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NATURAL AND POSITIVE LAW AS VIEWED FROM GENERAL VALUE THEORY

RALPH SLOVENKO *

Each of us calls those ideas clear that are in the same
state of confusion as his own.

Marcel Proust

THE ultimate forms of value are usually put at three: Goodness, Beauty, Truth. Goodness is defined as that which we ought to do; Beauty that which we ought to appreciate; Truth that which we ought to believe.¹ According to the definition, an individual is a good individual when he does what he ought to do. The important question is: What ought he to do? We usually recognize that it is the province of law to guide us in how we ought to behave. We are then faced with the question of what law—the positive law or some other law?

It will be remembered that in the dialogue *Crito*, Socrates has been condemned to death; his friends have arranged for his escape, and Crito has been sent to the prison to take the old philosopher to safety and freedom. Socrates, however, declines to be rescued. He has, he indicates to his young friend, been sentenced to death under due process of law. The sentence is unjust, but it has been lawfully rendered. Socrates, although he will protest, will obey the positive law, whether it be good or bad. He will not contribute to destroying the state. The modern version of the old Sophist's stand is seen in such formulas as, "My country, may she ever be right, but right or wrong, my country"; "Deutschland über alles"; and "America first". On the other hand, in Sophocles' *Antigone*, natural "divine" law is selected over written law. The former is wise, the latter arbitrary.

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¹ See JAMES B. PRATT, *REASON IN THE ART OF LIVING* (1949). Perhaps it would be better to say that beauty and goodness *are* values, but that truth *has* value.

The word *good*, it should be recognized, is used in various senses. It is used to refer to simple goods which have no moral or immoral connotation, such as the good pie, the good day, the good time, as well as to the exalted qualities which characterize the deeds of men. The former are value usages, however, even though not referring to moral value. The English language invented special names for some of the more special types of valuable quality, such as beautiful for aesthetic value, pleasant for hedonic value, but it failed to coin a special term for moral value, and instead uses the generic word *good*. See PRATT, *op. cit. supra* at 165; see also EVERETT W. HALL, *WHAT IS VALUE?* (1952); SAMUEL L. HART, *TREATISE ON VALUES* (1949); HAROLD OSBORNE, *FOUNDATIONS OF THE PHILOSOPHY OF VALUE* (1933); DEWITT PARKER, *HUMAN VALUES* 17 (1931); R. B. PERRY, *THE MORAL ECONOMY* (1909); WILLIAM DAVID ROSS, *FOUNDATIONS OF ETHICS* (1939).

The relation of positive law to natural law presents in a different focus problems which are traditional to the philosopher of general value theory. In as much as the good is one form of general value theory, the meaning of the distinctions which are made in general value theory between absolute and relative, between objective and subjective, and between fact and value are also questions that become persistent for anyone who inquires with circumspection into the realm of legal philosophy. This brief paper purposes to do little more than raise these familiar problems. The analysis is not concerned with the question, "What are values?," but with the question, "In what sense do values exist?"

A. ABSOLUTE AND RELATIVE

The great divide in value theory is said to lie between the absolutists and the relativists.² The absolutist says, "This—without any qualification whatever."³ The relativist, on the other hand, says, "No value, except with qualification as to conditions" (place, time, persons involved, etc.)."⁴ Similarly, in legal philosophy, we mean by an absolute or universal law that which transcends cultural differences and is binding without qualification.

Natural law theories are the search for an absolute and ideal justice. During the last 2500 years, the idea of natural law has appeared, in some form or other, as an expression for an ideal higher than positive law.⁵ The natural law is the ideal or good law. Appeals to "nature" for a standard, however, are burdened chiefly by the ambiguity of the word. Thomas Hobbes wrote "All authors agree not concerning the definition of the natural law, who notwithstanding do very often make use of this term in their writings."⁶ However, the conception of a universal, natural law is generally associated historically with two cultural epochs. The concept is generally associated with medieval scholastic thought, on the one hand, and with the revolutionary ideologies of the late eighteenth century, on the other.

² See the comments by Lee, in *VALUE: A COOPERATIVE INQUIRY* 309 (Lepley ed. 1949).

³ See C. D. BROAD, *FIVE TYPES OF ETHICAL THEORY* c. 3 (1930).

⁴ See BROAD, *op. cit. supra* note 3, c. 4 (1930); EDMOND CAHN, *THE MORAL DECISION* (1955); *VALUE: A COOPERATIVE INQUIRY* (Lepley ed. 1949).

