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TABLE OF CONTENTS

Chapter I: Introduction	1
Chapter II: Generic Value Theory	6
Chapter III: The Value Theory of A. J. Ayer	40
Chapter IV: The Relation of Law to Value	86
Chapter V: The Legal Theory of Leon Duguit	113
Chapter VI: Conclusion	148
Bibliography	159

CHAPTER I: INTRODUCTION

This study begins with certain major controversies about theories of value. An examination of these controversies shows that their specific conclusions presuppose special metaphysical and epistemological commitments. The question arises: must the determination of the adequacy of any value hypothesis await the successful solution of persisting metaphysical and epistemological problems, or can a criterion be developed which is independent of peculiar philosophical assumptions? My own view is that in order to establish a competent test of opposing value conclusions neutral criteria are necessary. A criterion of any hypothesis must not derive its character from a special set of presuppositions and assumptions. For then its application will favor a theory which is grounded on kindred propositions and will result in question-begging inquiry.

It is admitted that the construction of criteria for any purpose will involve certain basic presuppositions, such as those regarding logical conditions. But a significant feature of these antecedent principles is that they are recognized and used in common by opposing theories. Unless this were so, it would be impossible even to establish

differing assertions in a relation of opposition. A criterion, then, which is constructed in the light of a universal logical requirement will presuppose and assume only what diverse theories already have in common in their foundation, structure, and purpose. Such a criterion will be competent to arbitrate between alternative hypotheses, and it will be neutral with respect to the diverse antecedent principles ultimately responsible for the opposition in the field.

The purpose of this dissertation is to illustrate the operation of a neutral value theory criterion which is based upon a common logical requirement and is, consequently, independent of the peculiar grounds presupposed by competing theories.

The criterion to be illustrated has grown out of the following considerations about the nature of hypotheses. Hypotheses are occasioned by our inability to account for certain experiences; the function and end of a hypothesis is to make questioned facts intelligible. Thus if our experience of solidity is rendered incomprehensible by other knowledge we possess about the physical world, the task of the scientist is to describe the conditions responsible for this experience. If the hypothesis which purports to explain solidity asserts that it is phenomenal only, that hypothesis is inadequate unless it provides a sufficient account of how the appearance involved derives its character from the un-

experienced reality. The scientist who analyzes matter into objects having no resemblance to those we perceive will explain the facts we do experience by describing them as the effects of a vast system of electrons and protons in violent motion.

If it were not required of a hypothesis to make intelligible the experienced facts which first occasioned it, there would be no means available of testing alternative assertions except self-consistency or compatibility with other propositions. But self-consistent assertions may be false, and the mere compatibility of propositions does not supply an adequate basis for the determination of truth. Further, instances may be found in the history of thought where the failure to account for an experience resulted in the denial of the facts experienced. Gorgias, for example, did not see how communication could take place, and consequently denied that it did. A procedure of this kind is the negation of rational inquiry, and is so recognized among competent modern scientists.

What is required of a philosophic theory is not less than is acceptable in science. In philosophy, as in science, a hypothesis is inadequate unless it renders intelligible the pertinent facts which we experience, and which originally produced the need of a theory. Thus the only sufficient criterion of a self-consistent value hypothesis

is to test its operation, and that of the special principles it presupposes, in a specific context where the need for clarification gives to value theory its distinctive function. This procedure does not rest upon special metaphysical or epistemological grounds. It is based on a common logical condition which all systematic inquiry must fulfill.

To illustrate the neutral criterion of value theories which is proposed by this dissertation, I have selected juridical law as a specific context in which certain facts, which we may call "legal phenomena", produce the distinctive kind of problem an adequate value theory must solve. The particular value theory to be tested is that of the Logical Positivist, A. J. Ayer. This theory is a concise and representative account of a contemporary position which has gained widespread acceptance in the field.

The structure of the dissertation will be as follows:

- 1) There will be a general exposition of the major controversies in value theory in order to demonstrate the fundamental alternative positions, and show in general that these positions are sustained by special presuppositions. This demonstration will establish the existence of the condition which necessitates the construction and application of a neutral criterion.

- 2) There will be a critical analysis of the positivistic value theory selected for testing. In the course of this

analysis it will be shown what the theory is, and how its specific conclusion is determined by antecedently formulated principles of a metaphysical and epistemological character.

3) I shall justify my choice of law as a relevant context within which a value theory and its determining principles may be tested.

4) I shall select a particular attempt to account for the nature, source, and end of law (that of Leon Duguit, an outstanding representative of the Realist School in jurisprudence) and shall show that it terminates in self-contradiction, because it cannot reconcile its use of the positivistic principles which determined Ayer's value theory with the facts that occasion legal theory. These facts, as the third section will have shown, are of the kind which value theory must explain, and so the peculiar failure of the legal theory examined is a direct reflection on the position taken by Ayer and the Positivists in value theory.

It is no part of the principal problem of this dissertation to construct a value theory which will meet the neutral criterion proposed. The task here is essentially one of contributing to critical analysis in value theory, and it is undertaken with the conviction that such work is needed as a preliminary to the more constructive endeavors which should follow.

CHAPTER II: GENERIC VALUE THEORY

This chapter is primarily expository. It will consider specific questions which determine the problem of value theory, and exhibit the basic alternative positions in the field by a discussion of the major controversies with respect to these questions. The purpose of this exposition is to show that the characteristic conclusion in each fundamental category presupposes certain antecedent commitments of a metaphysical and epistemological nature. This condition makes necessary the construction and application of the kind of criterion to be illustrated in the course of the present study.

Although value theory has its roots in the speculations of antiquity, its origin as a distinctive systematic pursuit is to be found in the beginnings of modern philosophy. In commenting upon the practices of ethical philosophers, David Hume observed:

"In every system of morality which I have hitherto met with, I have always remarked, that the author proceeds for some time in the ordinary way of reasoning ... when of a sudden I am surprised to find that instead of the usual copulations of propositions, is, and is not, I meet with no proposition that is not connected with an ought, or an ought not."

"... as this ought, or ought not, expresses some new relation or affirmation, it is necessary that it should be observed and explained; and at the

same time that a reason should be given, how ... this new relation can be a deduction from others which are entirely different from it." (1)

In thus exposing what appears to be a distinct type of proposition, and in demanding that its use be accounted for, Hume gave a concise statement of the problem of value theory.

Modern reflections on the functions of language have made familiar various discriminations among propositions. Many of these are useful to value theory because one of its crucial problems is to ascertain the correct significance of those propositions which appear to express the "new relation or affirmation" noted by Hume.

It is customary to distinguish between propositions which are said to describe a "mere fact" and those which purport to signify values. The former propositions are termed "descriptive", and have their clearest exemplification in the natural sciences. Sensible facts constitute the primary data for the scientist. His purpose is to render these facts intelligible, and the chief function of his activity is to establish the truth or falsity of the propositions which concern him as a scientist. The second class of propositions are called "normative". In contrast to descriptive propositions which state our experience of

1. David Hume, A Treatise on Human Nature, (1738), III, Pt. I, Sec. I.

phenomena, normative propositions are said to be primarily concerned with prescribing rules or signifying what ought to be. Thus G. E. Moore has maintained that

"The business of Ethics is finished so far as it inquires 'what is good', when it has completed the list of things which ought to exist, whether they do exist or not." (2)

For John Laird:

"The moral question is whether any given action is what it ought to be." (3)

The distinctive problem of the scientist is to tell what is the character of a given phenomenon, and to relate this knowledge to certain generalizations. For this purpose, the scientist employs descriptive propositions. But in addition to knowing what things are, men are constantly faced with the question: What ought I to do? This question presupposes that there is some knowledge which is a sufficient basis for a decision to act in one way rather than another. This question is either irrational and meaningless, or there is some knowledge possible which would determine an answer to the question, and also serve as a basis for criticizing whatever conduct actually ensued. The propositions which express this kind of knowledge are called normative propo-

2. G. E. Moore, Principia Ethica, p. 17.

3. John Laird, A Study in Moral Theory.

sitions. And the knowledge expressed is said to be a value judgment.

The terms ordinarily predicated by scientific propositions are those, such as "red", "moving", "solid", etc., which attribute to their subjects certain observable qualities and relations. The terms conventionally used in value judgments are predicates like "right", "good", "satisfactory", "desirable", etc., which are employed as standards and means of prescription.

While there is some controversy among scientists as to whether their principal activity is "mere description", or may truly be said to involve "explanation" and "construction", there is no question that descriptive propositions are employed, and that they have the character attributed to them above. Among philosophers, however, one meets considerable opposition concerning the significance of normative propositions. This fact makes it difficult to present a neutral formulation of the problem. For even an attempt to specify the location of the problem might proceed on the basis of a special interpretation of it. This can be seen from the following consideration of a difficulty peculiar to value theory.

Where there are no obstacles to ascertaining the denotation of a term, there are no inherent problems in

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discovering the intension and extension of that term. Thus where we find universal agreement as to the referent signified by a term, the matter of investigating its generic and differential character seems to rest primarily upon the construction of adequate principles of classification and a sufficient amount of empirical study.

The botanist, for example, studies plants. There may be questions of ultimate detail as to what is the conclusive definition of a plant, and there are frequently questions in particular cases. But, in general, that plants exist is not the question. The problem is usually one of determining whether the characteristics of any given object unite the known generic and differential qualities of plants so as to make that object an instance of a species of plant. There are borderline cases where it is not readily ascertainable that the object awaiting classification is properly a "plant". This is the case, for example, with certain fungi. But this does not alter the fact that plants exist, or that the criteria involved in distinguishing plants from animals and other objects ordinarily are adequate. It is known by virtue of identifiable generic and differential

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4. The intension of a term refers to the qualities that constitute the objects named by that term. The extension of a term indicates the variety of kinds comprehended by it. The denotation of a term consists of the object or objects that it names.

characters that horses, cows, and pigs are animals, and oak trees and asparagus are plants.

The epistemologist has the problem of explaining how the botanist is able to acquire the knowledge which gives his investigation a starting-point. But this problem is one of explaining what is already recognized as a fact. The uniform experiences of botanists have enabled them to reach a significant measure of agreement as to what characteristics are essential to any object which may be termed a "plant". No such experiences exist with reference to the meaning of the term "value". Philosophers disagree on whether "value" refers to an object, a relation of objects, a relation of an object to a subjective state of mind, or solely to a subjective state of mind. Some philosophers have denied that the term "value" has any denotation at all. Depending upon the position taken in regard to the denotation of the term "value", it may be asserted that the distinction between descriptive and normative propositions gives rise to a pseudo-problem. This implies that so-called normative propositions are not distinct from descriptive ones; that "value" does not denote anything generically different from the factual referents of some scientific propositions. It may also be asserted that normative statements do not constitute propositions at all, since they are employed merely

to elicit approval, or influence behavior, and consequently do not possess the capacity of truth or falsehood.

But value theory must not begin with assertions about the denotation of "value". Such a procedure would constitute a circular form of inquiry which sets out with propositions it is supposed to reach as conclusions. Value theory must not be merely an elaboration proceeding from some previously determined conclusions about reality and cognition. For a fundamental question is whether "value" denotes something unique. Thus it may be that judgments relating to a different kind of existence, and a different mode of cognition, are inappropriate as premises from which the investigation of value is to proceed. In other words, the premises used in value theory must not have the effect of denying in advance that values are sui generis. Any theory which employs such premises is stigmatized by the perversity of beginning with what is properly a result to be achieved by inquiry.

On the other hand, no inquiry can begin ex nihilo. A method must be employed and criteria need to be established if a philosophical analysis of the value concept is to be accomplished. This raises the question whether it is possible to avoid a fallacious predetermination of conclusions. For while methods and criteria are but instruments of search

and discovery, the character of such instruments must be appropriate to the nature of the object sought. You do not discover deity with the aid of a telescope, or chart the solar system without it. Some conception of the intrinsic nature of the object of inquiry is necessarily presupposed by the hypothesis initiating every scientific and philosophic investigation. Thus, there is an integral relation between value theory, metaphysics, and epistemology. All value theories tend to speak about the nature of value, the existential status of values, and the meaning of value judgments. Inquiries concerning values will conclude with affirmations or denials concerning some aspect or part of reality. They will also make assertions about cognition. For the questions produced by the many disagreements over the significance of value predicates and normative propositions are fundamentally of a metaphysical and epistemological character.

Do we have any genuine knowledge of values as unique entities? Or is what we take to be a value simply an emotional state produced in us by some non-value entity? If value terms have an independent referent, and we do possess knowledge of this referent, how did we acquire this knowledge? How do we distinguish the values referred to by a normative proposition from the objects described by the

factual, or scientific proposition? Do values exist as a part of nature, independent of man, or are they purely human phenomena? How can we tell whether any given value judgment is true or false?

While these specific questions which determine the problem of value theory are distinguishable, they are not entirely separate. The answer to any one will partially determine, or presuppose, the answer to the others. Thus, if it is said that we have knowledge of values because we perceive them in nature, the questions pertaining to the character and existential locus of values, and the question concerning the verification of value-judgments, are determined within certain limits. It is clear that the starting-point will involve some affirmation or denial of the distinction customarily made between fact and value. Otherwise, the distinctive problem could not be specified. But the validity of the distinction between fact and value rests upon certain propositions about the existence or non-existence of different modes of being and cognition. These propositions belong to metaphysics and epistemology. Now the operation of antecedently formulated metaphysical and epistemological propositions might be prejudicial to the major question of whether values are sui generis. That is why the chief task confronting value theory at the start

is to obtain a suitable method of investigation and to establish an adequate criterion to test resulting hypotheses. As long as value theory has any foundation in metaphysics and epistemology there is the constant danger that it is circular. A solution to this difficulty is to confirm as true some one of the many proposed metaphysical theories presently occupying the field in philosophy. Short of this, we can test a specific value theory in the context of the kind of facts which it is supposed to explain.

Having given a brief systematic account of the distinctive problem of value theory, and its integral relation to certain philosophical antecedents, I will now consider the major positions actually taken by diverse theories. In this portion of my exposition, I will not attempt an exhaustive account of the many distinguishable theories contained in the history of speculation about values. I will limit my account to certain broad categories of theories, and to the means by which they are ascertained. For the positions which concern me here are determined by certain generic characteristics possessed in common by many distinguishable theories which are subsumed in each category.

The lingual conventions concerning values seem to imply that values are objective constituents of reality.

One says: "The dome of the Cathedral at Florence is beautiful." This proposition has the same structure as the proposition: "The dome of the Cathedral at Florence is three hundred feet high." Propositions of this form describe their independent referents by predicating some objective quality or relation of their subject terms. In both cases the verb of existence is employed in expressing the judgment involved. And both propositions implicitly affirm themselves to be true.

The extent, however, to which one may meet disagreement over the truth of the normative proposition has stimulated considerable reflection on the suitability of making inferences about the existence and nature of referents from the structure of language. As Moore observed in his Philosophical Studies:

"Why we should use the same form of verbal expression to convey such different meanings is more than I can say. It seems curious that language ... should have grown up as if it were expressly designed to mislead philosophers." (5)

Disagreement over the meaning of value judgments made its appearance in antiquity. The homo-mensura tenet

5. G. E. Moore, Philosophical Studies, p. 215.

of Protagoras, which was the canonical statement of the entire Sophistic tradition, denied an independent existence to values. For the Sophists, values arose from human institutions. They were not to be found in nature, as it was previously supposed. The Sophists distinguished between objective reality and convention, and denied that justice, goodness, and beauty were determined by anything but men's interests, desires, or approval. These views are related by Plato as the doctrines of such Sophists as Polus, Callicles, and Thrasymachus.⁶ Diogenes Laertius tells of Archelaus, a disciple of Anaxagoras, who maintained

"that what is just and what is base depends
not upon nature but upon convention." (7)

Socrates, Plato, and Aristotle opposed the Sophists, and asserted that a knowledge of independent reality was a necessary condition of virtue. Values, for these latter philosophers, were objective, and it was held that our knowledge of values could be organized into a rational system. Nature, and not convention, or men's feelings and beliefs, was declared to be the real standard for guiding and criticizing the actions of men.

6. Gorgias, Republic, Bk I.

7. Diogenes, Laertius, II, 16-17.

The circumstances in the ancient world which resulted in the bifurcation of "nature" and "convention" have had their impact on philosophic speculation ever since. Modern writers have emphasized the extent to which value judgment are found to vary, not only among the distinctive ethnic divisions of mankind, but within the same groups from time to time. Much of the work of the modern anthropologist consists in comparing, contrasting, and interpreting the beliefs and behavior of diverse societies with regard to such cultural manifestations as morals, art, and politics. From a discovery of differences, some theorists have inferred that the truth of value judgments is relative to an arbitrary or accidental climate of opinion. Similarly, in ancient Greece, a considerable variety was exhibited in laws and in moral usages. Wilhelm Windelband observes that

"In the face of these experiences the question arose whether there is anything whatever that is valid everywhere and always, any law that is independent of the differences between peoples, states, and times, and therefore authoritative for all."

