, highest form. Among German natural-law thinkers he was the most radical in making freedom of the individual the starting point of his system. Liberty or autonomy is the sole right that belongs originally to every man in virtue of his humanity. Man’s innate equality and the entire list of the other prismatic rights are comprised in it. As the supreme law of right, emerges the formula: “Act externally in such a manner that the free exercise of thy Will may be able to coexist with the Freedom of all others, according to a universal Law.”

This is likewise the basis of Kant’s allegedly great achievement: the separation of ethics and law, of morality and legality. That law essentially concerns the external order was, however, a tradition of long standing. Equally ancient was the corresponding view that legal duties are, without any self-contradiction, enforceable by physical means, in contrast to such duties as love, gratitude, and reverence (love of country, for instance, is unenforceable, whereas obedience to the laws of the state can indeed be enforced). But both classes had always been conceived as moral duties. Up to that time there were no merely juridical duties, even though there existed merely ethical duties, e.g., gratitude. Yet no one recognized any mutually exclusive opposition between ethical duties and juridical duties, although people knew how to distinguish them. Juridical duties are enforceable, and they are enforceable because without such enforcement there can be no durability to the social order, through which and in which the idea of man as a social animal finds completion. Permanence is a special attribute of law. Violation of the law is a negation of this order. But precisely because this order must exist, the fulfillment of legal duties is likewise always a moral duty. Consequently the state is not a pure apparatus for compulsion; it is always a moral community, too. Moreover, it does not live by law alone, though it lives in the law; it lives rather by the exercise of all the social virtues. Accordingly thinkers had in the past always assigned to the state as its essential task, to render the citizens virtuous.

Despite such accurate discrimination (precisely for the sake of morality as free fulfillment of duty), this inner connection was first torn asunder by Thomasius in the separation of ethics (equivalent to inner peace of the individual soul) and law (equivalent to external peace of society). Kant, on the other hand, replaced inner peace by autonomous freedom. Inner freedom, the moral autonomy of the individual person, is the sphere of morality. “A person is subject to no other laws than those which he (either alone or jointly with others) gives to himself.” External freedom, according to Kant, requires coercive laws; on this point he found himself in full agreement with tradition. Therefore, Kant infers, the condition of external freedom (i.e., law) is something purely external. Morality and law differ not so much by reason of the diversity of duties (e.g., justice, love of neighbor, filial and parental love) as because of the disparity of legislation. The motive of moral legislation is duty, derived from the autonomy of reason and appearing in the form of the categorical imperative and practically deified by

8. Immanuel Kant, The Philosophy of Law. An Exposition of the Fundamental Principles of Jurisprudence as the Science of Right, Introduction, C, trans. by W. Hastie (Edinburgh: T. & T. Clark, 1887), p. 46. Kant further lays down (p. 43): “Every Action is right which in itself, or in the maxims on which it proceeds, is such that it can co-exist along with the Freedom of the Will of each and all in action, according to a universal Law.”

Kant. The motive of juridical legislation is not morality but the keeping of external freedom, the carrying out of the coercive measures that are necessary thereto. The legal order is devoid of moral character. "Hence ethical legislation cannot be external (not even that of a divine will)." Thus the impersonal, formal, categorical imperative takes the place of the eternal law. The natural law, therefore, as part of the lex naturalis, is no longer connected with the eternal law, for the very reason that it can no longer be understood as part of the lex naturalis, of the rational moral law. Furthermore, not enforceability but external physical force is directly and necessarily included in the concept of law.

Freedom as a starting point and first principle of the natural law in its purely formal character renders impossible a material natural law, a natural law with a material content. This follows also from Kant's pronounced dualism of speculative and practical metaphysics, the coordinated knowledge contents of theoretical and practical reason. Theoretical reason affords no sure knowledge of the essence of things; it can posit the existence of external reality only as a postulate. Practical reason alone yields certitude about the metaphysical. Practical reason "believes" in God, freedom, and immortality, things which theoretical reason is unable strictly and necessarily to know and demonstrate from the world of phenomena; for without them morality would be impossible. This primacy of the practical reason parallels to some extent the nominalist contention that the will is a higher faculty than the intellect and that supernatural faith as well as the positive divine law is the positive rule of knowledge and action. As in the case of the nominalist Occam, on this primacy of practical reason rests Kant's ethical rationalism, his deductionism uncontrolled by the intellect and consequently by reality. For otherwise the intellect would have to perceive the ideas in things and to be able to present that which is to the will as that which strictly ought to be.