⁵ W. FRIEDMANN, *LEGAL THEORY* 15 *et seq.* (1949). See also EDGAR SHEFFIELD BRIGHTMAN, *MORAL LAWS* (1933); WALTER GOODNOW EVERETT, *MORAL VALUES* (1918); WALTER LIPPMAN, *A PREFACE TO MORALS* (1929); Urban, *Doctrine of Natural Rights and the Everlasting Man*, 30 *RICE INST. PAM.* 95 (1943).

⁶ THOMAS HOBBS, *Philosophical Rudiments Concerning Government*, in *SELECTIONS* 283 (Woodbridge ed. 1930). As a matter of language, it should be pointed out that if everything that exists is called "natural," then, obviously, there is nothing distinctive about natural law. The term "natural," of course, may be used in this trivial sense if one so desires.

Under the first view, natural law is considered to be a set of rules or precepts conveyed to man by immediate inspiration, and this communication is considered to have a divine origin. Blackstone starts with the idea of the law of nature which is the will of God.⁷ On the other hand, where religious inspiration is weak or absent,⁸ resort is made to an intuitive origin of basic moral judgments.⁹ Another variant of this approach consists in the appeal to the condition of man in a "state of nature." For instance, it was supposed that the American Indians were living in a state of nature.¹⁰ It was imagined that these happy savages lived without the burden of positive laws, in peaceful obedience to the laws of nature. To discover the natural law, all that man must do is divest himself of his hampering garment of man-made laws and to listen to the law of nature. The implication is that natural law is instinctively and immediately evident. For less romantic thinkers, this approach takes the form of innatism or aprioristic rationalism. In this version, the mind of man is thought to be endowed by nature with a sense of duty, or even certain initial rules of conduct. All of this is prior to sense experience. Although Kant makes little use of the term "natural law", his philosophy appears closely related to this approach. Obligation, for Kant, is a command arising from one's own rational nature which one recognizes as binding. The quality of rationality is the very essence of thinking and is necessarily shared by all thinking beings.¹¹

In short, the natural law traditionalists maintain that there are certain transcendental basic principles, and that from these we can, by deductive reasoning, infer the most important rules of law. Whether delivered to man by Moses and the Prophets, through inspired scripture; whether revealed by innate principles of "reason" or "the light of nature"; whether deducible from the *a priori* forms of consciousness, the ideal has been thought to be essentially universal and changeless. The relativists, on the other hand, insist that the basic principles of law are directly based upon empirical data or experience and, therefore, are as plastic as the social environment. There are a multitude of "schools" of legal

⁷ WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 40 (1776). St. Thomas Aquinas, we note, distinguished between natural law and divine law.

⁸ Dostoyevsky once said, "If God is dead, everything is allowed." Indeed, this is what a great many people believe. See ERICH FROMM, MAN FOR HIMSELF, 248 (1947).

⁹ See Bourke, *Two Approaches to Natural Law*, 1 NATURAL LAW FORUM 92 (1956); see also JACQUES MARITAIN, THE RIGHTS OF MAN AND NATURAL LAW (1944).

¹⁰ JOHN LOCKE, *Treatise of Civil Government*, in SELECTIONS 62-80 (Lamprecht ed. 1928); JEAN JACQUES ROUSSEAU, DU CONTRAT SOCIAL (1792).

¹¹ See E. BOUTROUX, LA PHILOSOPHIE DE KANT (1926); G. H. MEAD, MOVEMENTS OF THOUGHT IN THE NINETEENTH CENTURY (1936); HERBERT JAMES PATON, THE CATEGORICAL IMPERATIVE (1948).

philosophy, but most reflect the basic viewpoint of either the absolute or relativist theory.

Natural law theorists, it seems, have not been able adequately to explain away the existence of diverse positive laws. This has given strength to the relativist position. Codes contradict one another; one code absolutely praises action which another absolutely condemns. Moral rules which we habitually accept, such as those which prescribe monogamous marriage and forbid unchastity, have been and are by no means accepted, even as an ideal, among all races of mankind. In the face of this evidence, can we say that there are universal values or universal laws? Can we say that one code is the right code? Is it possible to make moral judgments which are true for all men everywhere, judgments not affected by individual or cultural differences?¹² A challenge is at once issued to natural law theorists to point out a single value the actual existence of which in human experience is not subject to many conditions. The only way to confirm the natural law would be to produce at least one such judgment with convincing evidence of its truth without a possible exception.¹³ "Universals," it appears, always require some qualifying word or phrase such as "usually" or "in most cases."