(8)

Just as Socrates vigorously opposed the Sophists, many contemporary philosophers are concerned with repudiating modern subjectivism and modern relativism. This is manifested by the attempts to provide normative propositions

8. Wilhelm Windelband, A History of Philosophy, p. 73.

with a basis as objective as those which ground scientific descriptive statements. In general, the historical picture describes a recurring affirmation and denial that the referents of normative propositions have an independently real existence in the ordo essendi.

This approach to the problem of value theory has⁹ been formulated systematically by Ralph Barton Perry.

Those who affirm the independent existence of values would maintain that a thing is valued because it is valuable.

Those who deny objective reality to values would claim that a thing is valuable because it is valued. This first position indicated is that of the theorist for whom value theory is the study of a peculiar kind of predicate, i.e., when it is asserted that "X is valuable", the term "valuable" is taken to signify an attribute or a relation possessed by X whether this fact is apprehended or not; where X has whatever is denoted by "valuable", the proposition "X is not valuable" is false.

The second position indicated by Perry's formulation is quite different. Here value theory is viewed as an investigation of the act of valuing, rather than a study of predicates signifying some objective state of being. "Value"

9. Ralph Barton Perry, General Theory of Value, p. 4.

on this view denotes a subjective state of mind. And it would seem that a judgment which affirms or denies value of X must be true regardless of the character of X, unless the person making the judgment is intentionally deceitful.

This treatment of value theories by Perry determines a broad classification of theories as "objective" or "subjective". A value theory is said to be "objective" when it adopts the view that its specific function is to examine some portion or aspect of independent reality in order to locate and determine the nature of values. "Subjective" theories are those which take the existential status of values to be certain psychological conditions. These are, then, alternate major positions determined by the view held on the metaphysical question of whether independent reality contains any entity which is the referent of a value predicate. Not all value theories may be readily classified under this dichotomy. Some theories, such as that of Perry, himself, will declare that they are "objective", but maintain that some subjective state, e.g., interest, is a necessary condition of the existence of value. For such a theory, value will be said to reside in the relation between an object and an interested subject. But no matter what variations may be found among particular theories, or how difficult it may be to classify them with respect to their "objectivity"

or "subjectivity", any value theory will tell us about the location of values in the cosmos. It is, then, a generic character of all value theories to make some metaphysical commitment with regard to the referents of value predicates. Even the purely subjective theories, which identify value with some psychological state, must base their position on the metaphysical assertion that independent reality does not contain the referents of value terms. From this it can be seen that the adequacy of value theories rests ultimately upon the truth or falsity of antecedent philosophical propositions. If nothing in objective reality is signified by the terms, "good", or "right", then one of the major positions determined by Perry's formulation is eliminated. But this presupposes that we have the means of verifying affirmations or denials about the independent existence of the referents of value terms. We do not possess the instruments of such verifications and, as a consequence, the controversy over the fundamental objectivity or subjectivity simply reaches the impasse of assertion and counter-assertion without the support of relevant evidence.

The antithesis stated by Perry serves another important function. It reveals the sense in which the dichotomy of fact and value, generally considered as a prime issue in value theory, is an over-simplification and, as such,

prejudicial to final determination. It is generally held that the basis of the distinction between descriptive judgments and value judgments lies in the irreducible difference between facts and values. But unless whatever is said to be a value is not also a fact, how can value theory be considered either the study of a peculiar kind of predicate or the investigation of the act of valuing? In the first case, where the assertion "X is valuable", or "X is good" is taken to be a description of X, such a proposition can not be true unless it is a fact that X possesses what "valuable" or "good" describe. The same consideration prevails in the case of the second alternative. If value denotes a state of mind, then before "X is good" can be a true proposition, what is denoted by "good" must in fact exist.

The same problem exists for those who discover the unique character of value to lie in the peculiar meaning of "ought". Here it is asserted that descriptive propositions refer to facts since they describe what "is", regardless of whether this "ought" to be. And such propositions are distinguished from normative statements on the ground that the latter assert only that something "ought" to be whether it "is" in fact or not. But if "X is good" means "X ought to be", and this proposition is said to be true, then is it not a fact that X ought to be?

Hume's contention that "ought" and "is" express different affirmations cannot be denied. We do not intend and we do not understand the same meaning in their use. But we may not assume the difference to be based upon a dichotomy of fact and value. To affirm or deny such a dichotomy is properly a result stemming from an investigation of the problems raised by our experiences and by the commonplace use of the normative proposition. Actual value judgments are primary data. The ultimate problem produced by them is to discover what is signified by "ought", "good", "just", "beautiful", and other such value terms which are employed in a proposition when the judgment expressed is not confined to affirming what "is" in the sense characteristic of the propositions of science.

Another systematic formulation of the generic problem of value theory may be made in terms of the distinction between naturalistic and non-naturalistic theories. What C. D. Broad takes to be "the first and most fundamental problem of pure ethics" is, mutatis mutandis, a basic question in value theory. This is whether what is denoted by value terms is "unique and peculiar, in the sense that it cannot be analyzed without remainder" into non-value objects, characters, or relations.¹⁰ The theories which hold that the concept of

10. C. D. Broad, Five Types of Ethical Theory, p. 257.

value can be analyzed without such remainder are called "Naturalistic" theories. Those which deny this are called "Non-Naturalistic" theories.

The concept of analysis with or without remainder can be understood in the following terms. The naturalistic theorist believes that the totality of existence could be completely described if what is alleged to be the peculiar referent of the term "value" were omitted. This implies that whatever is called a "value" is reducible by analysis to objects, qualities, or relations which might be described perfectly without recourse to value terminology. Moore describes this position in the Principia by asserting that

"theories are 'naturalistic' which declare the sole good to consist in some one property of things which exist in time, and which do so because they suppose that good itself can be described by reference to such a property." (11)

In short, the naturalist denies that the term "value" refers to anything which is "unique and peculiar".

There are many forms of naturalistic value theories. What differentiates these theories is the character of the non-value terms into which value terms are reduced. The sociological theorist might reduce value terms such as "right", "good", and "better", to "promotion of stability"

11. G. E. Moore, Principia Ethica.

in society. For Herbert Spencer:

"Better conduct means conduct that comes later in the course of evolution, and is more complex than earlier conduct of the same kind." (12)

The most common form of naturalistic value theory is the psychological. Psychological theories reduce value terms to those which denote such subjective states as desire, pleasure, interest, or approval. This is what the Platonic Thrasymachus does in identifying "justice" with the "interest of the stronger". The ethical theory of Hume presents an even clearer illustration of psychological naturalism.

Hume declares that a value judgment simply indicates that its object possesses certain characteristics which receive general approbation. Thus, usefulness and pleasantness are values because men approve of them. On this view, if men began to approve some other qualities, then these other qualities which were not valuable before would become so in virtue of the state of mind directed toward them. This equation of what is good with what is generally approved makes value a property of whatever is an object of approval. Value exists when approval exists and, as Broad observed:

"the statement 'X is good' means the same as the statement 'X is such that the contemplation of it would call forth an emotion of approval toward it in all or most men'." (13)

12. Cf. C.D. Broad, Five Types of Ethical Theory, p. 259.

13. *Ibid.*, p. 85.

Thus Hume's explication of the value term "good" constitutes a denial of any distinctive character to so-called normative propositions and a rejection of the alleged disjunction between fact and value.

The non-naturalist is diametrically opposed to such a position as Hume's. The non-naturalist upholds the distinction between descriptive and normative propositions, and asserts that values are sui generis. In A Study in Moral Theory, Laird has argued that if any theory makes values co-extensive with facts, with mere existence, then value becomes a name for everything. This leaves no intelligible meaning to the term "value". Such theories, Laird insists, are erroneous. Yet he believes that values are found in experience and may be elicited from the tidings which experience gives. Value generalizations such as ethical standards are produced by induction from particular judgments of good and evil. But this is not to say that, for Laird, value theory is a study of the act of valuing. Laird maintains that value theory is a study of "an entirely new order of predicates" which possess a "visible and quite peculiar autonomy". These are the kinds of predicates which comprise normative propositions, and

"the main thing about them appears to be that they are radically different from all other predicates".

(14)

14. John Laird, A Study in Moral Theory, p.

Laird asserts that non-value predicates, such as the term "approval" to which Hume reduces "good", merely describe existence, whereas value predicates go further in enjoining "an altering and a refashioning of something real". Thus it is argued that value and fact cannot be the same concepts, for valuable things may or may not exist. This, according to Laird, is what prevents the positing of any direct or simple connection between the concept of value and the facts of existence. Laird envisions the problem of value theory as one of justifying imperatives.

"The value of any possible thing is a reason which would justify the bringing of it into existence." (15)

The issue raised by the difference between the naturalist and the non-naturalist is clear. But the difficulties inherent in the concepts employed in formulating the diverse positions inhibit the construction of adequate means to confirm either view.

In determining what values are, Hume equated "good" with "general approval". In so doing, one of three distinct possibilities might have been intended. First, if the meaning of "good" is taken to be commensurable with "general approval", the judgment relating these terms would be a definition. If such a definition is considered a true

15. Ibid.

analytic proposition, then it would have to be asserted that its contradictory is nonsense. On this view it must be held to be self-contradictory to assert that "X is good and is not generally approved".

Second, Hume's definition might be taken as a true synthetic proposition. In this case it would have to be maintained that no instances could be found where what was generally approved was bad, and that what was good was not generally approved.

Finally, it is possible that what Hume intended was to create a linguistic rule governing the words "good" and "general approval". This would inform us that whenever he used the one term, the other could be substituted for it without alteration in his intended meaning. But unless the meaning of a term can be determined exclusively by his own intention, Hume would have the problem of justifying the equation of the terms, "good" and "general approval". Linguistic convention does not recognize this equation; it may be said that X is good and is not generally approved, and that Y is generally approved and is not good, without self-contradiction. If Hume did intend to stipulate a mere linguistic rule, he would have to show how it could express a judgment about values.

What these distinct considerations of Hume's naturalistic theory have in common is that in each case the very

concept in question is what is required to resolve the difficulties. We cannot determine the self-contradictory character of the proposition "X is good and is not generally approved" unless we have already determined the meaning of "good" and its relation to "approval". Here we can test the assertion only by adopting it, or by setting it against some opposing theory. But the latter procedure is not acceptable unless there has already been established some means of confirming this opposing theory.

Again, how shall we judge the truth of Hume's position if his equation of "good" and "approval" is taken as a true synthetic proposition? We cannot discover instances where what is good has not been approved unless we already know what things are good.

Finally, we can judge the effectiveness of Hume's conclusion regarding "good", taken as a linguistic stipulation, only in the event we already know that this usage does not obviate real and significant distinctions. This once again presupposes knowledge which it is the function of value theory to ascertain.

At bottom, it is the truth or falsity of metaphysical propositions implied by the naturalistic view which will sustain or eliminate the position. As I observed in considering value theories from the point of view of their

objectivity or subjectivity, an impasse is reached because we lack adequate means of verifying these metaphysical propositions.

It is important to note that the same type of difficulty prevails with regard to the non-naturalistic position. Laird has insisted upon the disjunction of fact and value on the grounds that without it, no intelligible meaning is reserved to the term "value". This argument begs the question since it rests upon the metaphysical presupposition that the referents of the so-called normative propositions are distinctive in kind. Laird's non-naturalistic conclusion about value is really no more than a counter-assertion to the naturalists who reduce value to some class of facts.

The metaphysical basis of the non-naturalistic position is clearly exemplified in G. E. Moore's theory that "good" refers to a simple, unanalyzable, quality. Moore's case, and his opposition to the naturalists, rests ultimately upon the alleged simplicity of "good". From the simplicity of "good" he deduces that value is indefinable and non-relational. Moore assumes a composition theory of definition in which it is held that any definition is the result of an analysis revealing a subject's constituent parts. Since good is said to be simple, it

has no constituents, and the naturalistic definitions of value in terms of certain non-value facts are thus eliminated. Again, value may not result from a relation. For relations require at least two members, and are inherently complex. The assertion that there are simple qualities in reality, and that "good" is one class of them is a metaphysical assertion. How is it to be sustained? Moore answers this with an unverifiable epistemological assertion about a mode of cognition called intuition. The tests available for perceptual experiences are not available to confirm our intuitions. In fact, there are no grounds for believing that what we intuit is less likely to be erroneous than true. If intuition is infallible, then we cannot explain the fact that errors exist. If there are incompatible intuitions, we have no basis for selecting one and rejecting others; since intuitions are direct apprehensions, we cannot examine the operation and relevance of any mediating factors, or grounds, to support any judgment in question.

Thus the metaphysical basis of Moore's non-naturalistic position, i.e., there is a simple quality in reality which is the referent of any value predicate, is said to be known by intuition. Since we have no criterion of the truth and adequacy of intuitions, there is no verifiable evidence in support of Moore's fundamental assertion about the

simplicity of "good". Moore never establishes the existence of the simple quality which is good, but declares that there is no proof of ultimates. Naturalism and non-Naturalism appear to be in an inescapable predicament due to our inability to confirm or reject the diverse metaphysical and epistemological grounds which are responsible for their opposition. The controversy reaches an impasse. The non-Naturalist maintains that no examination of people's desires, interests, satisfactions, etc., can settle the question what is good. And the Naturalist charges that this objection depends for its validity upon the questionable prior assumption that value terms have referents which are unique in nature. The controversy finally comes to rest on the question whether the referents of value predicates are sui generis. This question is a problem of metaphysics.

With the advent of the "Vienna Circle", and the school of Logical Positivism it founded, a novel position in general value theory makes its appearance. It is a view which promises to resolve the difficulty attending the controversy between the naturalistic and non-naturalistic value theories. In the portion of this chapter which remains, I will briefly indicate the position which the Logical Positivist holds in relation to other value theories. In the succeeding chapter, a particular value theory which is

representative of the Positivistic position will be examined in detail.

For the purpose of showing the relation of the positivistic position to other major views, it is convenient to describe certain further discriminations among propositions in general. Logicians regularly distinguish propositions according to their indicative or expressive functions. To this I think there should be added a distinction between what I shall call a direct indicative and an indirect indicative function.

A statement is said to be an "indicative" proposition when it asserts something which is either true or false. This is the case whenever the content of an assertion has an independent reference. The agreement or disagreement of the content of an indicative proposition with this independent referent determines the truth or falsity of the proposition. According to this usage the meaning of "indicate nothing" must be distinguished from the meaning of "non-indicative". Some false propositions "indicate nothing" in the sense that what is asserted does not describe its intended referent. But such statements express the content of an act of judgment. And the presence of the intention to refer an ideational content to some independent reality constitutes the indicative function of

a proposition. A "non-indicative" statement "indicates nothing" and is unaccompanied by any referential intention.

A non-indicative statement may take the form of an indicative proposition, and so appears to be a literal description of an independent referent. It has in reality a relation only to the subjective, psychological state of the person who makes it. Statements of this variety are called "expressive" propositions. They do not refer to a state of mind, but merely manifest one.

Thus, if it is asserted that "Yorick was a fool", the statement may be taken as a literal description of Yorick's capacity in the Danish court where he was retained as a professional buffoon. Such an assertion possesses an indicative function. The intention involved in the expression of the judgment is to refer to an objective factual state involving a peculiar and describable relation between the person signified by the subject term and the employment denoted by the predicate. The statement has an independent referent and is, consequently a genuine proposition, capable of being either true or false; if Yorick was not, as a matter of fact, a court jester, then the assertion in question is false.

The further statement might be made (as, indeed, it was) that "Yorick was a mad rogue". This assertion might be

nothing more than a display of strong feelings by one who, like the grave-digger, recalls having a flagon of Rhenish poured on him by the jester. In this case, the assertion that Yorick was mad would not indicate that his mentality was actually characterized by delusion. For the statement does not intend a literal description of any fact. The predicate has no referent at all. It is used by way of invective, and merely manifests a feeling about its subject. Such a statement does not signify an independent reality with which it is to be compared in order to ascertain its truth or falsity. It has an "expressive" function only and is, therefore, neither true nor false. The feeling displayed by the assertion, which is the only "meaning" involved, may be appropriate or inappropriate, expected or unexpected; it cannot be said to be true or false. Thus an utterance which merely manifests a feeling is not a genuine proposition, it is called an "expressive" statement. This is not to be confused with an indicative statement which may refer to the feeling which the expressive statement merely manifests. Thus, the assertion "I feel anger when I think of Yorick" is an indicative proposition which refers to the feeling I merely display when I say "Yorick was mad".