Kant's formalism, i.e., the theory of mere conditions of knowledge and of moral autonomous freedom, is the main cause of this peculiarity of his ethics. It did not allow him to develop a doctrine of material values, but only the doctrine of conditions under which values can be "given." The principle of freedom is too formal and hence too unfruitful to permit a material ordo, whether of oughtness or of essential being, to find acceptance, in relation either to knowledge or to volition. Since metaphysical being can thus exercise no control with regard to thinking, deductive free thought loses itself in rationalist constructions. Only too frequently, moreover, it clothes empirical, historical contents with the sheen of pure and absolutely valid deductions from reason. Indeed, this can be verified even in the case of the Neo-Kantian theories of formal and pure law, as, for example, in the writings of Stammel and Kelsen. (However paradoxical it may appear, Karl Bergbohm would actually have uncovered, in virtue of his peculiarly keen scent, abundant traces of natural-law thinking even in Kelsen.) Hence every external mode of action whereby the arbitrary freedom of the citizens is not mutually impaired would have to appear as juridical. That is to say, the joint consent and approval of the citizens would necessarily be able to render, in a positivist fashion, any action whatever a juridical one, quite apart from its material moral quality (here the well-known strong influence of Rousseau upon Kant is discernible). Thus, on the sole condition of the formal freedom of others, it would be possible for such intrinsically immoral actions as usury, theft, and adultery to become juridical, which Occam, who taught the same dualism of theoretical and practical reason, had admitted even in the case of the lex naturalis. The inherently immoral character of an action is no longer of importance for its juridical qualification.

This formalism thereupon led to abstruse deductions that altogether disregard the social value of, for instance, marriage and the family as institutions. To Kant the entire world of law appeared exactly like a variegated, intrinsically uncoordinated aggregate of subjective rights. Marriage becomes for him "the Union of two Persons of different sex for life-long reciprocal possession of their sexual faculties." The use of another's sexual organs is, in Kant's view, a gratification for the sake of which one party gives himself to the other. But thereby a man makes himself a thing, which is contrary to the law of the humanity in his person. Only because the other person similarly acquires another as a


thing does he regain himself and recover his personality. "The Acquisition of a part of the human organism being, on account of its unity, at the same time the acquisition of the whole Person, it follows that the surrender and acceptance of, or by, one sex in relation to the other, is not only permissible under the condition of Marriage, but is further only really possible under that condition." The act of generation is a process by which a Person is brought without his consent into the world, and placed in it by the responsible free will of others. This Act, therefore, attaches an obligation to the Parents to make their Children—as far as their power goes—contended with the condition thus acquired. Hence Parents cannot regard their Child as, in a manner, a Thing of their own making, for a Being endowed with Freedom cannot be so regarded. Nor, consequently, have they a Right to destroy it as if it were their own property, or even to leave it to chance, because they have brought a Being into the world who becomes in fact a Citizen of the world, and they have placed that Being in a state in which they cannot be left to treat with indifference, even according to the natural conceptions of Right.

In Kant's thought also the state of nature, which is contrasted not with the social but with the civil or political condition of mankind, plays the same great role that it did in the individualist conception of natural law. Kant held that the state of nature is already social, and that the norms of natural law have force in it as private law. Accordingly the whole body of law derivable from reason (the law covering marriage, the family, inheritance, contracts, property and the ways of acquiring it, as well as trial and verdict) is dealt with in this connection. The status civilis is looked upon as something superadded, not as equally original. It is the domain of public law, in which "through public laws the 'mine' and 'thine' [is] safeguarded," hence not created. It has the important function of presenting these norms of private law, which are projected upon or into the state of nature conceived as social, as sacred to the public or positive coercive law of the state. The rights and institutions existing in the state of nature are at most to be protected by the state with its force; they are not to be substantially altered or to be abolished. For what did not previously belong to the law of nature cannot become matter of civil law. The circle of subjective rights, which is continually widening, and the maintenance of these rights in the status civilis form together the contents of the natural law. They are projected into the state of nature in order to protect them from encroachment on the part of the state. In this way the state itself is merely an institution resting on a free contract: it does not result intrinsically and necessarily from the essence and reason of man. At most it arises from eudaemonist and utilitarian motives, so far as the passions, which were generally viewed by rationalism after the Stoic fashion as devoid of value, menace the state of nature in its very existence and hence render coercion necessary.

The era of the individualist natural law, conditioned by the theory of a purely imaginary, unreal world of the state of nature and adopting as a starting point any propensity or attribute whatever of empirical human nature, brought to light nearly as many supreme principles of law and resultant natural-law systems as there were chairs and professors of natural and international law. Such were sociality, external peace, urge for earthly happiness, and, finally, freedom. As Warnkoenig has shown, eight or more new systems of natural law made their appearance at every Leipzig booksellers' fair since 1780. Thus Jean Paul Richter's ironical remark contained no exaggeration: Every fair and every war brings forth a new natural law.