The modern tendency is to ridicule the notion of universal principles.¹⁴ The aphorism that "general rules do not decide concrete cases" is often quoted. The most important modern challenge to the natural law school stems from the thinking of Jhering and Holmes, and is often epitomized in Holmes's epigrammatic slogan, "The life of the law has not been logic; it has been experience."¹⁵ According to the

¹² Relativism in the theory of values is in accord with relativism in the theory of physics, which is to say that properties are dependent upon the frame of reference. According to the theory of relativism in physics, Dewitt Parker writes, "It is impossible to ascribe to a physical body any single, absolute mass, size, shape or date, for the reason that even these so-called 'primary' qualities depend upon a particular frame of reference, of which there are as many as there are observers in the universe. These properties would be absolute only if there were a single, universal frame of reference, which does not exist." PARKER, *op. cit. supra* note 1, at 4. See also OSWALD SPENGLER, *THE DECLINE OF THE WEST* (1918).

¹³ Moreover, it is argued, a "natural law" which is not concerned concretely with natural beings is not very "natural."

¹⁴ Generations ago, "the fight against faith was a fight for emancipation from spiritual shackles; it was a fight against irrational belief, the expression of faith in man's reason and his ability to establish a social order governed by the principles of freedom, equality, and brotherliness. Today the lack of faith is the expression of profound confusion and despair. Once skepticism and rationalism were progressive forces for the development of thought; now they have become rationalizations for relativism and uncertainty." FROMM, *op. cit. supra* note 8, at 198.

¹⁵ OLIVER WENDELL HOLMES, *THE COMMON LAW* 1 (1881). Perhaps no assertion of legal theory has met with wider approval than Holmes's saying that law is the prediction of what judges will do. We observe, however, that some of the approval has been of the rather superficial kind that likes a wisecrack. The advantage of Holmes's theory is that it lifts legal science to the dignity of the natural sciences. The natural sciences are supposed to be predictions of the behavior of

historical school, law is the effect of the secret working of the *Volksgeist*. The individual does not make decisions or give preferences; he listens to the *Volksgeist* and lets it act through himself. The legislator, under this theory, has to refrain from acting, and the judge has to apply the customary law not because it is good, but because it has always been applied.¹⁶ According to Hegel, history is the working of an objective mind. The individual is the instrument through which the objective reason acts; if the individual believes that he decides and chooses for himself, he deceives himself and is deceived by the objective reason. Marx substituted economic forces for objective reason. Legal positivism, from Austin to Kelsen, regards law as a body of rules, commands, or imperatives. Law is, according to Austin, what the sovereign has commanded. Under the common law, it is what judges have laid down as rules in deciding cases. According to Kelsen, law is simply a system of progressively concretized commands derived from a "Grundnorm" or basic command.¹⁷

The crucial question, then, in view of these theories, is the validity of the judgments of the legislator and the jurist as value judgments. In making value judgments, do we have to assume absolute and eternal values brooding somewhere in the skies? Do we have to have a universal standard? We commonly assume without any basis, that everybody who affirms the possibility of valid value judgments advocates a natural law, true for all times and all places, and discovered in a speculative process. What clear test, the popular quandry runs, can be applied to human conduct so as to determine on each occasion whether it is right or wrong, or so as to distinguish the higher of two contending values from the lower?

What is the role of experience in the realm of values? Aesthetic values cannot be discovered without experience. He who has never heard music cannot know of the distinction between good and bad music. Furthermore, the more music one hears and the more pictures one sees, the more one is able to appreciate them. The same is true of the appreciation of human actions. Constant experience can teach us what values human actions can realize or violate.

Of course, experience is not enough. We shall discover what kind of values can be applied to human actions, and in what sense, only if we direct our attention toward the possibility of evaluation. Holmes, in

electrons, etc. If law is the prediction of the behavior of judges, then identical methods can be applied in both fields.

¹⁶ Law, according to the historical school, is nowhere a set of norms that can be called "good" with universal validity. Rather, it is everywhere the outcome of a historic process. What is good law in one country is not so in another.

¹⁷ See GEORGE H. SABINE, A HISTORY OF POLITICAL THEORY (1937).

his famous statement on the role of experience in law and in his statement that law is a prediction of what the judge will do did not mean to minimize the importance of rational thinking in the law. It has been argued, and not entirely as a joke, that Holmes's view has led to the digressive theory of law. According to this position, the judge's breakfast and unconscious prejudice are the factors which influence the decision of a case and that reason in the legal process is mere rationalization.¹⁸ The high point of this approach was reached in Fred Rodell's book, *Woe Unto You, Lawyers!*, where it is stated that legal principles have nothing to do with justice, that they are nothing more than tricks of the trade.¹⁹ This view has not been confined to lawyers. In the *Pickwick Papers*, Charles Dickens relates a conversation occurring on the morning of the trial of a breach of promise action brought by Mrs. Bardell against Mr. Pickwick. As the jury was being selected, Mr. Pickwick's friend Snodgrass said to Pickwick's solicitor:²⁰

"I wonder what the foreman of the jury, whoever he'll be, has got for breakfast." "Ah!" said Mr. Perker, "I hope he's got a good one." "Why so?" inquired Mr. Pickwick. "Highly important; very important, my dear sir," replied Perker. "A good, contented, well-breakfasted jurymen, is a capital thing to get hold of. Discontented or hungry jurymen, my dear sir, always decide for the plaintiff."