Indicative propositions may be of two kinds which

I have termed "direct" and "indirect". The direct indicative proposition signifies either the fact that some external referent is characterized by a quality, or that a relation exists between two or more such referents. Thus "X is round", and "Y is to the left of X", are direct indicative propositions. The intention governing any proposition of this kind is to signify some completely external reality.

Propositions with an indirect indicative function refer to a relation between some external reality and a psychological state. Here, despite the formal structure of the statement, there is no intention simply to describe some external relation, thing, or event. Thus where "good" is taken to mean "approved" or "desired", the proposition "X is good" does not describe X or its relation to another independent object.

The difference between an indirect indicative proposition and an expressive statement is just the difference between a judgment referring to a subjective state and an utterance which merely evinces such a state. The difference is the one between "This object hurt me" and "Ouch!"

What both types of indicative propositions have in common is the fact that they are governed by a cognitive apprehension of their referents. They are, therefore, genuine propositions, i. e., they are capable of being true

or false. This is not the case with statements having only an expressive function.

On the basis of these distinctions among propositions we may derive three fundamentally distinct positions in value theory. Each of these has an exemplification in contemporary writings on value. In the Principia Ethica, G. E. Moore contends that "good", like "yellow", denotes a simple, unanalyzable quality of natural objects. Hence, for Moore, the statement "X is good" has a direct indicative function. The meaning of this statement consists in assigning the quality, good, to an object. The interest theory of values of Ralph Barton Perry represents a second alternative view of the significance of normative propositions. According to Perry, value consists in the relation which any object may sustain to any attitude of disposition of favor or disfavor. This favorable or unfavorable disposition is what Perry means by "interest". Whatever is an object of this characteristic of the motor-affective life is said to be eo ipso invested with value. Hence, for Perry, normative propositions are indirect indicative propositions. Such propositions do not describe independent objects or qualities, or the objective relations of independent objects or qualities. They describe the relation that some object has to a subjective, psychological state, i.e., to an interested response of an organism.

A third position is that normative statements are expressive only. This is the view held by Logical Positivists, such as Rudolph Carnap, Moritz Schlick, and A. J. Ayer. According to Carnap, a so-called normative proposition is not a verbal expression of a genuine judgment. It is merely a vocal manifestation of some psychological state. Carnap maintains that the value statement, "Killing is evil" is merely an expression of a certain wish. It is not considered to be a proposition, although it appears in propositional form. Thus Carnap writes:

"Most philosophers have been deceived by this form into thinking that a value statement is really an assertive proposition, and must be either true or false. Therefore they give reasons for their own value statements and try to disprove those of their opponents. But actually a value statement ... may have effects upon the actions of men, and these effects may be in accordance with our wishes or not; but it is neither true nor false. It does not assert anything and can neither be proved nor disproved." (16)

For this reason, Schlick maintains that ethics is in reality a purely psychological study; that the fundamental question of ethics is "Why does man act morally?", a question to be answered only by psychology.

16. Carnap, Philosophy and Logical Syntax, p. 24.

17. Schlick, Problems of Ethics, p. 30.

Thus, it is said by the Positivist in value theory that value terms have no referential character at all. Unlike the position of the non-naturalist, the view here is that the sentence "X is good" makes no assertion about X. Nor does it, as the Naturalist might maintain, refer to a feeling about X. The sentence merely displays a feeling. It is "expressive" only, and is not, therefore, a proposition about anything at all.

This is the novel view which would reject both the naturalistic and non-naturalistic positions and consequently deliver value theory from the impasse which results from this opposition. The positivistic position, which is gaining widespread acceptance, is the view to be tested in this dissertation. In the following chapter, I will consider in detail the value theory of A. J. Ayer, the most recent representative of positivism in the field of value theory.

Ayer claims that unwarranted metaphysical and epistemological assumptions are responsible for the traditional philosophic controversies. One function of my consideration of Ayer's theory is to determine whether the positivistic position is free of such antecedent commitments.

CHAPTER III: THE VALUE THEORY OF A. J. AYER

The impasse produced by the opposition between the Naturalists and the Non-Naturalists has stimulated renewed efforts to discover distinctive principles and techniques which will break the deadlock of the traditional positions, and clear the way for constructive philosophical endeavors. Perhaps the most eminent of the new approaches to knowledge is the systematic pursuit of the traditional problems by means of a logical analysis of language. Adherents of this new method view traditional philosophy as the disease of which it should be the cure, because difficulties such as those described in the preceding chapter are considered to be the result of

"wishful thinking of all sorts, the reading into experience of features which are incapable of test, and the multiplication of entities beyond necessity."

For the most part, traditional philosophy is thought of as a product of the immaturity associated with pre-scientific modes of explanation, and of perplexities which it has created itself through linguistic confusions.¹

This is the general attitude with which A. J. Ayer begins the work containing the value theory to be considered here. Ayer feels that the traditional disputes of philosophers

1. Feigl, "Logical Empiricism", Readings in Philosophical Analysis, p. 5.

are "as unwarranted as they are unfruitful", and that

"the surest way to end them is to establish beyond question what should be the purpose and method of a philosophical enquiry." (2)

Ayer attempts to end the traditional disputes in terms of a conception of the purpose and method of philosophy, and he acknowledges this conception to be the one adopted by the group known as Logical Positivists.

In that portion of his work which is devoted exclusively to value theory, Ayer sets out to determine how expressions of ethical judgments should be classified.³

The consideration of this problem is occasioned by Ayer's recognition of the common belief that normative propositions are generically different from descriptive ones. It is Ayer's contention that problems arising from this distinction in types of propositions can be solved only by giving an analysis of value terms. More specifically, what interests Ayer is the question of whether the whole sphere of ethical terms can be reduced to non-ethical terms.

"We are enquiring," he writes, "whether statements of ethical value can be translated into statements of empirical fact." (4)

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2. Ayer, Language, Truth and Logic, p. 15.
 3. Ibid., Chap. VI. Ayer indicates that whatever is said about ethical statements applies mutatis mutandis to all normative statements.
 4. Ibid., p. 152.

As I noted in the preceding chapter, naturalistic theories which ascribe an indicative function to normative statements, do so because they assert that terms signifying value concepts can be reduced without remainder to non-value, or purely factual terms. According to the Naturalist, for every normative statement there is a descriptive statement with an equivalent indicative function. This is denied by the Non-Naturalists. The latter contend that some independent and peculiar referent is signified by any value term.

Ayer discusses and rejects these views. Both positions attribute an indicative character to the normative statement. They differ in the analysis given to the meaning of value terms. Ayer considers it fatal to a theory of the type which equates "good" with such a naturalistic concept as "general approval" that no proposition affirming the one and denying the other of the same subject is self-⁵contradictory. Thus, a man who confessed that he sometimes approved of what was bad or wrong would not be contradicting himself. In regard to the possibility that a naturalistic theory like that of Hume's is simply stipulating a linguistic

5. Ibid., pp. 153-4.

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usage, Ayer observes that any such equation of ethical with non-ethical terms is inconsistent with the conventions of our actual language. And a procedure of this type could not possibly constitute an analysis of the existing value concept.

"Our contention is simply that, in our language, sentences which contain normative ethical symbols are not equivalent to sentences which express psychological propositions, or indeed empirical propositions of any kind." (7)

If the indicative function said to characterize normative statements is not constituted by an empirical concept, then the naturalistic theory must be excluded as a possible alternative position in value theory. Ayer takes this stand when he asserts:

"... the validity of ethical judgments is not determined by the felicific tendencies of actions, any more than by the nature of people's feelings ... it must be regarded as 'absolute' or 'intrinsic', and not empirically calculable." (8)

Ayer's arguments, which rule out the traditional naturalistic position, seem unimpeachable. For it is shown that it is necessary to the naturalistic view to consider

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6. There is some controversy among the positivists as to whether a proposition of logic is per definitionem a linguistic stipulation. I believe that logical relations cannot be analyzed without remainder into linguistic relations, but this dispute is not germane to the development of this essay.
 7. Ibid., p. 155.
 8. Ibid., p. 154.

propositions of the form, "X is good and is not approved (or desired, etc.)" as containing the same defect as the proposition "X is a triangle and is not a three-sided figure". The latter assertion is self-contradictory because the predicate denied of the subject term is part of that subject's definition. It is clear upon inspection that the former, naturalistic proposition is not self-contradictory, hence it has failed to define value. And this is what naturalism sets out to do.

Having eliminated naturalism on the grounds that validity of ethical judgments cannot be based upon a definition of value predicates in terms of psychological states or any other empirical entity, Ayer appears to be giving his support to non-naturalism, traditionally considered the sole alternative. But Ayer has indicated that his position is a "third approach" to the problem which both naturalism and non-naturalism have failed to resolve. He must, then, not only distinguish his view from that of non-naturalism, but meet the arguments which, in addition to his own, are employed by non-naturalism to counter opposition. One such argument is advanced by G. E. Moore in support of the principal non-naturalistic view that there is an intrinsic value which is sui generis. Since Ayer has rejected naturalism, he must avoid Moore's argument or be committed to a non-naturalistic position.

In a lecture entitled, "The Nature of Moral Philosophy", Moore repudiates subjective naturalism with the observation that if this latter position were true, and ethical statements were really nothing but assertions about the feelings of the speaker, then no genuine moral dispute would be possible. Moore shows that if

"When I say 'That was wrong' I am merely saying 'That sort of action excites indignation in me'; and when you say 'No; it was not wrong' you are merely saying it does not excite indignation in me when I see it," then, "we are not in fact differing in opinion about it at all; any more than we are differing if I make the judgment 'I came from Cambridge today' and you make the judgment 'I did not come from Cambridge today.'" (9)

Moore believes that people do sometimes really differ on a moral question and that this can be so only if

"when I think a thing to be wrong, and you think it not to be wrong, I mean by 'wrong' the very same characteristic which you mean." (10)

With this argument Moore not only rejects psychological, or subjective naturalism in value theory, but advances a basis for asserting that there is an independent referent for value terms. This is sufficient to give normative statements an indicative function, which Ayer must deny in order to establish his value theory as a new position.

9. Moore, Philosophical Studies, p. 333.

10. Ibid., p. 334.

Ayer notes that Moore's argument rests on the assumption that we do dispute about questions of value. This Ayer denies, and claims that although it seems to be a very paradoxical assertion,

"in all cases, we find, if we consider the matter closely, that the dispute is not really about a question of value, but about a question of fact." (11)

To substantiate this, Ayer explains that when we have an alleged moral dispute with someone,

"we do not attempt to show by our arguments that he has the 'wrong' ethical feeling towards a situation whose nature he has correctly apprehended."

Ayer maintains that the substance of such disputes is always confined to such factual data as motives, or probable effects of actions, or special circumstances involving the agent in question. The reason why we argue in this way is that we believe our opponent to have the same moral education as ourselves, and that if we can get him to agree with us about the empirical facts, he will then have the same feeling about the situation as we do. When an opponent has a different "conditioning" from ourselves, so that even if he agreed to all the facts, he still differs with us as to the moral worth involved, we do not resort to argument. We give up discussion when facts are agreed upon but evaluations differ. For Ayer, this is not the result of any reluctance to contest another's set of values, for we often give up argument and resort to abuse. It is

11. Ayer, Language, Truth and Logic, p. 165.

because, he says, there are no arguments to sustain the validity of a purely valuational statement. It follows that what appear to be moral disputes are, in reality, factual disputes; argument is possible only when the nature of values is already presupposed. Ayer writes:

"Given that a man has certain moral principles, we argue that he must, in order to be consistent, react morally to certain things in a certain way. What we do not and cannot argue about is the validity of these moral principles." (12)

Ayer defies his reader to imagine an argument on a question of value which does not reduce itself to a purely logical argument, or to a dispute about some factual matter.

Recent analyses of the nature of disagreement in general lend their support to Ayer's contentions. C. L. Stevenson, for example, has shown that controversial ethical issues involve a disagreement that is of a dual nature. He begins by noting that "disagreement" in general has two senses, which he calls disagreement in belief and disagreement in attitude. "Attitude" is taken to designate any psychological disposition of being for or against something, e.g., love and hate, approval and disapproval, etc. ¹³ People are said to have a disagreement in belief when they contradict each other's assertions about any empirical matter. Thus two physicians

12. Ibid., p. 167.

13. Stevenson, Readings in Philosophical Analysis, The Nature of Ethical Disagreement, p. 587.

may dispute whether or not a patient has been told that he has a fatal disease. This disagreement involves incompatible beliefs; they cannot both be true. In such disagreements one or the other of the disputants might be shown to be wrong if evidence can be found. The significant aspect of this kind of disagreement is that, in principle at least, some variety of data is recognizable as evidence for or against one of the incompatible views. But suppose the parties are agreed that the patient has, as a matter of fact, been informed of his condition, they might still disagree on the question whether the patient ought to have been so informed. This type of disagreement Stevenson calls disagreement in attitude. Whereas the first type of disagreement involves an opposition of beliefs, both of which cannot be true, Stevenson characterizes the second as "an opposition of attitudes, both of which cannot be satisfied." In the first case the two physicians might have agreed that a patient ought to be told of his condition, but have disagreed as to whether he was told or not. In the second case, they might have agreed that the patient was told about his illness, but have disagreed that he should have been told. It is the latter dispute which is the distinctively "ethical disagreement". This is recognized by Stevenson who writes:

"It is disagreement in attitude, which imposes a characteristic type or organization on the

beliefs that may serve indirectly to resolve it, that chiefly distinguishes ethical issues from those of pure science." (14)

Beliefs are relevant to ethical disputes, but it is the disagreement in attitude which marks an argument as ethical. Attitudes may determine which beliefs are relevant, and showing that a belief is false may affect attitude. But suppose all parties to a dispute are agreed on the facts, and still disagree, one approving and the other disapproving of the facts, what can be brought in as evidence to settle the controversy? Is there anything which would serve as evidence for the distinctively ethical part of any argument. Ayer denies that there is and in support of this, asserts that all arguments purporting to be ethical disputes are only factual disputes, or as Stevenson would say, disagreements in belief.

Ayer seems to have the support of empirical data. People do often resort, as one philosopher put it, "to the bashing in of heads" when they find themselves agreed on the facts and disagreed in attitude about those facts. At a recent meeting of the Tumor Board of the medical department of the University of Cincinnati, the question for discussion was whether patients ought to be informed when they have cancer. Members of the board disagreed, but the only discussion that took place was confined to the effects such information has

14. Stevenson, Ethics and Language, p. 13.

had and might have on the patient under various circumstances. Even when different participants were agreed on the probable consequences involved, some of them could not agree on the ethical question. The meeting terminated without resolution of the principal problem. Thus Ayer does have facts to support his claim that

"What we do not and cannot argue about is the validity of these moral principles."

The hope of results from such a debate as that which took place at the Cincinnati Tumor Board meeting would seem to rest on an antecedently presupposed system of value. Then, as Ayer argues:

"if our opponent concurs with us in expressing moral disapproval of all actions of a given type t, we may get him to condemn a particular action A, by bringing forward arguments to show that A is of the type t." (15)

The question whether A does or does not belong to that type is an empirical question, and what are called "moral disputes" do seem to restrict themselves to either a discussion of this type, or to mere assertion and counter-assertion.

The issue between Ayer and the non-naturalist, Moore, may now be clearly stated. Moore asserts that we do argue moral matters and this is evidence that there exists some common value referent which is the subject of dispute. Ayer charges that we do not argue moral matters, and that whenever there is a common referent involved it is an empirical fact and

15. Ayer, Language, Truth and Logic, p. 167.

not a value that is in actual dispute. Thus Ayer distinguishes his position from naturalism by agreeing with Moore that no feeling or empirical concept of any kind is a necessary and sufficient condition of the validity of a value judgment. And he distinguishes his position from non-naturalism by denying that value assertions have an independent common referent which determines their validity. Ayer's novel position will maintain that so-called value judgments have no referent at all, and consequently no validity. Ayer will agree with Moore that value predicates are unanalyzable, but he explains away this character by holding them to be pseudo-concepts. The feature common and peculiar to the non-naturalistic theories is the view that value statements are not ordinary empirical statements, but are at the same time literally significant. In his theory, Ayer will be concerned with showing:

"that in so far as statements of value are significant, they are ordinary scientific statements; and in so far as they are not scientific, they are not in the literal sense significant." (16)

Having indicated his departure from the two general views, traditionally considered to be the sole alternatives, Ayer begins the exposition of a third theory which he holds to be the correct treatment of a value statement. This is the theory that value statements have an expressive function only.