The reforming zeal of the eighteenth century considered useful, right, and good its ideal of civil liberty and equality, economic freedom as a condition of social harmony, and liberation from the rigid bonds of guild law and corporations. All this was taken, together with and in addition to the traditional contents, into the natural law and transferred to the state of nature. Thus the particular systems of natural law became compendiums in which the norms of the positive law (only now rationally demonstrated), vindicated by speculative thought and before the bar of reason, appeared side by side with proposals for improvement

\[12. \text{Ibid., no. 25 (p. 111).} \]
\[13. \text{Ibid., no. 28 (pp. 114 ff).} \]
\[14. \text{Cf. ibid., nos. 41 and 44 (pp. 155–57, 163–65).} \]
arising from the criticism of the positive laws. Moreover, in these systems the natural-law norms handed down from the past were dealt with alongside both the ideas of political reform stemming from the spirit of the time and the subjective rights of citizens and men. With these last were combined, with more or less good fortune or skill, the personal and often abstruse desiderata of the individual teacher.

For these reasons Anselm Desing, O.S.B. (1699–1772), who as a Catholic, in contrast to the majority of natural-law teachers, was still in close contact with the Scholastic tradition, could rightly point out that the pretended natural law of his time was in no way a “dictate of reason”; that it was rather a rationalization of the positive law of the period, yes, even of the laws of the nation to which the author belonged; hence that it was not at all derived, as asserted, from reason alone, but was little more than “the civil law adorned with some spoils of philosophy and moral theology.” How are we otherwise to explain the fact that, side by side with the natural right to liberty and equality, a natural law of feudalism was taught; and that, alongside the new French constitution, the constitution of the Holy Roman Empire was shown to belong to the natural law? Or that the postal system was converted into a natural-law institution? Nature, state of nature, natural reason, natural theology, and natural ethics were the dominant ideas and viewpoints of the age. Whoever was desirous of representing something as good and worth while had now to make of it a requirement of the natural law, and to show that it is a conclusion of reason and that it existed in the state of nature.

This individualist natural law of rationalism did not, however, owe its importance in world history to its absurdities. It owed this significance rather to its ethical and politico-economic aims, which were raised to the sublime dignity of natural justice and held in altogether singular esteem by the spirit of the eighteenth century. Through its acid criticism of society, it certainly served to dissolve the traditional and rigid forms of feudal and guild law in the reforming legislation of enlightened despots like Frederick the Great of Prussia and Joseph II of Austria. This causal connection is verified in the authors of these reforms, who lived and taught wholly under the spell of this natural law. Nor did it only smash these forms to pieces in a revolutionary manner, as the Jacobins inspired by Rousseau did in France. It also preserved from ultimate extinction a goodly part of the old national legal heritage by investing much of the latter with the splendor of natural justice. For example, Thomasius rejected the free testamentary disposition of Roman law and opposed to it, as a requirement of natural law, the Germanic system of succession according to blood. Moreover, in conjunction with the Enlightenment, it again did away with the belief in demons, which since the close of the Middle Ages had been working havoc in the sphere of law (witchcraft delusion); and it thus deprived torture of all justification arising from belief in demons, from the supposed “possession” of the criminal. Finally it upheld, in Germany by means of reform, in France through revolution, human and civil rights against a personal absolutism of princes that towered above everything; in this way it once more helped the idea of the constitutional state on to victory. Yet we should not overlook that it likewise vindicated to the point of chicanery the police-state of enlightened despotism along with its tutelage of the citizens.

On the other hand, the separation of morality and law, and the assignment of law alone to the state and of morality to the individual, aided materially in the suppression of the police-state. The state, it was held, is not to concern itself with the morality of the citizens, which is an internal matter. Among the consequences of this view in the moralizing century was not only the victory of civil toleration in matters of religious belief, but also the victory of the liberal constitutional state over the totalitarian educational state, whereof Maria Theresa’s morals commissions still afforded evidence. For, supposing that the Church as a free community pre-eminently concerned with faith and morals is lacking or is not recognized, the identification of morality and law leads readily to a state which no longer respects a sphere of personal moral responsibility or a personal nature and goal which transcend the state.

We can, therefore, readily understand that the rationalist natural law should have lost ever more and more of its importance as its aims were progressively achieved in political life and in positive law. Yet it is a singular thing, and a sort of poetic vengeance for its own betrayal of tradition, that throughout the entire nineteenth century this natural
law passed in the scientific world for the natural law par excellence, and that thus the battle against it was regarded as a fight against the natural law. Thus positivism, which was now beginning its triumphal march, obtained its laurels all too easily, since it was indeed able to vanquish this historical form of a philosophy of law which called itself natural law, but not the idea itself of natural law. The latter was carried along by the *philosophia perennis* even through the centuries flushed with passion for deduction. It sought for fresh confirmation in every historical setting of the problem until, with the exhaustion of positivism, with the resurgence of metaphysics, and with the collapse of the spirit of the nineteenth century, it came back renovated. It returned, not of course absolutely speaking, for it had always been cherished in the shadow of moral theology and the metaphysics of the *philosophia perennis*, yet return it did even into the realm of jurisprudence, from which positivism had attempted to banish it.