Holmes, however, did not assert that reason has no place whatever in the judicial process. The fallacies to which Holmes referred were the notions that the only force at work in the development of the law is logic and that the judge is not influenced by his social history in reaching a decision.²¹

B. OBJECTIVITY AND SUBJECTIVITY

Philosophers who rest upon the Cartesian framework bifurcate nature into the two mutually exclusive and jointly exhaustive classes of objective and subjective.²² A theory of objective value finds value in the object, as a quality of the object. According to this theory, when we call a thing good or valuable, we are referring to some quality, property, or

¹⁸ Not too long ago, a federal judge remarked: "A judge can make up his mind either way on a question, and then have his law clerk dig up enough precedent to support either decision! The only time a judge goes against his own convictions is where the letter of the law is so plain that it is not subject to construction—and that happens in relatively few instances." Davidson, *Judge Goldsborough Takes the Stand*, *Collier's*, Aug. 7, 1948, p. 20.

¹⁹ FRED RODELL, *Woe Unto You, Lawyers!* (1939). See also Bingham, *Legal Philosophy and the Law*, 9 *ILL.L.REV.* 96 (1914).

²⁰ CHARLES DICKENS, *PICKWICK PAPERS* c. 34 (1837).

²¹ See Loevinger, *An Introduction to Legal Logic*, 27 *IND.L.J.* 471 (1952).

²² See GORDON SINCLAIR, *JURY, VALUE AND ETHICAL OBJECTIVITY* (1937).

characteristic which the thing has in itself, irrespective of its relations to other things or to an appreciating subject. Value, this theory maintains, is a property of things, like any other property; things have value just as they have size or shape or color.²³ Just as we discover or recognize shape in the rose, so we find beauty there.²⁴ It should be pointed out that persons who defend a theory of objective value often confuse objectivity with permanence, and then they try to demonstrate the permanence of standards. To say that a quality is objective, however, is not to say that it is absolute. Thus, to say "This rose is beautiful" is not the same as to say "This rose is forever beautiful for all men under all circumstances." Heraclitus is a good reminder of the never-ending flux of things.²⁵

According to the subjective theory, on the other hand, when we call a thing good or valuable, we are simply indicating a state of mind in an appreciating subject. The subjective theory identifies value with a quality of consciousness. It maintains, furthermore, that nothing can be proved to be objective unless it can be shown to exist independent of any consciousness, and, since this cannot be done, it concludes that all value is subjective.²⁶ All consciousness is a process within the mind, and so, in contrast to the outer world, is subjective. Thus, the individual is considered, in the last resort, to be the home and center of all value. This conscious process within the mind, however, presents two sides or aspects, one of which has to do with the objects of our attention and interest, the other with the way in which these objects affect us.

In moral value, Kant, an absolutist, emphasizes the subjective in his insistence that the will is the only source of moral value and in his rejection of the consideration of consequences in the determination of moral value.²⁷ Some relativists are called subjective because they make goodness relative to feelings or opinions, whereas other relativists are called objective because they relate the act to something outside of anyone's mind, such as the actual consequences that follow from the act.

²³ See JOHN LAIRD, *A STUDY IN REALISM*, c. 7 (1920).

²⁴ There is a charming story to illustrate the point of view that values are out there, ready to be discovered. Two tourists at the Louvre were looking at Leonardo da Vinci's portrait of Mona Lisa. One said, "I don't care for it." "Neither do I," replied the other. When they left, the museum guard chirped, "They think they were judging the picture, but actually the picture was judging them."

This view of value finds expression in law in such concepts as "nuisance per se" and "inherently dangerous instruments" (e.g., see *MacPherson v. Buick Motor Co.*, 217 N.Y. 382, 111 N.E. 1050, L.R.A.1916F, 696, Ann.Cas.1916C, 440 (1916)). As this essay will attempt to show, there are no nuisances which are *per se* nuisances, or instruments which are inherently dangerous, but that their value depends upon the situation.

²⁵ See FRANK THILLY, *A HISTORY OF PHILOSOPHY* 23 (1949).

²⁶ See Lee, *A Precise Meaning for Objective and Subjective in Value Theory*, 37 J.PHIL. 626 (1940).

²⁷ See note 11 *supra*.