16. Ibid., p. 157.

Where a sentence has literal significance, it possesses the capacity of being true; and every sentence that can come under the category of truth and falsehood has literal significance. Thus no assertion, regardless of the form it takes, is a genuine proposition unless it conforms to the conditions of truth and falsity. The literal significance of any proposition comprises the indicative function of that proposition. With these stipulations of logic in mind, Ayer examines particular value statements. His object is to discover the indicative function served by the value terms which are said to make such statements distinctive propositions.

Ayer's immediate conclusion is that the presence of a value term in any assertion adds nothing to its indicative function. What he finds is that

"In every case in which one would commonly be said to be making an ethical judgment, the function of the relevant ethical word is purely 'emotive'. It is used to express feeling about certain objects, but not to make any assertion about them." (17)

Thus a sentence such as "Stealing money is wrong" is said by Ayer to have no more meaning than the utterance "Stealing money". The latter is not considered to be a proposition, but is asserted to be no more than a vocal manifestation of some particular feeling.

17. Ibid., p. 160.

In support of his contention that the sentence "stealing money is wrong" is equivalent to some non-indicative ejaculation, Ayer explains:

"It is as if I had written "Stealing money!!-- where the shape and thickness of the exclamation marks show, by a suitable convention, that a special sort of moral disapproval is the feeling which is being expressed." (18)

This feeling may be an automatic response to a provoking situation. It may also be deliberately displayed in order to influence the behavior of others.

It is clear that if this is the character of normative statements, they assert nothing which is capable of being true or false. Such a statement would have no indicative function, either direct or indirect.

Ayer's solution to the problem of the significance of normative statements consists of a denial that such statements have any indicative character. "X is good" is said to be an expressive assertion the sole "meaning" of which resides in the particular emotion displayed. The emotion involved is revealed only in the fact that an assertion is made which employs value terms. We may not say that, for Ayer, "X is good" refers to a particular emotion. For if this were the case, normative statements would not be merely expressive ones. They would be indistinguishable from the indicative propositions of the naturalists.

18. Ibid., p. 159.

And these, Ayer has argued, are false.

Ayer is explicit in distinguishing his conclusions about value from those of the "orthodox subjectivists". The latter does not deny that the assertions of the moral philosopher, or the esthetician, may be genuine propositions. We have seen that Hume believed value statements were capable of being true or false; and that they were of an entirely empirical nature. For Hume, the statement "Stealing money is wrong" would be a true proposition if all or most men actually disapproved of stealing money. If most men were indifferent to stealing money, or felt an emotion of approval toward it, then, on Hume's theory, the proposition "Stealing money is wrong" would be false.

On Ayer's view, such an utterance is not a statement about emotions of approval, or about anything else.

"I should simply be evincing my feelings, which is not at all the same thing as saying that I have them." (19)

The difference lies in the contrast between an expression of feeling and an assertion that there is a feeling. The latter is an indicative statement about a referent. It describes a fact and is, consequently, a significant proposition which may be true or false. But it is not, according to Ayer, a value judgment. A statement about a feeling or any empirical

19. Ibid., p. 162.

matter is an ordinary scientific statement, and as I have already indicated earlier, Ayer refuses to identify value statements with scientific ones. Ayer has observed that if a value term is an empirical concept, then value would be definable in empirical terms. And Ayer has shown that this is not the case. In his arguments against Moore, Ayer showed that value statements do express attitudes, and that in so-called disputes, people do not really attempt to give any rational, scientific evidence in support of their value assertion. Unlike Moore, Ayer sees no reason to give values an independent and peculiar status in reality. He finds in experience that we express approval and disapproval with our value statements, but sees no basis for transcending this experience in order to say anything more about value statements. Ayer asks of the non-naturalist:

"Must he not begin, as other men do, with the evidence of his senses? and if so, what valid process of reasoning can possibly lead him to the conception of a transcendent reality?"
 "Surely," he adds, "from empirical premises nothing whatsoever concerning the properties, or even the existence, of anything super-empirical can legitimately be inferred." (20)

Moore's answer to such a charge is that he does not begin with the evidence of his senses, but apprehends the facts about value through intuition. But Ayer observes that

20. Ibid., p. 16.

this non-naturalistic response

"has not the slightest tendency to prove the validity of any moral judgment. For dissentient moralists may equally well 'know' that their ethical views are correct." (21)

This is the situation I noted in the preceding chapter. The non-naturalistic position, which must rely upon intuitive knowledge of the existence and sui generis nature it attributes to values, has no means of confirming the veracity of its intuitions or of exhibiting their content to others. Thus, in the absence of any positive and verifiable arguments to the contrary, it seems plausible to assume with the opponents of both traditional positions that non-naturalism is an "only resort" from the inherent defects of naturalism.

Ayer has at this point arrived at his announced goal. This was to show that statements of value are either ordinary empirical propositions or they are not significant statements. Since these alternatives are exclusive, and the first is rejected, Ayer's final determination is a rejection of value theory as a distinctive philosophic subject-matter. He believes there is nothing to justify the view held by some philosophers that the study of values embodies a unique

21. Ibid., p. 156.

22. Stevenson, "The Nature of Ethical Disagreement," Readings in Philosophical Analysis, p. 593.

type of knowledge. The special normative fields, such as ethics or esthetics, are converted by Ayer's theory to departments of psychology or sociology. Nothing remains for any investigation of values except an examination and description of emotions and the conditions which cause them.

Ayer writes:

"When one comes to pursue the psychological enquiries which constitute ethical science ... one finds that one of the chief causes of moral behavior is fear, both conscious and unconscious, of a god's displeasure, and fear of the enmity of society." (23)

Since the only knowledge that could possibly be gained from a study of ethics or esthetics is data which relates to our own complex constitutions,

"it follows that any attempt to make our use of ethical and esthetic concepts the basis of a metaphysical theory concerning the existence of a world of values, as distinct from the world of facts, involves a false analysis of these concepts." (24)

The whole of genuine ethical philosophy, for Ayer, consists in one proposition, i.e.,

"that ethical concepts are pseudo-concepts and therefore unanalyzable." (25)

What this leaves is a task for the psychologist who will describe the different feelings that the so-called ethical

23. Ayer, Language, Truth and Logic, p. 169.

24. Ibid., p. 172.

25. Ibid., p. 168.

terms are used to express and to provoke. Ayer's view that ethics, as a branch of knowledge, is nothing more than a department of psychology and sociology is characteristic of the positivist position. Thus, Carnap writes:

"We do not at all deny the possibility and importance of a scientific investigation of value statements as well as acts of valuation. Both of these are acts of individuals and are, like all other kinds of acts, possible objects of empirical investigation. Historians, psychologists, and sociologists may give analyses and causal explanations of them ... But the value statements themselves ... have ... no theoretical sense." (26)

Moritz Schlick, who asserts that the chief ethical problem is a purely psychological one, argues that

"if we decide that the fundamental question of ethics, 'Why does man act morally?' can be answered only by psychology, we see in this no degradation of, nor injury to, science, but a happy simplification of the world-picture. In ethics we do not seek independence, but only the truth." (27)

It remains for me to examine the basis of assumption and presupposition employed by Ayer in his critique of values. Ayer's conclusions in value theory fulfill an ulterior purpose which he, himself, claims is responsible for his special concern with normative statements. The common supposition that our knowledge is divisible into normative as well as descriptive judgments rests upon certain conceptual distinc-

26. Carnap, Philosophy and Logical Syntax, p. 26.

27. Schlick, Problems of Ethics, p. 30.

tions which constitute disturbing departures from Ayer's fundamental epistemological thesis. The traditional dichotomy of fact and value necessitates an account of value by Ayer that will be consistent with his general philosophical convictions. Ayer begins his "Critique of Ethics and Theology" with the observation:

"There is still one objection to be met before we can claim to have justified our view that all synthetic propositions are empirical hypotheses. This objection is based on the common supposition that our speculative knowledge is of two distinct kinds--that which relates to questions of empirical fact, and that which relates to questions of value."(28)

Ayer's theory of values has been formulated to vindicate the antecedently established conclusion that if any statement is a significant synthetic proposition, it is an ordinary scientific descriptive statement. Ayer must show that unless the validity of a value statement depends solely on the definitions of the symbols it contains, nothing except the ordinary facts of experience can sustain it.

If the validity of a normative proposition rested only upon the definitions of its related terms, it would be an analytic proposition. And, as with the proposition, "If X is a triangle, it is a three-sided, rectilinear, plane figure", one cannot resort to experience for confirmation. But as we have already shown, Ayer rejects the possibility

28. Ibid., p. 149.

that value statements are analytic propositions. According to Ayer, any value statement whose terms are commensurable is either the result of a false analysis or inconsistent with actual existing value concepts.²⁹ If value statements were valid analytic propositions, their contradictories would be self-contradictory in every case. Since any proposition must be synthetic, if it is not analytic, the issue is confined to a consideration of the conditions under which any synthetic statement may be a valid, or significant, proposition. This is the matter of direct concern to us now.

Ayer does not arrive at his conclusion on value solely by examining data which suggest his emotive theory. He has discovered that some normative statements have an expressive function. But it is not shown that every statement with an expressive function is a non-indicative statement. Indeed, this could not be shown. For it is clear that an expressive function is not incompatible with an indicative function. If these functions were incompatible, it might not be such an unfortunate matter for the employee who received the message: "Jones, you are fired!!" (where the shape and thickness of the exclamation marks show that a feeling of disapproval is being expressed).³⁰ The employer's statement

29. Cf. supra p.43

30. Cf. supra p.53

undoubtedly expresses some disquieting emotion. But this does not prevent his explosive utterance from indicating the termination of a certain relationship with Jones.

Since it is not the case that the presence of an expressive function renders a statement ipso facto non-indicative, Ayer's conclusion that value statements are merely expressive is determined by the elimination of what he considers to be possible alternative hypotheses. The considerations actually operative in determining the peculiar character of Ayer's value theory should include an exhaustive account of alternatives. Otherwise, the process of elimination employed is not reliable.

The clue to the discovery of the epistemological assumptions operative in Ayer's theory is to be found in the statement of purpose with which he commences his value inquiry. We should remember that Ayer has set himself to show:

"that in so far as statements of value are significant, they are ordinary 'scientific' statements." (31)

Thus, if we do not interpret value statements as ordinary empirical hypotheses, then we must consider them non-significant utterances which are

"simply expressions of emotion which can be neither true nor false." (32)

31. Cf. supra p.51

32. Ibid., p. 150.

Our immediate problem is to see why Ayer considers these conditions to be the sole alternatives for value statements.

In his preface to Language, Truth and Logic, Ayer writes:

"The philosophers with whom I am in the closest agreement are those who compose the 'Viennese Circle' ... and are commonly known as logical positivists." (33)

The logical positivists comprise a school of philosophers who characterize their epistemology as a radical empiricism, i.e., an epistemology which

"identifies knowing with the immediate process of sense-perception, and represents all connection in the content known as identical in kind with such connection as it is assumed may be apprehended in sense-perception." (34)

Ayer has explicitly described his view as a "thorough-going phenomenalism". This is essential to his alliance with logical positivism which holds:

"that propositions of existential import have an exclusively empirical reference, and that this empirical reference can be conclusively shown by logical analysis." (35)

33. Ibid., p. 13.

34. Baldwin, Dictionary of Psychology and Philosophy, p. 318.

35. Weinberg, J. R., An Examination of Logical Positivism, p. 1. No positivist can provide a logical demonstration of the proposition: "All existential propositions have an exclusively empirical reference." For discussion of this point, see infra, p.77

Ayer maintains that his position is ultimately derived as a logical outcome of the empiricism of Berkeley and Hume.³⁶ Following Hume, Ayer classifies all genuine propositions as either a priore propositions of logic, or propositions concerning empirical matters of fact. The first class of propositions is composed of those analytic statements which signify nothing but our "determination to use symbols in a certain fashion."³⁷ Any definition would, according to Ayer, be a proposition of logic fulfilling this description.

It is with the second class of propositions, those relating to "matters of fact", that Ayer is principally concerned. And since Ayer has rejected value statements as possible analytic propositions, it is with regard to the character he attributes to the factual proposition that his emotive theory of value is developed.

Ayer's theory of truth and meaning follows from his account of the validation of the statements he considers to be the only genuine class of non-analytic propositions. According to Ayer, the test of whether a statement is a genuine synthetic proposition is in terms of a principle of verification. The principle concerning verification

36. Ayer, Language, Truth and Logic, p. 11

37. Ibid.

determines the necessary and sufficient conditions under which any statement which is not analytic may be said to have meaning. In order to show that all sentences of a certain type are devoid of meaning, Ayer contends that he

"need only formulate the criterion which enables us to test whether a sentence expresses a genuine proposition about a matter of fact, and then point out that the sentences under consideration fail to satisfy it." (38)

Clearly the effectiveness of this procedure depends upon the validity of the criterion employed.

Stated simply, Ayer's criterion is that a non-analytic statement has significance to any person

"if, and only if, he knows ... what observations would lead him under certain conditions, to accept the proposition as being true, or reject it as being false." (39)

From this it follows that a person must make us understand how his assertion would be verifiable before it can be said that he communicates anything to us.

Ayer introduces two important modifications of this positivistic criterion of meaning. He distinguishes between "practical verifiability" and "verifiability in principle". It is not necessary to possess the actual means to enable us to make the relevant observations which render a synthetic proposition verifiable. It is sufficient if we are able to

38. Ibid., p. 19.

39. Ibid., p. 20.

know what observations would be relevant if we could be in a position to make them. The familiar example used by positivists is the assertion that there are mountains on the other side of the moon. We do not, at present, have the means of deciding the truth of this proposition. But the proposition is a significant empirical statement, because we do know what kind of perceptions would be involved if the statement were true and we were able to make the observations. The proposition is, then, "verifiable in principle".

On the other hand, there are putative propositions with such a content that no relevant observation can be conceived which would verify them. Sentences of this kind are not endowed by the positivists with any meaning; being unverifiable in principle, they are said to be nonsense.

"If a putative proposition fails to satisfy this principle, and is not a tautology, then I hold that it is metaphysical, and that, being metaphysical, it is neither true nor false, but literally senseless." (40)

This is a fundamental general principle of Logical Positivism. Carnap has assigned to the "realm of metaphysics" all propositions which

"claim to represent knowledge about something which is over or beyond all experience, e.g., about the real Essence of things, about Things,

40. Ibid., p. 12.

in themselves, the Absolute, and such like." (41)

Thales' assertion that "The Essence and Principle of the world is Water", is an illustration given by Carnap of a metaphysical proposition which "asserts nothing at all", because from it

"we are not able to deduce any proposition asserting any perceptions or feelings or experiences whatever which may be expected for the future." (42)

To the same realm of "metaphysical nonsense", Ayer commits such sentences as those which assert there is a transcendent god, or that men have immortal souls, or that there is a non-empirical world of values.⁴³

Ayer also distinguishes between "strong" and "weak" verification. "Strong" verification is said to exist when the truth of a proposition is conclusively established. But Ayer recognizes that in the nature of the case, experience is entirely incompetent to establish certainty. Other positivists who have recognized this fact have maintained that while universal synthetic propositions are meaningless, because unverifiable, they are somehow "an essentially important type of nonsense".⁴⁴

41. Carnap, Philosophy and Logical Syntax, p. 15.

42. Ibid., p. 17.

43. Ayer, Language, Truth and Logic, p. 12.

44. Schlick, "Die Kausalität in der gegenwärtigen Physik", Naturwissenschaft, vol. 19, 1931. Cited by Ayer, *ibid.*, p. 23.

Ayer allows that a proposition is verified in the "weak" sense where the relevant experiences are such that the proposition is probable. This enables Ayer to avoid condemning such synthetic propositions as: "All bodies tend to expand when heated." The principle of "weak verification" and "verifiability in principle" also make it possible for Ayer to accept propositions of history as meaningful.

In these two important respects Ayer's position is a departure from the philosophy of the "Viennese Circle". But in retaining its essential phenomenalism, Ayer's epistemology manifests no fundamental deviation from the radical empiricism of the preceding Positivists. The whole test of significance for Ayer is as follows: the question must be asked whether any observations are relevant to the determination of a statement's truth or falsity. If no perception could decide this, it must be concluded that the statement under consideration has no meaning. This principle of verification, as the criterion of whether or not a sentence has any meaning, entails the conviction that whatever is a fact is experiential. Indeed, Ayer contends that

"all propositions which have factual content
are empirical hypotheses." (45)

45. Ibid., p. 31.

It is now clear that Ayer had committed himself, prior to his investigation of value, on the question of whether value terms denote sui generis referents. This was accomplished by his formulation of a criterion of meaning which was intended to be exhaustive in its application, irrespective of the question whether normative statements constitute an entirely distinct branch of knowledge. Ayer's methodological procedure was to restrict all possible meaning to statements which are analytic and to those which can be "verified" by observation. This epistemic basis determined Ayer's position in values in the following manner.

When Ayer argued against naturalism that value concepts are irreducible to factual ones,⁴⁶ he appeared to be acknowledging the validity of the foundation employed by the non-naturalistic theorist. But the non-naturalistic position denies that normative propositions are analytic, and assigns to them a genuine significance which distinguishes them from the only alternative antecedently recognized by Ayer. Hence, Ayer writes:

"It is clear that the acceptance of an 'absolutist' theory of ethics would undermine the whole of our main argument. And as we have already rejected the 'naturalistic' theories which are commonly supposed to provide the only alternative to

46. Cf. supra p.43

'absolutism' in ethics, we seem to have reached a difficult position." (47)

In virtue of his criterion, that in so far as a statement is not scientific it is not significant, Ayer's only solution to his "difficult position" is to explain away value concepts as pseudo-concepts.

The manner in which Ayer denies the non-naturalistic position, in order to sustain the whole of his "main argument", discloses the virulent operation of his special epistemological premises. The non-naturalistic value theory is described by Ayer as

"the view that statements of value are not controlled by observation, as ordinary empirical propositions are."

Ayer then protests that this leaves nothing but a "mysterious intellectual intuition" to serve such a theory as the instrument of cognition. The objection is that this makes statements of value unverifiable.

"For it is notorious that what seems intuitively certain to one person may seem doubtful, or even false, to another. So that unless it is possible to provide some criterion by which one may decide between conflicting intuitions, a mere appeal to intuition is worthless as a test of a proposition's validity." (48)

47. Ibid., p. 157.

48. Ibid., p. 156.

Ayer's assertion that the validity of an intuited proposition is affected by its unverifiability would be a non sequitur if it did not presuppose his antecedent identification of truth and verifiability. For without Ayer's peculiar criterion of meaning, it can be said that any proposition might be true, regardless of its source or the absence of a relevant test to confirm it. There can be no question that a proposition must have meaning before it is verifiable. It is quite another matter to maintain that a proposition must be verifiable before it has meaning. Such a conversion of the first contention is legitimate only if Ayer's assertion relating meaning and verifiability constitutes a definition of meaning.

To define meaning in terms of verifiability is clearly intended by Ayer. Otherwise he must acknowledge that the proposition, "If Q is empirically verifiable, then Q is meaningful" is perfectly compatible with the proposition, "Q is meaningful and is not empirically verifiable." But this latter statement is the contradictory of Ayer's basic position. Its compatibility with the first proposition, which Ayer himself asserts, can be denied only in the event that the antecedent of the first proposition is intended to express both the necessary and sufficient conditions of the consequent. Since Ayer has confined "meaning" to empirical

verifiability, it remains to be determined whether this restriction is more than an arbitrary and unwarranted postulation. For if this is the case, nothing pertaining to reality, cognition, or values, could be affirmed or denied on the basis of it. Yet Ayer's emotive theory of values is the direct result of the operation of his criterion of meaning upon normative statements and the alternative views of their significance.

Ayer's account of the necessary and sufficient conditions under which genuine synthetic propositions are significant presupposes that whatever is a fact is experiential. Is this a mere assumption that Ayer's conclusion about values might open to question? How does Ayer support such a description of actuality?

The view usually taken is that testable propositions constitute a sub-class of significant propositions. Bertrand Russell states this view concisely in An Inquiry into Meaning and Truth:

"A 'verifiable' proposition is one having a certain kind of correspondence with an experience; a true proposition is one having the same kind of correspondence with a fact ..."

(49)

The distinction expressed by Russell depends upon the difference in meaning that exists between "fact" and "experience". This is a distinction which Ayer's epistemology

49. Bertrand Russell, An Inquiry into Meaning and Truth, p. 383.

does not allow. Russell goes on to show that since whatever is experiential is a fact, verifiable propositions are true. What Ayer holds is that since a fact is experiential, true propositions must be verifiable. Regarding such a conversion of his position, Russell observes:

"... there is no reason to suppose that all true propositions are verifiable. If, however, we assert positively that there are true propositions that are not verifiable, we abandon pure empiricism." (50)

Abandoning pure empiricism is what Ayer is unwilling to do.

If Ayer were to accept the prevalent view of the relation of fact and experience, as described by Russell, it would involve him in an epistemology explicitly containing metaphysical implications. If "fact" is taken as a different and wider concept than "experience", propositions need only conform to fact, and not to experience, in order to be true. It is granted that we might not be able to ascertain the truth of propositions relating to fact and not to experience. But what is significant is that despite such a failure, these propositions may be true. The metaphysical problem, which is held to be insoluble, concerns the correspondence said to exist between non-experiential facts and true propositions concerning them. 51

50. Ibid.

51. Ibid., cf. p. 363, 368.

The philosophers who hold the broader meaning of "fact" must account for the possibility of forming synthetic judgments which are not derived from observation. This will involve hypotheses about a non-empirical aspect of reality, and a non-sensuous mode of cognition. Ayer considers such hypotheses to be pseudo-propositions resulting from a kind of superstition. The generic designation of this variety of sentence is "metaphysical", i.e.,

"a sentence which purports to express a genuine proposition, but does, in fact, express neither a tautology nor an empirical hypothesis." (52)

Ayer maintains that metaphysical statements, most of which are "merely the embodiment of humdrum errors" are produced either by philosophers duped by grammar or by mystics trying to express the inexpressible. The distinction, however, is held to be of no great importance.

What is of great importance in understanding Ayer's theory is to consider his attitude and assumptions in light of the ideals he espouses. The function Ayer conceives for his particular philosophic system is inherited from the program set forth by the "Viennese Circle". As reported by Professor J. R. Weinberg from this school's official statement, the principal aims are:

52. Ayer, Language, Truth and Logic, p. 31.

"first to provide a secure foundation for all the sciences, and second to demonstrate the meaninglessness of all metaphysics. The method used to realize these aims is the logical analysis of all concepts and propositions." (53)

Ayer finds that the traditional disputes in philosophy have been unfruitful and unwarranted. He believes this would not have been the case if it had been settled beyond question what the purpose and method of a philosophical inquiry should be. This task is not, according to Ayer, as difficult an undertaking as one would suppose from examining the history of philosophy.

"For if there are any questions which science leaves it to philosophy to answer, a straightforward process of elimination must lead to their discovery." (54)

Ayer's position includes a doctrine of the unity of philosophy with science. Philosophy is not to venture into fields which cannot be investigated scientifically. The function of the philosopher qua philosopher is not to assess the value of any theory, but simply to elucidate the theory by defining the symbols which occur in it. Thus the activity of philosophising is to be confined to a logical

53. Weinberg, An Examination of Logical Positivism, p. 1

54. Ayer, Language, Truth and Logic, p. 15.

55. Ibid., p. 245.

analysis of the linguistic signs employed in science to designate the experiential properties of the physical world.

Ayer warns against the hasty view that the philosophical elucidation of scientific theories is of little real benefit to science. It is pointed out that Einstein's definition of "simultaneity", for example, was of great importance to contemporary experimental physicists. The scientist must be furnished "with clear and definitive analyses of the concepts he employs." This is said by Ayer to be the sole function of the philosopher. Ayer points out that

"If science may be said to be blind without philosophy, it is true also that philosophy is virtually empty without science." (56)

Beyond the purview of science, no contributions to knowledge can be made. Neither philosophy nor any other theoretical pursuit can significantly transcend the compass of the natural sciences.

Equipped with his doctrine of the unity of science and philosophy, and a precise opinion as to what constitutes legitimate scientific procedure, Ayer turns his attention to metaphysics.

56. Ibid., p. 247.

"One way of attacking a metaphysician who claimed to have knowledge of a reality which transcended the phenomenal world would be to enquire from what premises his propositions were deduced."

(57)

Ayer holds that since the metaphysician must begin, as other men do, with the evidence of his senses, no valid process of reasoning can possibly lead him to the conception of a reality that transcends the senses. Hence the metaphysician can only "produce sentences which fail to conform to the conditions under which alone a sentence can be literally significant."⁵⁸ What the metaphysician does, according to Ayer, is to utter nonsensical sounds which he takes to be a report of some kind of fact about an aspect of reality that transcends observation. This conclusion by Ayer is inevitable if his convictions about the nature of fact and his criterion of meaning are granted.

It may be that the radical epistemological principle which plays a controlling part in Ayer's value theory presupposes unwarranted assumptions about the nature of reality, and about the character and limits of science. It appears that Ayer confines the operations of science to perceptible reality because he believes that facts consist simply of elements which correspond to sensations. If Ayer's point

57. Ibid., p. 16.

58. Ibid., p. 19.

of departure is this particular concept of reality, then his conclusions about the nature of philosophy are internally incoherent. For as Morris Cohen has remarked:

"It is clearly a metaphysical dogma of doubtful verifiability to assert that there is nothing in the world other than physical events." (59)

Let us employ Ayer's criterion of meaning and ask whether any perceptions could decide the truth or falsity of the proposition that whatever has existence is empirically verifiable. Is any actual or conceivable observation competent to repudiate or verify such an assertion?

Ayer is not unaware of this objection. He is careful to distinguish his procedure from that of Kant who condemned transcendent metaphysics on the grounds that the human understanding was simply not constituted to deal with things-in-themselves. Ayer recalls Bradley's well-known assertion that

"the man who is ready to prove that metaphysics is impossible is a brother metaphysician with a rival theory of his own."

It is clear that Kant cannot tell what the boundaries are beyond which human understanding may not venture unless he succeeds in passing these boundaries himself.

Ayer maintains that these objections do not prevail against his procedure. He does not, as Kant does, overstep

59. Morris Cohen, A Preface to Logic.

a barrier previously described as impassable. For the impossibility of a transcendent metaphysics is not asserted by Ayer as a matter of fact. Thus his denial that knowledge can exceed the limits of a possible sensuous cognition is not a synthetic proposition, and is not to be tested by Ayer's principle of verifiability. That it is fruitless to attempt to transcend the limits of possible sense-experience is neither an inductive generalization nor an assertion deduced from factual propositions. It is a proposition of logic, deduced "from the rule which determines the literal significance of language."⁶⁰ This rule is the principle which, as we have seen, is employed by Ayer to determine his value theory. As an epistemological criterion of meaning, it is irrefutable by any experience because it is not a proposition which affirms or denies anything about the empirical world. As a proposition of logic it is simply, in Ayer's own terms, a record of his "determination to use symbols in a certain fashion."⁶¹

The problem confronting us at this point is to seek to discover what is responsible for Ayer's particular determination in the use of symbols. Are we bound by Ayer's

60. Ayer, Language, Truth and Logic, p. 19.

61. Ibid., p. 11.

determinations to use symbols in one way rather than in some other? Is anybody's determination to use symbols in some particular fashion capable of deciding whether normative statements have a sui generis referent which distinguishes them from ordinary scientific statements of description?

The ethical nihilism characterizing Ayer's theory is determined antecedently by a criterion which is not the result of discriminations made in the realm of facts. If matters of logic are no more than Ayer asserts them to be, how can he effect the necessary transition from the individual subjective world of determinations about the use of symbols, to affirmations and denials which will have some relation to truth and existence?

Perhaps Ayer's peculiar determination with regard to lingual symbols results from his desire to achieve for philosophical activity the fecundity characteristic in the sciences. This would account for his strict doctrine of the unity of philosophy and science. There are some, however, who would maintain that in his attempt to pattern philosophy after science, Ayer reveals a superficial view of the nature of science.

If all that is factual is empirical, and if all significant propositions are either factual propositions

or propositions of logic, then no strictly scientific proposition has any meaning unless there exists some perception which would verify it. It seems clear that scientific hypotheses, which are not propositions of logic, may and frequently do exceed a reference to particular experiential objects. Are there not numerous propositions in physics which are significant and yet unverifiable in Ayer's terms? Propositions about "frictionless engines", "absolutely rigid bodies without weight", "complete vacuums", etc., are all propositions which have no existential import. Yet they serve a vital function in the construction and elaboration of physical theories. There may be observable facts which are pertinent to these fundamental physical propositions. But it may not be maintained that certain observable data "verify" the truth of propositions whose subject terms can have no denotation. It is questionable whether Ayer's conception of science as an activity which views the world solely under the categories of determinate, experiential, existence is compatible with what science actually does.

Ayer has argued that

"the theories of psycho-analysts are particularly full of metaphysical elements which a philosophical elucidation of their symbols would remove." (62)

62. Ibid., p. 246.

Ayer's belief is that the business of the philosopher in this regard is to make clear what is the real empirical content of the propositions of psycho-analysts. But this view is challenged by some philosophers who would maintain that if philosophy has anything to make clear about the propositions of the psycho-analysts, it is to stress the extent to which value judgments are implied by this science. Whereas Ayer maintains that the removal of "metaphysical elements" is essential to the clarification of the psycho-analyst's propositions, others would assert that such elements are in the nature of the case presupposed by these propositions.

Morris Cohen has argued that psycho-analysis, and the whole system of therapeutics it develops are actually based upon a normative distinction between the "adjusted" and the "pathologic".⁶³ What experiential facts relating to the difference between a "physiological" and a "pathological" state can signify the existence of an undesirable condition which requires "cure"? Cohen shows that the answer to this question presupposes some proposition about the end or purpose of physiological process. But propositions about final causes are odious to scientists, and condemned as

63. Morris Cohen, A Preface to Logic, p. 167.

metaphysical nonsense by Ayer. No relevant perception would lead one to accept or reject any teleological proposition. But there is no reason to assume that this fact is a commentary on the meaning or truth of teleological propositions. Bertrand Russell has expressed himself to the effect that positions like Ayer's positivism are such narrow theories that one is driven to reject them and hold a view which involves

"the possibility of events that no one experiences and of propositions that are true although there can never be any evidence in their favor."

Russell adds:

"... if we are to retain beliefs that we all regard as valid, we must allow principles of inference which are neither demonstrative nor derivable from experience." (64)

It is very likely that the narrowness Russell would attribute to Ayer's epistemology stems from the conviction of the latter that only those characteristics he believes to be employed in the sciences are suitable for the acquisition of any kind of knowledge. An attitude of this type illustrates Wolfgang Köhler's observation that the insistence upon such characteristics in any theoretic investigation implicitly contains a judgment of value concerning

64. Bertrand Russell, An Inquiry into Meaning and Truth, p. 383.

those characteristics. Köhler writes of philosophers who

"will insist upon 'objective procedure', or 'careful verification', or on 'genuinely scientific theory' ... Implicitly all this is accepted as valuable, as required. But the very next moment they will express their contempt of 'metaphysical speculations such as concern ethics', which 'cannot be submitted to the absolutely indispensable experimental test'. One begins to wonder whether logic would also have to pass this indispensable test-- which is itself full of logical premises." (65)

We have seen in our examination of Ayer's emotive theory of values that his conclusions about the significance of normative statements presupposes an epistemological proposition about meaning in general. It may also be seen as a development of a fundamental attitude about philosophy and its relation to the natural sciences. Our discussion of both of these factors indicated that Ayer's value theory is constructed upon questionable foundations. Ayer's principle of verifiability, as a criterion of meaning, is a logical stipulation about the use of lingual symbols - a record of a determination to employ terms in a certain fashion. Ayer's insistence that philosophy confine its procedures to those he takes to be strictly scientific implies a value judgment about such procedures. If Ayer's conclusions about values are true, then his basic doctrine of the unity of science and philosophy is really an expression of feeling about science, calculated to provoke

65. Wolfgang Köhler, The Place of Value in a World of Fact, p. 36.

widespread conformity. Again, Ayer's criterion of meaning presupposes, as Cohen maintains, certain metaphysical assumptions about the necessary and sufficient constituents of facts. But Ayer would reject this, claiming his criterion is not a synthetic proposition.

This is not the occasion to embark upon a further investigation of assertions and counter-assertions about metaphysics and epistemology. It should be observed that even if Ayer's epistemic and metaphysical assumptions are false, this would not be sufficient to establish the falsity of his conclusion about the meaning of normative statements. It is our purpose here to recognize that Ayer's value theory is determined by a special set of assumptions which underlie his criterion of meaning. This criterion most directly controls his treatment of value statements. Ayer has declared this criterion to be the result of his determination to use symbols in a certain fashion.

The subsequent task of this dissertation is to test the adequacy of such a value theory by examining its operation among the facts it is required to make intelligible. In this way we may establish a basis for accepting or rejecting Ayer's determinations in the use of symbols. A consequence of this will be the acceptance or rejection of his emotive theory of value without being overcome by

the insuperable difficulties of deciding among alternative systems of metaphysics and epistemology.