Those who adhere to a natural law are often called subjectivists because the meaning of natural law depends upon a sentient being's notion (or prejudices) of the natural law.²⁸ The term is commonly used by people to convey a flavor of moral authority to their personal likes and dislikes. History shows that with changing social and political conditions, the notions on natural law have changed. When the social structure itself was rigid and absolute, as at the time of the Schoolmen, the ideal too was static and absolute. At different times, and in the hands of different men, natural law was both a liberalizing and a developing doctrine, and a conservative and stagnating force. Whether its technique worked toward one side or the other turned upon those who used it.

Classical and medieval philosophy sought to avoid the pitfalls of subjectivism by developing a theory of universal ideas or by conceiving the mind of God, rather than the mind of man, to be the ultimate point of reference. Plato conceived of universal ideas as having individual existences independent of the human mind. However, as it was impossible to conceive of the existence of a thought independent of a thinker, the human race accepted the existence of a Supreme Intelligence, namely, God, to be the thinker. However, the Ideas are just as dependent upon a sentient being's consciousness when the Ideas are in God as when they are floating, as it were, in the air.²⁹

Is positive law any more objective than natural law? We consider positive law to be objective. This finds expression in the aphorism inscribed over the portals of the courthouse, "This is a government of law, not of men." This is to say, the judge is not arbitrary or capricious in his decision, as he is bound either by a promulgated statute or, under the doctrine of *stare decisis*, by a prior decision.³⁰ However, just as all values in the last analysis can be called subjective because they are dependent upon a subject, so, too, can all law and everything else, be called subjective. Law requires interpretation and is, therefore, dependent upon a consciousness, although not an arbitrary one.

The common law is said to be built on precedent. The civil law is said to be built on statute, but the meaning of the statute is dependent upon a judicial decision. In both the common law and the civil law, there is no controlling verbal formulation of the meaning of the prior decision or of the statute. What the court said in a former case is always subject to

²⁸ "Whose natural law?" is the crucial question. See LEO HUBERMAN, *MAN'S WORLDLY GOODS* 204 *et seq.* (1936); SABINE, *op. cit. supra* note 17.

²⁹ See Weiss, *The Nature and Locus of Natural Law*, 53 *J. PHIL.* 713 (1956).

³⁰ The common law, at times, was identified with the natural law itself. The theory was that the judge discovers law by deduction from moral principles.

reinterpretation as new situations arise. Ludwig Wittgenstein gives an illustration:³¹

Someone says to me: "Show the children a game." I teach them gaming with dice, and the other says, "I didn't mean that sort of game." Must the exclusion of the game with dice have come before his mind when he gave me the order?

And, similarly, a court, when examining a decision which is cited to it as controlling for the instant case, can say, "No, the court did not mean that kind of game." The scope of the precedent is determined not only in the light of the end-in-view pursued by the court that decided it, but in the light of new ends or ends then out of view because not stirred into active consciousness by the facts of the case being decided.³²

C. FACT AND VALUE

The dichotomy of the universe into objective and subjective is often presented in the form of the fact-value dualism.³³ It, too, is erected upon Cartesian assumptions. It is common to ask, "How do values differ from facts?" or, "How do evaluative or normative expressions differ from descriptive or factual statements?" The descriptive sciences, it is often said, describe existing facts, but remain wholly indifferent to their values; the normative sciences seek a standard of value to serve as the measure of what ought to be. The descriptive sciences, dealing with what actually exists, formulate all their results in so-called "is-judgments," or judgments of fact; the normative sciences, dealing with what ought to be, irrespective of whether the ideal is existent or not, present their results as "ought-judgments." The dichotomy between fact and value, between description and criticism, is illustrated by R. B. Perry in his text on *General Theory of Value* by three selections which refer to the same object, England.³⁴ The first is from the *Century Dictionary*:

A country of Europe, which forms with Wales the southern portion of the island of Great Britain. . . . The surface is generally level or undulating in the east, south and center. . . . The highest mountain is Scafell Pike (3,210 feet). The chief river-systems are those of the Thames, Humber and Severn. . . . Its capital is London and its government a constitutional hereditary monarchy. . . . Among the leading events in English history are invasions by Julius Caesar, 55

³¹ LUDWIG WITTGENSTEIN, *PHILOSOPHICAL INVESTIGATIONS* 33 (1953).

³² Fuller, *Human Purpose and Natural Law*, 53 *J. PHIL.* 697 (1956); see also EDGAR SHEFFIELD BRIGHTMAN, *A PHILOSOPHY OF IDEALS* (1928); STEPHEN C. PEPPER, *A DIGEST OF PURPOSIVE VALUES* (1947); PRATT, *op. cit. supra* note 1, c. 21; JAMES WARD, *THE REALM OF ENDS* (3d ed. 1920).