CHAPTER IV: THE RELATION OF LAW TO VALUE THEORY

In the preceding chapter I showed that Ayer's theory of value results from the use of antecedently formulated epistemological principles and concealed metaphysical tenets. My discussion of the philosophic background of Ayer's theory disclosed two important factors. First, as a matter of formal procedure, the question of whether value terms denote referents which are sui generis is prejudiced by Ayer's insistence that his treatment of values accord with his previously determined classification of significant propositions. Second, Ayer's "novel position" in value theory, in common with the traditional views in the field, is ultimately grounded upon the questionable assumptions of a distinctive philosophic school. Since we lack the means of verifying the metaphysical assertions upon which these positions are based, it is necessary to employ a criterion of value theories which is independent of special philosophical commitments. Consequently, Ayer's theory, and the principles it presupposes will be examined in an actual context of specific value problems. For, as I have argued in the introduction to this dissertation, any hypothesis relating to values is inadequate unless it makes intelligible

the problematical facts which occasion generic value theory; and the only neutral criterion of any value theory consists in testing the operation of its principles among the relevant facts which await clarification.

A. J. Ayer is, himself, in complete accord with this methodological idea. In speaking of his value theory as an attempt to show what people are doing when they make moral judgments, Ayer has acknowledged that "The only relevant consideration is that of clarity."¹ Ayer's analysis has resulted in the assertion that all significant non-empirical propositions simply record our determination to use symbols in a certain fashion. It remains for us to learn whether Mr. Ayer's particular determinations in the use of symbols can clarify the factual situations in which we discover the use of normative propositions.

To this end I have selected the law as a specific context in which certain facts, which we may call "legal phenomena", produce highly important questions about the significance of normative propositions. I will consider the attempt of a jurist to ground the law on a basis which is identical in pertinent respects with the principles of

1. Horizon, p. 173, vol. XX, September, 1949.

Ayer's theory. The nature of this attempt and its outcome will be shown as a basis for the rejection of the value theory in question. But before I can proceed with the above mentioned exposition and analysis, I must justify my selection of the law as an instrument in the verification of value theory. Certain distinctive controversies in jurisprudence make it necessary to explain the relevance of legal phenomena to value hypotheses.

The burden of this present chapter is, therefore, to show that law consists of, or implies, value judgments, and that legal theories presuppose value theories. This follows from the fact that legal theories are constructed to explain particular facts which are included in the class of facts pertinent to value theory. Thus the success or failure of a legal theory with respect to the facts it must clarify will be a reflection upon the adequacy of the value theory which it presupposes.

In confronting problems that related to law, I am not unmindful of the fact that it is as difficult to generalize in jurisprudence as it is to master the Hydra of Heracles. For the solution to any fundamental problem of juridical thought seems to have a way of producing a multitude of new questions. It is as one eminent philosopher wrote in discussing jurisprudence:

"In the midst of this vast labor it becomes clear to us that the more we relieve the gods of their burdens, the more we need to know what the gods know ..."

There will be no endeavor here to solve the problem of providing law with a definition. And neither the many exacting questions which arise from the distinct ways of considering law, nor those produced by any diversities among separate legal orders will concern me. I intend to show the integral relation between law and value theory, in the face of contrary contentions, with a discussion limited to certain characteristics that are generic to whatever is law.

The existence of law as a fact has never been denied. The fundamental problems of the legal philosophers are those which concern the true sources of law, its essential nature, and the chief purpose it is to serve. The interrelationship of these questions is readily apprehended. It might be that the purpose of law determines its nature and enables us to ascertain its source. Possibly the source of the law fixes its function and provides the explanation of its nature. Finally, it may be legitimate to infer both the source and the end of law from a knowledge of its nature. As in the case of value theory, conclusions about law on any of its distinguishable but inseparable fundamental questions

may be predetermined by the starting-point. We meet again the difficult methodological problem found in value inquiry. This is to determine what constitutes primary data for a consideration of law from a neutral position.

It is fortunate that my highly specialized concern with law does not entail a complete solution to this problem. For my task is not one of organizing the world's store of knowledge about law into a systematic account. The propositions necessary to be established here may be substantiated by a consideration of a relatively few assertions about law. Where these assertions are not unquestioned or logically necessary descriptions of law, the grounds in support of them will be advanced.

The peculiar setting of the legal controversies which are relevant to my problem is the discrepancy between the urgent need to comprehend the reality of the most powerful instrument of social control and the abstruse character of its source and nature. Certain unmistakably true assertions may be made about law, e.g., the law in any given political area is composed of certain rules established by a judicial or legislative department with a view to disclosing legal rights and legal duties. Diametrically opposed theories would assent to this proposition; it tells

us so remarkably little about law. The problems of the nature and source of law now attach themselves to the concept of "rules". Are the rules which are laws and are established by official bodies constructed by these bodies, or are they discovered? In the one case it must be asked what determines the construction of a rule and how it can be criticized or modified. In the other case the question is how and where is the law displayed to those responsible for its official pronouncement and enforcement. Other perplexing problems follow from the above true proposition about law: Is a governmental department "judicial" or "legislative" because it establishes certain rules? Or are certain rules "law" because they are established by a judicial or legislative department? Do rights and duties determine the law, and thus become "legal rights" and "legal duties"? Or does the law determine what are "rights" and "duties"?

It is clear, as Austin has said, that

"If the causes of laws ... be not assigned,
the laws themselves are unintelligible." (2)

Yet as competent a jurist as Cardozo observed:

"Any judge, one might suppose, would find it easy to describe the process which he had followed a thousand times and more. Nothing

2. Jurisprudence (4th ed.), p. 1, 113.

could be farther from the truth. Let some intelligent layman ask him to explain; he will not go very far before taking refuge in the excuse that the language of craftsmen is unintelligible to those untutored in the craft."

(3)

Cardozo points out that while such an excuse may cover an otherwise ignominious retreat with a semblance of respectability, it will not prevent a recurrence of the troublesome problems. In moments of introspection the judge will ask himself: "What is it that I do when I decide a case? To what sources of information do I appeal for guidance?"⁴

An appeal for guidance by a judge is a search for the general principles on which this finding should be based. Such an appeal indicates that some concern for purpose or end is inherent in the very notion of juridic law. The presence of a regard for ends is a clear sign of the rational character of any activity; and the rationality of law is an essential aspect of its formal structure. It may not be denied that law is a rational construct, no matter what other kind of manifestation its complexity reveals. Whether its non-rational aspects are accidental to it as law or not does not concern us. It is enough to find in it an essential rational core. This was recognized in antiquity by Aristotle who regarded juridical law as a rational

3. The Nature of the Judicial Process, p. 9.

4. *Ibid.*, p. 10.

formulation of the Nomos. It is recognized today by anyone who reflects upon the fact that inherent in juridical law is the notion of purpose. The laws of the natural world describe causes and effects, but juridical laws are deliberately designed by judicial authorities to serve certain human aims.

The basis for the essentially rational character of law is clear enough. The greatest task in the fashioning of any legal system is to provide for the settling of conflicts. This is what law as a matter of fact does. It directs human conduct and it enforces the redress of grievances. Litigants press for the satisfaction of claims; law undertakes to adjudicate these claims, and it makes a decision. What are its materials? We have returned to Cardozo's questions? "What is it that I do when I decide a case? To what sources of information do I appeal for guidance?"

One answer to this question is produced by Edward Levi in his attempt to describe generally the process of legal reasoning. On the basis of an inductive examination in the field of case law, Levi concludes that the chief question in the mind of the judge is whether it will be just to treat the case at bar as if it were the same as one previously decided. Under the doctrine of stare decisis, a

judge must follow the established rule of a prior case when he discerns a significant element of identity which is sufficient to make the new case similar to the former. The problem of knowing the conditions under which it is just to treat different cases as though they were the same is considered by Levi to be "the problem for the law." Thus,

"A working legal system must therefore be willing to pick out key similarities and to reason from them to the justice of applying a common classification." (5)

Levi's answer to Cardozo's question is "Justice"; an ethical ideal, a moral value, is the ultimate end which guides the development of law.

Despite the problems it might create, there is an undeniable sense in which this answer is true. For the general condition under which law is pronounced is one in which men purposely choose to prohibit or create certain situations and relations which they consider to be good or bad. Thus it seems clear that any standard of law-making, and of legal criticism, has a basis in ethical values.

Gurvitch, a legal sociologist, in discussing the extreme complexity of the jural phenomenon, asserts that the recognition of certain values embodied in social facts constitutes the peculiar legal experience. He writes:

5. Levi, An Introduction to Legal Reasoning, p. 2.

"It is that incarnation and realization of values in facts which is the most profound datum of jural experience."⁽⁶⁾

From the time of Anaximenes in the sixth century B.C., who claimed that

"Law is a definite statement according to a common agreement of the state giving warning how everything ought to be done,"⁽⁷⁾

to the present day, some philosophers have considered it undeniable that values produce the conceptual foundation which accounts for the actual operation of law. One modern legal philosopher believes the normative character of law to be "so rudimentary and obvious that it seems impossible that anyone should dispute it."⁸ But the relation of law to values has been disputed. And a widespread denial that law presupposes any value judgments is characteristic of a great deal of reflection in legal philosophy today.

The concept of law undergoes a severe transformation when the normative character of court rulings disappears under the solvent action of a purely descriptive analysis. Some jurists have maintained that the whole reality of law is confined to the concrete behavior of a magistrate, or to the actual service of a writ. Law is said to be nothing

6. Gurvitch, Sociology of Law, p. 53.

7. Cited, Pound, Outline of Jurisprudence, p. 60.

8. Cohen, M. R., Law and the Social Order, p. 240.

but what the court's say it is; and no propositions which might serve as criteria to determine whether a court's ruling is as it ought to be constitute law.

In some cases the denial that law is normative is a result of a reaction against the old jus naturale doctrine. This doctrine has been thought to rest on a metaphysics which is contrary to certain facts about the law. It was supposed that what was called Natural Law was real juridic law, and that its function was to determine the validity of the rulings and sanctions enforced by the courts to govern particular cases. Chief Justice Hobart of 17th century England asserted that

"even an act of Parliament made against natural equity ... is void in itself, for the laws of nature are immutable and they are the law of laws." (9)

The name of Blackstone, perhaps the most famous in Common Law, is associated with the view that

"No human laws are of any validity if contrary to this (the law of nature), and such of them as are valid derive all their force and all their authority, mediately or immediately from this original." (10)

In the famous case of Swift v. Tyson, Mr. Justice Story denied that the decisions of courts constitute laws. According to Story, what the courts do or say "are, at most,

9. Cited, Emery, Concerning Justice, p. 22.

10. Ibid., p. 23.

only evidence of what the laws are, and are not of themselves laws."¹¹

The excesses and the limitations of this view of an immutable law of laws have produced considerable repercussions. The late Chief Justice Oliver Wendell Holmes was sceptical of philosophers who made him fancy for a moment that he heard "a clang from behind phenomena." Holmes has said that jurists who believe in natural law seem to be in that naive state of mind which accepts what has been familiar as something that must be accepted by all men everywhere.¹²

Holmes defines a "right" as nothing more than

"the hypostasis of a prophecy--the imagination of a substance supporting the fact that the public force will be brought to bear upon those who do things said to contravene it." (13)

"The prophecies of what the courts will do in fact, and nothing more pretentious, are what I mean by the law." (14)

Holmes asserts that the opposing views of the concept of "right" and "law" are beliefs about the universe which have been determined largely by early associations and temperament, coupled with the desire to have an absolute guide.

11. 16 Pet. 1 (1842)

12. Holmes, Collected Papers, p.

13. Ibid., p. 169.

14. Ibid., p. 173.

Holmes is greatly impressed with the fact that "men to a great extent believe what they want to."

Holmes' position in the philosophy of law is not fixed solely by his unquestionable intimacy with legal processes. He has formulated certain epistemological principles which he uses to explain his iconoclastic definition of law and of rights. When Holmes says a thing is "true", he means that he is stating an experience in which his feelings leave him no choice but to believe as he does. Thus Holmes has defined truth as the system of his particular limitations, and regards any system of morality as a body of generalized emotional expressions. But he does not venture to assume that his own inabilities in the way of thought are the inabilities of the universe. Thus when he advises about the means for getting at the truth of morality, Holmes decides that it is useful

"to omit the emotion and ask how far the generalizations are confirmed by fact accurately ascertained." (15)

It should be observed that since Holmes' definition of truth is in terms of the emotional compulsions which attend our experiences, nothing can be "accurately ascertained" except the presence of emotions. Yet this is precisely what we are asked to omit in our concern for moral generalizations.

15. Ibid., p.

Pursuing the path taken by Justice Holmes, numerous jurists have developed a school of self-styled "Legal Realism". There is considerable diversity among the members of this school, but what distinguishes them is the fundamental scepticism of Holmes' view of the relation of law and value. The emphasis here is placed upon the concrete behavior of the judge as the essential ingredient of law. The "law that is" is sharply distinguished from what others have termed "law that ought to be". The latter is denied a place in the legal order. The realists insist that law is simply a collection of facts, i.e., judicial decisions. Jurisprudence, for the legal realist, is not a rational study but an empirical analysis of actual events.¹⁶ The substance and criterion of law is not to be found in what the judge says about law. According to the realist the written decision of a court is an irrelevant ad hoc rationalization for a jural act. For the realist, the substance of law consists in patterns of judicial behavior; and a rule of law is not a finding which presupposes some normative proposition. The real legal rule is nothing but a generalization about the way judges act.¹⁷ Law is thus said to be grounded in facts and not in norms.

16. Cf., Paton, Jurisprudence, p. 20; Frank, Law and the Modern Mind.

17. Cf., Fuller, The Law in Quest of Itself, p.52.

Certain realists, in their empirical study of the facts which are law, have produced a philosophy termed "Digestive Jurisprudence". For a favorite illustration of these jurists is to point out that

"a judge's digestion may be just as potent a factor in influencing his decision as the abstract rules of law." (18)

In keeping with this view we must include a judge's particular neurosis or any other factor capable of determining specific attitudes and behavior. If these are the sole elements of law, then any concepts of a "system" of law or of a "legal order" are obviously impossible. For while neuroses and digestive tracts may be sufficiently similar for the purposes of certain limited scientific classifications, their operation under the variable conditions in a law court would render "legal rights" and "legal duties" quite unknowable. Law would then be, as Holmes indicated, what a court said or did in any particular litigation. But we could have no basis to establish the means of predicting what the court will do. There would be no general law. There would be nothing but isolated decisions.

In The Nature of the Judicial Process, Cardozo discusses the view of one legal realist who asserts that real law is not found anywhere except in the judgment of a

18. Paton, Jurisprudence, p. 20.

court:

"In that view, even past decisions are not law. The courts may overrule them. For the same reason present decisions are not law, except for the parties litigant ... Law never is, but is always about to be. It is realized only when embodied in a judgment, and in being realized, expires. There are no such things as rules or principles: there are only isolated dooms." (19)

It is clear that "isolated dooms" cannot be law. For unless law is conceived as general in its application, it is not law. It is self-contradictory to assert that law is a formless mass of individual rulings.

It is doubtless true that in some, perhaps many, cases, the actual ground for a particular decision is a psychological state, or some inarticulated premise. But it does not follow from this that there are no cases in which the written opinion, manifesting a rational application of abstract rules, constitutes the genuine legal grounds for the court's action.

Even if the behavior of judges were uniform when produced by factors other than abstract rules, it could not be asserted that a description of such behavior constitutes law. Vinogradoff has pointed out that it is an inadequate definition of medicine to describe it simply as a drug which is administered by a physician. For in such a case, the real function of medicine, which is that of curing, is totally

19. Cardozo, The Nature of the Judicial Process, p. 126.

ignored. Thus it is with any definition of law that ignores its real function of regulating conduct according to just norms. The difficulties of ascertaining and applying the norms do not affect the fact that inherent in the nature of law is a concern for justice, whatever this may be.

There is no need to dispute whether the real ground for a judge's decision is some psychological motive which is actually unconnected with any premise to be found in his legal decision. For this question is irrelevant, no matter how interesting a phenomenon it might be. When a court writes a decision, it is because it is required by law itself to do so, and the only relevant question is whether what the court says is logically sufficient to ground its finding. This is all that determines the legality of its acts. If the argument produced by the court is adequate to sustain its decision, no showing that this argument was an ad hoc rationalization of impertinent motives would suffice to reverse the decision. A motion for appeal from a court's ruling must show its cause to lie in the legal insufficiency of the actual ruling. A judge whose motivations were undesirable might be impeached; his rulings would remain law if the grounds actually provided for them were logically adequate.