³³ See WOLFGANG KÖHLER, *THE PLACE OF VALUE IN A WORLD OF FACTS* (1938).

³⁴ R. B. PERRY, *GENERAL THEORY OF VALUE* 1-3 (1926).

and 54 B. C. . . . Area, 50,867 square miles. Population (1901), with Wales, 32,526,075.

The second selection is the account of England in Shakespeare's *Richard II*:

This royal throne of kings, this scepter'd isle,
 This earth of majesty, this seat of Mars,
 This other Eden, demi-paradise:
 This fortress, built by Nature for herself,
 Against infection and the hand of war;
 This happy breed of men, this little world,
 This precious stone set in the silver sea,
 Which serves it in the office of a wall,
 Or as a moat defensive to a house,
 Against the envy of less happier lands;
 This blessed plot, this earth, this realm, this England.

The third selection on the same theme is Lissauer's *Song of Hate*:

We have but one single hate;
 We love as one, we hate as one;
 We have but one single foe,
 Whom you all know, whom you all know.
 He sits crouched behind the gray flood,
 Full of envy, full of fury, full of craft, full of guile,
 Set apart by waters that are thicker than blood.
 We wish to go before a seat of judgment
 To swear an oath, face to face,
 An oath of metal no wind can blow away,
 An oath for children and children's children.
 Hearken to the word, repeat the word,
 It rolls on through all Germany;
 We will not forbear from our hate;
 We have all but one hate;
 We love as one, we hate as one;
 We have all but one foe—
 England!

The first selection purports to be a statement of fact. It is, as we say, a mere description of the object; it is colorless and unheated. The second and third, on the other hand, are critical and passionate; moreover, the second is for, the third against, England. All three characterize the object, England, but they qualify the object differently. They impute different characters to it. The first imputes to England a certain location in space, a certain epoch in time, a certain magnitude of area and population. The second and third impute happiness, preciousness, blessedness, envy, craft, and guile. This difference between the first of these selections and the other two may be regarded either as one of at-

titude on the part of the subject or as one of character ascribed to the object.

Some philosophers seek to overcome the bifurcation of nature between fact (the objective) and value (the subjective) by either translating all fact into value or all value into fact. The first approach is based on the view that there are no "brute facts." The simplest "descriptive" or "factual" report involves a value term.³⁵ Elements of attitude and perception are involved both in value-expressions and in factual-statements. As C. I. Lewis has pointed out:³⁶

The tendency to forget that initial concepts are never merely dictated by empirical findings is precisely what accounts for the absurd prejudice—now happily obsolescent—that science is "just the report of facts."

In other terms, an element of choice or decision goes into the constitution of any fact. The world is a single unified whole, and, in knowing, we select and group from this continuum some small scraps, being driven on to do so by our emotions, feelings, impulses, and interests. By our concepts, we slice from this reality, or try to do so, in the simplest and most coherent ways available.³⁷ Moreover, by defining value as an ob-

³⁵ See WILLIAM ANGUS SINCLAIR, *THE CONDITIONS OF KNOWING* 134 (1951). José Ortega y Gasset writes: "A great man is dying. His wife is by his bedside. A doctor takes the dying man's pulse. In the background two more persons are discovered: a reporter who is present for professional reasons, and a painter whom mere chance has brought here. Wife, doctor, reporter, and painter witness one and the same event. [But see note 37 *infra* and supported text.] Nonetheless, this identical event—a man's death—impresses each of them in a different way. So different indeed that the several aspects have hardly anything in common. What this scene means to the wife who is all grief has so little to do with what it means to the painter who looks on impassively that it seems doubtful whether the two can be said to be present at the same event.

"It thus becomes clear that one and the same reality may split up into many diverse realities when it is beheld from different points of view. And we cannot help asking ourselves: Which of all these realities must then be regarded as the real and authentic one? The answer, no matter how we decide, cannot but be arbitrary. Any preference can be founded on caprice only. [Why is this? We would suppose that we can have reasons for our preferences at least sometimes.] All these realities are equivalent, each being authentic for its corresponding point of view. All we can do is to classify the points of view and to determine which among them seems, in a practical way, most normal or most spontaneous. Thus we arrive at a conception of reality that is by no means absolute, but at least practical and normative.

"As for the points of view of the four persons present at the deathbed, the clearest means of distinguishing them is by measuring one of their dimensions, namely the emotional distance between each person and the event they all witness." JOSÉ ORTEGA Y GASSET, *THE DEHUMANIZATION OF ART* 14–15 (1951).

See also FROMM, *op. cit. supra* note 8, at 61: "Environment is never the same for two people, for the difference in constitution makes them experience the same environment in a more or less different way."