If one abides by a resolution to hold to the facts pertaining to law, he will discover an element in the jural order

which modifies both the Realist and the Natural Law positions. This element is the change and the growth of law. Real law does not possess the immutable character of a general principle which, as Justice Johnson believed, "will impose laws even on the Deity."²⁰ The original Natural Law theory does not account for the law which courts follow and enforce. But this does not mean that the principles describing what "ought to be" are not pertinent to real law. Cairns has written that

"A theory of Natural Law that possesses no application is at best an idle game, but a theory of positive law that ignores the normative is fatally incomplete." (21)

It is a fact that the law enforced by courts is made by minds and wills possessing some end toward which they work. If the Realist is to report what the law truly is, he must report on all the motives which produce a court's ruling. One such motive, and the most characteristic legal motive, is a theory of right or justice.

Law changes when it is seen that a given rule does not produce what is thought to be good. Again, a principle source of law can be clearly seen to be ethical judgments. Law changes in order to promote what is considered to be a good or a better result than previously existed. But the

20. Fletcher V. Peck, 6 Cranch 87, 143 (1810).

21. Cairns, Legal Philosophy from Plato to Hegel, p. 326.

law can be measured by its concrete results only if these results can be evaluated in light of the end desired for law.

Consequences form a basis of judging law because they may be more directly seen as good or bad, as undesirable, or as what ought to be. And when the consequence of a law is as it ought to be, the law is considered valid because the production of what ought to be is the function of the law.

In a motion and brief entered in the Supreme Court of the United States it was argued that observable and verifiable conformity to the positive law which requires equal facilities for people of diverse races may not be sufficient to avoid the scrutiny of the courts. For even if the facilities are in all respects equal in value, the separation of the facilities in question is discriminatory because of the adverse effect which it has on the Negro community.²² Here the validity of a rule of law is being challenged by the "adverse effects" which it produces. The effects are said to be "adverse", and the law "erroneous", because the legal ruling in question is not compatible with certain value judgments expressing ethical ideals. Since the presupposed value judgment is thought to be true, it is contended that

22. Brief entered as Amicus Curiae, No. 25, sup.ct. Oct. term. 1949, Henderson v. The United States of America, Interstate Commerce Commission and Southern Railway Co.

the law should be changed and the inconsistent finding of a previous case be overruled.

Thus value judgments, as a source of law, also account for the change and growth of law. Due recognition of the force of value judgments in a law that changes will produce a position such as Cardozo's which, as he expressed it, is "midway between the extremes" of the old jus naturale doctrine and the Realist view. Cardozo acknowledges the fact that the power to declare the law carries with it the power to make law where none exists. But this power is confined to the limits of a genuine moral duty.

There could be no law without what may be termed "the general juristic postulate of lawfulness." This postulate is based on the assumption that the court will adjudicate in terms of some general principle describing what ought to be, rather than as a result of an arbitrary or peculiar individual will. This is recognized by Professor Cahn for whom such an assumption represents "the keystone of the legal arch." In The Sense of Injustice, Cahn writes:

"There is a firm presumption that, at least within the hierarchy of adjudication, men generally intend to fulfill their duties ... A Decision or a verdict is law because of the force of this faith."

(23)

23. Cahn, The Sense of Injustice, p. 96.

The juristic postulate of lawfulness is evident in all law. It has produced what is called the doctrine of legal plenitude. This doctrine asserts that for every case there is some pertinent legal principle to be applied. The concept of legal plenitude is as fundamental to law as the postulation of a cause for each event is basic to the physical sciences.

The relevance of the doctrine of legal plenitude to our purpose lies in its unmistakable denial that assertions of what ought to be are separate from the law. The law must not be viewed from the realist position. It is neither a mere collection of detailed rules laid down in the past, nor a compilation of uniformities in court behavior. The Anglo-American legal system presupposes that law is an organic body. Its concern for value, for what ought to be, is the synthesizing element providing juridic law with the inherent power of growth and adaptation which the doctrine of legal plenitude necessarily presupposes. For in Common Law the absence of any legal facts such as judicial precedents, legislative authority, etc., is irrelevant to the court's duty to make a ruling. This is the case in every known legal order. Article IV of the French Civil Code declares:

"Le juge que refusera de juger sous prétexte du silence, de l'obscurité ou de l'insuffisance de la loi, pourra être poursuivi comme coupable de déni de justice." (24)

24. Cited, Gray, The Nature and Sources of the Law, p. 302.

Underlying this provision is the understanding that a court's refusal to adjudicate could be manifested only in the dismissal of the plaintiff's request for a remedy. This would constitute a judicial finding because it would give the defendant a legal right to the act which was the cause of complaint. But here it would not be the judge's intention to declare that the defendant ought to have such a right. Since this is what is intended when a court makes a ruling on substantive grounds, the possibility of the former situation must be precluded. It is clear that there are cases where there is nothing to guide the judge in making law except such value concepts as right, good, wrong, and better. Where there is no authority for a holding, the judge must determine for himself what the law ought to be. To do this he cannot avoid employing or presupposing some value judgments.

It is here that the unsettled controversies in value theory manifest themselves in the jural order. But the difficulty of solving the problem of the significance of normative statements does not imply the separation of law and values. It does not make such a separation desirable no matter how complicated legal phenomena may be as a result of it. Jurists have not agreed on the source from which the court may learn its legal duty in the absence of legal authority. The English doctrine laid down in Stuart v. Bell maintains that the court is to look to the community for a knowledge of the values upon which to ground its decision.

In this case Lord Justice Lindley said:

"I take moral or social duty to mean a duty recognized by English people of ordinary intelligence and moral principle."

The controlling consideration according to Lindley is "what the great mass of right-minded men in the position of the defendant" would have thought their duty to be under the facts before the bar.²⁵ This legal principle presupposes a value theory such as that of Hume who asserts right and good to be determined by general approval.

The same objections to Hume's value theory which were indicated in the previous chapter are raised in legal theory against the principle declared at the Queen's Bench in Stuart v. Bell. In asking what the court should do when it recognizes, in the absence of juridic authority, that the universal opinion of right and wrong in the community is against it, Gray maintains that the judge should follow his own notion. For,

"Suppose that the general opinion in this community is that a harlot has a right to kill a man who has become tired of her company;-- should he so decide?" (26)

Gray recognizes that the actual motive of a judge's opinion may be of the kind in which the legal Realist seeks to discover genuine law, e.g., digestion, the blandishments

25. 2 Queen's Bench Division 341, at 350 (1891).

26. Gray, The Nature and Sources of the Law, p. 290.

of a woman, desire for popular favor, etc.; but he asserts that these "are not sources which Jurisprudence can recognize as legitimate."²⁷ Gray believes, as I have argued earlier in this chapter, that the psychological question is irrelevant to the essential matter of justification, and that legality depends upon the adequacy of a principle to ground a ruling. This adequacy is primarily a logical question of noting the implications that exist between pertinent normative and descriptive propositions. It is obvious that an adequate criterion of values, and consequently of value theories, is very important for the theory of law.

The urgent need for an adequate legal system in our daily lives gives to law an autonomy in evolving workable tests of values. The fact that law cannot wait for value theory to solve its difficulties does not deny the integral relation between legal theory and value theory. As Paton has said:

"Whatever be the problems of philosophy, the law must actually translate a set of values into working rules of law." (28)

Thus the rules of law and the legal principles which ground them will, upon analysis, reflect the value judgments they presuppose. This fact is sometimes obscured by linguistic

27. Ibid.

28. Paton, Jurisprudence, p. 106.

confusions which result from an attempt to isolate some aspect of law and artificially restrict the denotation of the term "law" to this selected aspect. Sometimes the integral relation of law to value theory is denied because of an inept and inappropriate desire to establish a clearly defined "science" of law. Others have rejected the law's basis in values in order to expediate a desired simplification of law and legal processes. Finally, there have been those who endeavored to establish the reality of law on an exclusively factual basis because they feared commitment to some questionable metaphysical doctrine. Some of the above motives may be admirable; none of them is adequate to the task of explaining the law as it is. It was not within the scope of the present work to provide a critical commentary on various historical positions in the field of jurisprudence. And it was not my function to define or completely describe the law as it is. It was intended that a general consideration of certain attributes of law would suffice to sustain the contention that legal theory presupposes value theory.

I have argued that law has some end to which it attempts to conform. Thus it is essentially a rational instrument whose nature, source, and adequacy can be understood in light of its end. In the nature of the case, the end of law, whatever it may be, implies a value judgment. Those who

defend a view of law as an instrument for satisfying actually prevailing social interests conceal in their definition the principle that such interests ought to be satisfied. The Historical School purports to describe law as the mere product of the volksgeist, but its argument is that since law is the outcome of custom, it ought to follow custom. The Analytical School not only affirms that law is merely the command of the sovereign, it maintains that law ought to be nothing but such commands. Some legalists assert that it is logical harmony (elegantia juris) which determines law. But implicit here is the notion that consistency ought to be the supreme end of law. The implicit moral norm exists no matter how hard a jurist may try to divorce it from law. The substance of legality is justification, and no statements about conformity to the past, or to any end, are relevant unless it is assumed that this ought to be. Something is the end of law because it is what ought to be.

The arguments from the creative element in law, and the doctrine of legal plenitude, were produced to substantiate a proposition of prime importance to this dissertation, i.e., the existence and nature of law is intrinsically related to justice where by "justice" is meant "that which ought to be." Hence the law includes ideal or normative elements, and law "that is" may not be separated from law

"that ought to be." These elements are interwoven to produce the legal fabric in any political society. A legal theory which presupposes a value theory that vitiates the distinction between fact and value will fail to give an adequate account of the law. Thus a necessary condition of the development of any legal theory is an adequate account of values. For this reason the inadequacy of a value theory may be indicated by an examination of certain related shortcomings in a legal theory which consciously or unconsciously is based upon it.

I intend now to consider the efforts of a legal theorist, Leon Duguit, to establish the nature, source, and end of law with the use of principles which are related to the value theory of A. J. Ayer. The relation of Duguit's theory to that of Ayer will provide us with a means of tracing the implications and operation of the value theory, and an objective basis upon which a neutral and rational criticism of that value theory may rest.

CHAPTER V: THE LEGAL THEORY OF LEON DUGUIT

In his account of the nature and foundation of law, Duguit employs the same fundamental principles which mold the value theory of A. J. Ayer. Duguit is determined to show that previous ideas concerning law and rights are "fictions and abstractions which disappear at the touch of the wand of reality." He finds that the chief problems of legal philosophy can be traced to the fact that the domain of law is still imbued with notions of "a purely metaphysical character." Like Ayer, Duguit regards metaphysical notions as alien to reality. They are thus incompatible with applying to the study of the juridical problem a "genuinely and exclusively realistic method." The distinctive feature of Duguit's "realistic method" is the elimination of everything which is not a fact. By "fact" Duguit intends to signify¹ only what can be directly observed.

In discarding all affirmations of a metaphysical nature, Duguit shares with Ayer the hope of providing his philosophy with a firm scientific basis. Duguit has expressed the belief that by adhering to facts, he will do his "modest part in breaking the narrow and artificial molds into which legal thought has been run for ages." For Duguit, such

1. Duguit, "Objective Law", 20 Columbia Law Review 818.

narrow and artificial molds have taken the form of a concept of values or norms, of a distinction between natural law and positive law, of a relation between law and morals. Natural law and values are rejected because their existence cannot be proved directly by observation. Duguit wants to meet the conditions under which a purely positivistic science can exist. Consequently he holds that to affirm the existence of a norm, or of natural law, is to formulate a metaphysical hypothesis. And this, in turn, is

"to reason like the physicists or the physiologists who see the phlogiston ... or the psychologist who, beneath psychic phenomena, affirm the existence of a thinking substance." (2)

Duguit, like Ayer, regards such concepts as "assuredly a consoling belief, doubtless a religious affirmation, but not a scientific fact." What a thinking substance shares with norms and natural law is a non-observable character. This is considered sufficient to remove it from the category of fact. Following the sociological positivism of August Comte, and in conformity with the epistemology of Ayer, Duguit will not allow as "factual" or "realistic" any proposition which

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2. Duguit, "L'Etat: Le Droit Objectif et la Loi Positive", Modern French Legal Philosophy, Ch. VIII, p. 243. (This reference will hereafter be designated "MFLP". For the benefit of the modern reader who is more familiar with the concepts of science than of theology and jurisprudence, the term "natural law" in this dissertation means an independent moral law which is said to determine positive jural law.

cannot be arrived at by observation and verified by further observation.³ Thus the concept of natural law and the idea of laws presupposing norms is discarded by Duguit because our observation of phenomena does not reveal natural rights or values. The content and basis of law is to be refashioned by Duguit in strict conformity to what a positivistic epistemology will accept as reality. Duguit will undertake to show that law is "the constant and spontaneous product of the facts".⁴ The non-observable and non-verifiable ideas of natural law and norms are not facts for Duguit. They are pretenses, and it should long ago have been inquired of the schools which affirmed their existence

"whether this world of subjective rights is not artificial and inane - whether all these arguments (concerning such hypothetical affirmations) were not empty scholasticism, a display of cleverness without real importance." (5)

My reason for examining Duguit's theory is just because it purports to deny the real importance of non-observable, non-verifiable elements in law. For it is my contention that the extent of Duguit's success or failure

3. Cf. Pound, "Fifty Years of Jurisprudence", 51 Harvard Law Review 444, 467.

4. Duguit, Les Transformation Generales du Droit Prive depuis le Code Napoleon, p. 13.

5. MFLP, p. 243.

in establishing law on positivistic grounds is a direct reflection on the adequacy of a related value theory such as Ayer's. The last chapter considered the relation of value theory to legal theory. It was seen that certain requirements are the same for both. Both must make intelligible certain pertinent facts. Some of the facts which must be accounted for by a theory of law constitute a species of value phenomena. Thus if a generic theory of values is adequate it will not prove to be a principle cause in the failure of the more specialized legal theory. Where it can be shown that a legal theory has certain fundamental principles in common with a theory of values, and the function of the legal theory is thwarted by the operation of these principles, it may be inferred that the value theory is incompetent. It was previously shown that the alternative to this test is to consider the requirements determined, not by facts involving value judgments, but by the implications of the metaphysics and epistemology presupposed by the value theory. This latter procedure has not proved fruitful, since it merely defers the testing process until a satisfactory criterion of epistemological and metaphysical systems can be devised and applied.⁶

6. Cf. supra p.

With the intention of basing his conclusions entirely upon what he conceives to be the facts of reality, Duguit raises the question whether the proper conception of law is that of a rule of conduct imposed upon all men living under social conditions or, alternatively, a power possessed by certain human beings to impose their wills upon other wills.⁷

Among the relevant facts to be examined, Duguit observes that juridical law exists only in the political entity which we designate a "state". Here we find that because of a community of wants and a diversity of individual capacities, human groups are formed. This is a necessary condition of law. It is further seen that within these groups there are certain individuals who are stronger than the rest. These compel the obedience of all the others. Such, according to Duguit, are the facts, and those who go further "enter the region of hypothesis".

The theorists who find the substance of law in the power of those who command account for this power as law by maintaining that it is an expression of some "collective will". But this notion is metaphysical and is further held by Duguit to be nothing more than "an ingenious fiction invented to legitimize force by those

7. Duguit, "Objective Law", 20 Columbia Law Review 817.

exerting it". Further, it is a dangerous policy. It creates and maintains a conflict between the individual and the state which must end either in the triumph of collective tyranny or of individualistic anarchy.⁸

Duguit's rejection of this view is based upon the recognition that although the duty of administering law implies power, power itself cannot be law unless something "justifies" or legitimatizes" it. For this is a generic characteristic of whatever is law. Again, to be better armed, or to possess greater wealth, numbers, or ability, cannot be said to create any subjective, individual right to impose one's will. Such a right is not observable and must consequently be rejected as metaphysical nonsense.

"The right of the individual is a pure hypothesis, a metaphysical affirmation, it is not a reality!" (9)

Since the fact that there exists power in the state is relevant only to the enforcement of law and cannot be said to constitute law without utilizing metaphysical affirmation, Duguit has eliminated the second alternative to his question about the proper conception of law.

What remains is the notion of law as a rule of conduct which is imposed equally on all men living under

8. MFLP, p. 245.

9. MFLP, p. 249

social conditions. Duguit guides his investigation with the question, "If the law is a rule of conduct, what are the foundations, the object, the extent, and the sanction of this rule?"¹⁰ Duguit distinguishes his treatment of this question from that of the preceding philosophers whose doctrines rest on individual rights determined a priori through reason:

"My affirmation of the jural principle (la regle de droit) is based exclusively on a fact, namely, social interdependence, established by observation!" (11)

Duguit has thus far ascertained a distinctive characteristic of law which will direct his further exposition. Whatever else law is, it limits all individuals and so is not created by the power of any individual. Law is over and above political sovereignty since what is termed the will of the state is really only the will of a special group of individuals.