³⁶ C. I. LEWIS, *MIND AND THE WORLD-ORDER* 6 (1929).

³⁷ See WILLIAM ANGUS SINCLAIR, *AN INTRODUCTION TO PHILOSOPHY* (1944). See also Lee, *Theoretic Knowledge and Hypothesis*, 57 *PSYCH.REV.* 31, 32 (1950): "It was long ago pointed out by psychology that concrete perception always includes

ject of interest, it can be urged that everything is or can be an object of value, since someone, somewhere, cares or can care about everything that is. Every fact of description is, in some aspect, a fact for appreciation. All perceived facts stand in some relation to human interest and thereby possess some degree of value. Even the most barren bit of earth-crust which geology has to describe becomes, from the point of view of scientific interest, if from no other, a thing of value.³⁸

The second approach, namely, that judgments of value are translatable without remainder into judgments of fact, can be illustrated: The question "Will the burner burn *well*?" may be changed into "Is it a burner which burns clearly with a perfectly round flame," and so forth.³⁹ In this form, it appears to be as purely factual as the question "Will it light?" Suppose an artist recalls that he recently bought some paint which was not smooth and consistent; it was somewhat granular and incohesive when thinly spread. The question occurs: "Is this a tube of *good* paint?" The solution is to spread some of the paint and carefully attend, note, and judge whether the paint has the properties of "good" paint. In making our decision, it is to be observed that purpose lies in the background.⁴⁰

In ordinary affairs, there is a great deal of shifting from the extreme objective to the extreme subjective position.⁴¹ Value, however, is not

a reference to past experience. . . . Facts, in other words, always include a conceptual element. Facts mean something, both in reference to past experience and to future action, and meaning is conceptual. . . . The colors, shapes, and sounds in our experience are intuited, but these intuitions are never the whole of concrete adult experience. The concrete object of our perception is a tree or a telephone pole or juke box. These are perceptions of fact, and facts are always interpretations of intuited content in terms of concepts. 'Tree,' 'telephone pole,' 'juke box': these words name concepts."

F. S. C. Northrop has pointed out: "One cannot deduce the theories of science from the facts. Instead, the logic of deduction in scientific method runs in the opposite direction. One deduces the facts from the theory. . . . In other words, our theories imply the facts which we observe, but the facts do not imply the theories." F. S. C. NORTHROP, *THE MEETING OF EAST AND WEST* 204-05 (1946). See also HUGO MÜNSTERBERG, *ON THE WITNESS STAND* (1927). For the opposite point of view that the world is made up of discrete facts, see LUDWIG WITTEGENSTEIN, *TRACTATUS LOGICO-PHILOSOPHICUS* (1922).

³⁸ See Aiken, *Reflections on Dewey's Questions about Value*, in *VALUE: A CO-OPERATIVE INQUIRY* 16 (Lepley ed. 1949).

³⁹ RAY LEPLEY, *VERIFIABILITY OF VALUE* 26-28 (1944).

⁴⁰ *Ibid.*

⁴¹ Placing values *in* objects means that differences of opinion about values are the results of errors. If value is intrinsic to its object, the only way of learning what it is will be to study the object rather than our psychological processes in apprehending it. On the other hand, placing the locus of values in the subject (to be something subjectively conferred) does not account for the uniformity which does exist. For the logical positivists, value judgments have no objective validity and are nothing but arbitrary preferences or dislikes of an individual. See *e. g.*, A. J. AYER, *LANGUAGE, TRUTH, AND LOGIC* (1936); HANS REICHENBACH, *EXPERIENCE AND PREDICTION* (1938); JULIUS R. WEINBERG, *AN EXAMINATION OF LOGICAL POSITIVISM* (1936).

to be explained by resolving the object into terms of the subject or the subject into terms of the object. There is another approach, namely, a synthetic or summary theory, which can be called the situational theory of value. According to this position, a value of a certain sort comes to exist when there exists actually or potentially a subject of a certain sort in a relation of a certain sort with an object of a certain sort.⁴² According to this theory, when we call a thing good or valuable, we are referring to a characteristic which it may be said to possess only when it stands in relation to some appreciating subject. Value is, thus, a union of objective and subjective factors. It involves a subject, an object, and a transaction between them. Value depends upon the relationship that an object comes into with a sentient being, on the one side the feeling of appreciation in some subject, on the other the objective elements which yield the satisfaction. Out of a given subject, object, and relation, there arises one determinant value. Vary either the subject, the object, or the relation, and a different value emerges. Thus, a change of relation, without any variation in the object itself, may account to a complete change of value, as shown in one of Hardy's *Wessex Tales*, where the husband in the story, having discovered a picture of his dead wife's lover, takes one of the children on his knee, and comparing the child with the photograph, says, "Henceforth, you are nothing to me."⁴³ Values depend upon the total picture. Take a subject or object out of a situation, and the conception of value is meaningless.⁴⁴ Indeed, according to the theory of relativism in physics, the so-called "primary" qualities, such as size and shape, equally depend upon a particular frame of reference.⁴⁵

The dichotomy which is made between fact and value, between the objective and the subjective, leads, as we have seen, to the problem in moral value of the derivation of "ought" from "is." The relation between "fact" and "value" has sometimes been stated by the Cartesian

⁴² See Lee, *supra* note 26. It is to be observed that value is defined as a potential as well as an actual quality. If we try to think of a world which, in its earliest stages, was without consciousness, the values that can be ascribed to it are those anticipatory of the time when conscious life appears. Until this time, "all the choir of heaven and furniture of earth" must be conceived as without the slightest actual value.

⁴³ This example is quoted by Dewitt H. Parker, who, however, places the locus of value in the mind. See PARKER, *op. cit. supra* note 1, at 21-22. Although Parker insists on the subjectivity of value, he does not deny "that values have functional relations, to the organism and to the physical environment, which must be included in any complete account of values." *Id.* at 32.

The example of the illegitimate child serves to illustrate the proposition that when we speak of things as *having* value, we do not mean that things "have" value independent of its apprehension in a situation.

⁴⁴ The relationship out of which the value emerges is called interest by Perry. See PERRY, *op. cit. supra* note 34.

⁴⁵ See note 12 *supra*.

dualists in the form of a paradox. If judgments of value are not distinct from judgments of fact, then the distinction between *what is* and *what ought to be* is blurred, and valuation is reduced to a mere description of what already exists; but if judgments of value are distinct from judgments of fact, then it seems impossible to regard them as verifiable by scientific means, and a science of value is an illusion. In short, either value-judgments are not factual, in which case they cannot be regarded as scientific, or they are factual, in which case the distinction between *what is* and *what ought to be* is lost.⁴⁶

The paradox is removed by rejecting Cartesian dualism. The Cartesian bifurcation, as we have pointed out, leads irrevocably to solipsism,⁴⁷ and since there is no solipsism, the sharp distinction between fact and value, between the objective and the subjective, can hardly be counted satisfactory.⁴⁸ The situationalists, by interpreting human behavior as purposive, have achieved, it seems, an elimination of the dichotomy between fact and value, or between *what is* and *what ought to be*. Wittgenstein's example of games illustrates the patent or latent purposiveness in human behavior. Human action is treated as goal-directed. Events which are observed are interpreted as purposive. Lon Fuller illustrates:⁴⁹

Suppose that I were to observe a five-foot ladder leaning against a fifteen-foot wall. This state of affairs suggests nothing like a value judgment, yet I can say of it, "This is bad," if I assume that someone of normal stature plans to use the ladder to scale the wall, and if I provisionally accept his purpose as a valid one.

The *what is* and *what ought to be* are thus related. In other terms, the mind displays interest in an objective situation, and the objective situation takes on the quality of value.

⁴⁶ See Aiken, *supra* note 38. See also Daya, *The Moral and the Axiological "Ought"—An Attempt at a Distinction*, 53 J.PHIL. 634 (1956); Gollightly, *Value as a Scientific Concept*, 53 J.PHIL. 233 (1956); Bronowski, *Science and Human Values*, 183 NATION, 550, 561-62 (1956): ". . . systems such as logical positivism and its modern derivative, analytical philosophy . . . believe that the words *is* and *ought* belong to different worlds, so that sentences which are constructed with *is* usually have a verifiable meaning, but sentences constructed with *ought* never have. This is because . . . all British empirical philosophy is individualist. And it is of course clear that if the only criterion of true and false which a man accepts is his own, then he has no base for social agreement. The question how a man *ought* to behave is a social question which always involves several people; and if he accepts no evidence and no judgment except his own, he has no tools with which to frame an answer."

⁴⁷ The theory of solipsism is that only I (*i. e.*, the solipsist) exist; that other persons have no independent existence of their own but exist solely as objects of my consciousness, when and so far as I am conscious of them.

⁴⁸ See note 26 *supra* and supporting text. See SINCLAIR, *op. cit. supra* note 37.

⁴⁹ See Fuller, *supra* note 32.

To summarize: The sharp distinction between descriptive and normative sciences, between fact and value, breaks down when subjected to examination. We appreciate the world of description, and we describe the world of appreciation. The dichotomy between fact and value is false. Values are facts, although complex ones. The distinction is not between “what is” and “what is not, but what ought to be”, but between “facts indifferent in value” and what may be called “value-facts.”