"In our thought, then, of political power as the power of the strongest, a plain fact, there is contained, nevertheless, a rule which is just as obligatory for these strong men as it is for the rest. This rule is the rule of law." (12)

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10. Duguit, "Objective Law", 20 Columbia Law Review 817.
 11. Duguit, "The Law and the State", 31 Harvard Law Review 179.
 12. MFLP, p. 246

Duguit has maintained that the jural theories based on the spurious metaphysical notions of collective will and individual rights are dangerous doctrines which stimulate constant internal conflict between the individual and the state. Since law and chaos are incompatible, Duguit feels that the foundation of the law cannot reside in notions productive of conflict. Duguit will attempt to show that there is not, and cannot be, opposition between the individual and the state. He will maintain that the interests of all and of each are strictly solidary. He is further interested in showing a complete coincidence of purpose between individual and collective interests. Duguit hopes to give the support of his legal theory to the assertion of Karl Marx that

"the free development of each one is the condition of free development for all."

Having established that law is a rule of conduct, not a power possessed by rulers, and that law must be an expression of harmony between collective and individual purposes, Duguit's basic question takes the form: What is the foundation and the substance of the jural principles (*la regle de droit*) which is superior to the State, and which forbids it from doing certain things and commands it to do certain others? According to Duguit, this is solely and exclusively a question of law. It is not a

moral question. The problem may not be answered by resorting to principles conceived a priori. Nothing but observable and verifiable facts are held by Duguit to be relevant and competent. Duguit argues that the legal question is factual, while moral ones are metaphysical since they concern acts considered good or bad in themselves according to some non-verifiable normative principle.¹³ Positivists reject normative principles; Duguit's "realistic method" excludes them because a genuinely scientific foundation for law cannot be based upon them.

I intend to show in this chapter that when Duguit abides by his avowed positivistic principles, he does not account for acknowledged characteristics of law and, to the extent that his arguments are adequate to explain certain legal facts, logical sufficiency has been purchased at the expense of the positivistic epistemology.

Purporting to base his conclusion to the question concerning the jural principle on facts rather than on norms or any a priori affirmation, Duguit asserts that the jural principle is a rule of law which forbids or commands

"because it is contrary to or in agreement with social relations in a fixed human collectivity." (14)

Agreement or disagreement with social relations is a matter of conformity to social ends. The rule of law

13. Duguit, The Law and the State, 31 Harvard Law Review 2-4.

14. Ibid., p. 4.

remains to be distinguished from physical laws; the latter describe relations of cause and effect, while the rule of law is "the rule of the legitimacy of purposes." A purpose is legitimate when it conforms to what Duguit calls "the social law", and "every act done to accomplish such purpose has social value, that is, juridical value."¹⁵ Thus a law is a rule of conduct which imposes on individuals the obligation to act in accordance with social purpose. The rule of conduct which thus conforms becomes a law when material power is exercised in its enforcement:

"there is no jural principle except when the very idea of this principle, when the notion of the social necessity for it, which requires conformity to it, has so deeply penetrated the conscience of those composing the social group in question that the violation of this principle entails such a profound group reaction that the principle can be socially organized." (16)

The power which is sometimes said to constitute law is merely an instrument and a condition of law. The rule of law finds its

"realization through material coercion by the state - which accordingly is nothing but force put at the service of law." (17)

15. MFLP, p. 253.

16. Duguit, The Law and the State, 31 Harvard Law Review 4.

17. MFLP, p. 247.

Thus law does not depend upon the power of the sovereign for its substance. Duguit believes that the jural content of law exists independently of both the individual and the sovereign and is compulsory for both. Law is such that there are some things the state is obliged to do, and other things which it may not do. Indeed this limiting character is indispensable to the juridic nature of any rule. And "to determine the principle of this double limitation is the province of legal science."¹⁸

Duguit has observed that past efforts to account for law have either denied that the sovereign is limited, which is a denial of law, or have attempted to ground the ruler's obligations in the unreal, metaphysical notion of individual rights.

In considering the doctrines of such theorists as Jhering and Jellink who assert that law is exclusively the creation of the state, Duguit objects that this notion is false since it fails to explain the character of those laws under which the state is organized. If law is conceived as nothing but the rule created by the state under the sanction of coercion, how, Duguit asks, can we explain the fact that this rule is finally conceived as bilaterally obligatory. For

18. Ibid., p. 248.

"Law, in the full meaning of the word, is accordingly the bilaterally obligatory force of the state's mandate, the subordination of the state itself to its own decrees."

Only under this condition does coercion cease to be arbitrary, "to become legitimate, to become justice."¹⁹ In addition to possessing a purely factual character, a legal theory is required to find the basis for the obligatory nature of state contracts, and account for the capacity of law to limit the powers of the state.²⁰

The principle defining social purpose, which gives to law its essence, and which serves as the foundation for the juridic limitation of all individuals, ruled and ruler, is social solidarity.

Social solidarity, for Duguit, is not a metaphysical norm, it is not a rule of conduct, nor a moral ideal.

"Solidarity ... is a fact, the fundamental fact of all human society."⁽²¹⁾

Solidarity is not to be confused with Christian charity, or with the fraternity of the motto of the French Republic. Such usage constitutes an abuse of the word. Duguit argues that charity and fraternity are not facts, they are moral,

19. Ibid., p. 312. When the ruler, as well as the ruled, is subject to the obligation created by law, the law is said to be "bilaterally obligatory."

20. Ibid., p. 310.

21. Ibid., p. 259.

notions. But

"the doctrine of solidarity does not admonish; it shows that in fact men are solidary with one another."

According to Duguit, the fact described by "solidarity" is that while men have common needs, they have different capabilities. Thus men's needs can be satisfied only by an exchange of services, and this exchange can take place only in a society of interdependent individuals. This is why human beings do not live alone, but live in societies. It is further,

"an observed fact that man dies earlier if he lives isolated from other men. Besides, man suffers ... Suffering is not a vain word, as the Stoics would have us believe; it is a reality, the most unquestioning reality. It is a teaching of observation that the sum of human suffering is less when man lives in relations with other men. In fact, man suffers, knows that he suffers, wants to suffer less, and in fact does suffer less if he lives in a community with other men." (22)

These are the materials employed by Duguit to make social solidarity serve as a basis for a rule of conduct. Solidarity is not itself an imperative, but is intended solely as a simple statement of fact describing "the coincidence of purpose and effect" in society. From this simple

22. Ibid., p. 266. Duguit also claims on this same page "observed facts do not justify the assertion that at any historic or prehistoric period men lived alone." If this is true what observable and verifiable facts does Duguit rely upon to justify the assertion that "in fact man suffers less if he lives in a community?"

statement of fact, Duguit deduces the "social law" which legitimizes rules of conduct and makes them juridic law. It is argued that since man can live only in society,

"he should conform his conduct to the fact of social solidarity. Solidarity is thus indirectly the foundation of a rule of conduct." (23)

The notion of social solidarity, like the notions of natural law and individual rights, is held by Duguit to imply the conception of law as a universally limiting rule of conduct. Like the latter notions it is held to be "sufficient to determine the powers and the duties of social man in general and of man invested with political authority in particular."²⁴ But unlike the doctrines of natural law and individual rights, which are metaphysical and therefore artificial, the notion of social solidarity provides the rule of law with factual basis. This is of paramount importance to Duguit who maintains that law is obligatory because it is a fact. Duguit's rule is not like Kant's categorical imperative, nor is it the moral rule of the utilitarians. These rules "admonish the individual, 'Do this because it is good, because it is useful, because your happiness depends on it.'", while Duguit's rule is a rule of fact, not of norm; it says "Do

23. Ibid., p. 259.

24. Ibid., p. 288.

25
 this because this is."

It is a rule which, according to Duguit, depends not on some higher a priori principle, but solely on reality. The rule is held to have come into being as soon as men began to live in society. Its first form was psychological. It was a sentiment born of a consciousness of the fact that men have some identical needs and differing aptitudes,

"that men have the same instinct of self-preservation and the same need to lessen suffering, and that this double result can only be obtained through life in common." (26)

When men realize what Duguit calls the "necessary and logical consequence of solidarity", i.e., that man is man only by virtue of solidarity, which unites him to like men, and only through this solidarity can he succeed in diminishing the sum total of human suffering, he develops a feeling which is imposed on everybody. Solidarity forcibly possesses itself of every man's sentiments and respect.

Duguit then develops his argument by asserting that

"If every act of the will of an individual determined by an end of social solidarity receives the respect of all other individuals, it is evident that every act of will which does not fulfill this condition lacks such respect."

And

"if every individual has socially the power to

25. Ibid., p. 251.

26. Ibid., p. 270.

perform an act inspired by an end of social solidarity, no individual has power to perform an act inspired by a different end." (27)

From this basis Duguit arrives at the foundation and substance of law. He writes:

"It is, then apparent that the consciousness of social solidarity implies (sic) the notion of a double rule of conduct - the obligation on each individual to respect every act of an individual will done in conformity with a purpose of social solidarity, and an obligation on each individual to do nothing with a purpose not in conformity with social solidarity." (28)

It is the development of the human consciousness of the fact of men's interdependence which Duguit asserts must logically lead to the conception of the rule of law requiring cooperation in the realization of social solidarity.

"From the time when man was profoundly convinced that he was both individual and social, that he could not live without others and that others could not live without him, he perceived his obligation to cooperate in social solidarity." (29)

The rule requiring cooperation is a rule of law for Duguit, not because it is the expression of men's feelings, but because it determines the juridic value, i.e., the social value, of an act. The obligation Duguit refers to is not merely a psychological state. Law for Duguit is "objective".

27. Ibid., p. 290. Observe that Duguit's development here depends upon the confusion of sufficient with necessary conditions.

28. Ibid., p. 293.

29. Ibid., p. 294.

It is based on facts pertaining to psychological states, on consciousness, on wills, on sentiments, but it rises above these to direct them. Thus Duguit asserts not only that man is solidary, and that he desires solidarity, but that he ought to desire solidarity.³⁰

Yet Duguit is vehement in his denials that the rule is moral. He does not say man ought to cooperate in social solidarity because such cooperation is good. This would not be making what is for Duguit a factual assertion. Thus Duguit maintains that man should cooperate in social solidarity "because he is man, and as such can exist only through social solidarity." Cooperation does not appear to Duguit as a duty, but as a fact.

"The question is not whether it is good or bad - if it were, positive science could not answer it ... The rule based on the idea of solidarity is not a rule of morals, it can only be a rule of law." (31)

The rule of law, as we have observed,³² may not be based upon consoling beliefs or religious affirmations. It must be grounded on scientific fact, on reality as defined by the positivist. Duguit refers to law as a "rule of fact", i.e.,

30. Ibid., p. 296.

31. Ibid., p. 308.

32. Cf. supra p.

a rule which governs all individuals not by virtue of any "higher principle" such as good, interest, or happiness, but by virtue of the fact that men live in society and can live only in society.³³

Duguit believes that his distinction between "rules of fact" and "higher principles" has enabled him to establish social solidarity as a scientific foundation for the universally obligatory character of law without resorting to non-verifiable, a priori propositions. But this Duguit has failed to do. The fundamental basis of Duguit's rule of law is not derived by observation of a verified fact, and its a priori, normative character can be disclosed without great difficulty. Duguit's rule of law is not, as he termed it, "the constant and spontaneous product of the facts." His so-called realistic conception of the foundation of law has not succeeded in discarding all affirmations of a metaphysical nature. This is what Ayer, in his value theory, and Duguit, in his legal theory, set out to do.

Duguit has proposed the doctrine of solidarity as a means of determining "in as precise a way as possible" the origin and extent of a principle which is "jural" in that it imposes obligations upon the state as well as upon those who are governed. To accomplish this goal in a manner consistent with his positivistic epistemology, Duguit recognized that he may not employ any conception whose referent

33. MFLP, p. 251.

could not be the basis of a positive science, i.e., whatever conception is anterior to or independent of an observable, verifiable fact of social life. This was to be the contribution of a "genuinely and exclusively realistic method" which proceeds by eliminating "everything not a fact³⁴ directly observed."

Duguit began by observing the fact that there are those who rule and those who are ruled in any state. But from the start, this fact was insufficient as a basis for law:

"The truth is that political power is a fact which in itself has no quality either of legitimacy or of illegitimacy." (35)

Duguit saw that force could be lawful or unlawful, and that if anything was juridic law, it was bilaterally obligatory on ruled and rulers. This observation by Duguit is not simply an explication of his linguistic determinations with regard to the term law. Duguit has found, in examining actual law, that unless this character were taken into account, certain facts such as the organization of the state, could not be explained. He properly concludes, and in conformity to his own principles, that the law to which all in-

34. Duguit, Objective Law, 20 Columbia Law Review, p. 818.

35. Duguit, Traité de Droit Constitutionnel, Vol. I, p. 37.

dividuals, including rulers, are subject, must have its own independent basis. This was the proposition employed by him in his opposition to members of the German School who reduced law to the power of the sovereign. Thus to show how the state itself is bound by positive law was one of the specific problems which Duguit had to meet.

This problem does not, of course, originate with Duguit. It has been an objective of traditional theories of jurisprudence for as long as men saw that a failure to distinguish between a right and a force or power is a negation of the idea of law. But Duguit found that the traditional theories which agreed with him on this point, did not separate ethics and metaphysics from jurisprudence. They used a priori knowledge and did not, Duguit argues, draw their conclusions from an investigation of the observable facts of life. Such theories invariably terminated with the discovery of some form of Natural Law. This for Duguit was metaphysical and, as such, "artificial", "religious", and "inane". For Natural Law is normative in character. It is an imperative enjoining or commanding. For Duguit, as for Ayer, normative assertions have no indicative function since no observable, verifiable facts are referred to by them. Thus Duguit, and theorists since who employ the "realistic method",

must seek a means of separating law and morals, of basing jurial principles on facts and excluding norms. This Duguit has attempted by describing the condition of men in society in which solidarity, defined as the coincidence of similitude and diversity, is the chief characteristic. Duguit then observes that law makes for social solidarity, e.g., society is possible only when the relation of men's needs and capabilities are ordered by rules dedicated to this purpose. So much of Duguit's work may be factual. This need not be discussed here. But the scientific descriptive generalizations involved in determining the law's foundation soon undergo a metamorphosis. Duguit has smuggled into his account of law certain normative and a priori propositions which are unsuccessfully concealed by his explicit protestations to the contrary.

Duguit has written that unlike moral rules, the rule of law does not say that a thing should be done because it is useful, productive of happiness, or good. The rule of law says, "Do this because this is." It is thus said to depend, not on a "higher principle", but solely on reality. But the assertion "Do this because this is" is not an intelligible imperative unless whatever has existence has value, and so ought to be. Duguit does not maintain that whatever is, ought to be. And the mere fact of social solidarity does

not by itself really constitute the basis and determine the content of law in Duguit's system.

Juridic law is recognized by Duguit as "a law of purpose". It is a rule calculated to produce a consciously determined end. Duguit uses this fact in differentiating the rule of law from physical or biological laws which he describes as "laws of the relations of cause and effect". But not every purpose is said by Duguit to be "legitimate", i.e., some purposes are not compatible with social solidarity. And since social solidarity determines the rule of law, contrary purposes have no "juridical value". They are not "legitimate".

Thus the concept of social solidarity emerges not merely as a description of a factual situation. It is an end consciously selected by men. But it is not for this reason the foundation of law. For men may select many ends, and a purpose is not lawful when it possesses an end other than solidarity.

Now the question must be asked: What observable and verifiable facts determine solidarity as the only end capable of imparting the substance of legality to any rule whose consequences are in conformity to it? Duguit simply asserts that "an act has juridical value because the will which caused it

was determined by an end in conformity with the rule of law.³⁶ But the rule of law is, in turn, a rule of conduct in conformity with social solidarity. Thus the question is not answered. Solidarity is a condition of men in society, it is also an end which determines wills. But it is one among many ends and it remains to be seen why this one alone confers juridical value on an act.

In casting about for a fact which would appear as the basis for a selection of solidarity as the end which makes a purpose legitimate, Duguit discovers suffering, an observed fact whose reality would seem to preserve the integrity of his "exclusively realistic method". In the interests of this method, and the positivistic epistemology it presupposes, Duguit has denied that juridical acts may have happiness or the good as their end. For these are moral assertions whose normative character makes a positive science of law impossible. Duguit attempts to distinguish happiness and suffering as ultimate ends:

"It is true that man cannot have a clear idea what happiness itself is. But man suffers, wishes to suffer less, and wants all that he believes, rightly or wrongly, should diminish his suffering ... We can discuss happiness as much as we please, the fact of suffering is ever present ... in fact man has desired and always will desire to suffer less, and this is for us the single factor in his thoughts and in his acts."

(37)

36. MFLP, p. 253.

37. Ibid., p. 283.

The reason why suffering is "the single factor" is not explicitly given. Our inability to have a clear idea of what happiness in itself is, does not constitute a relevant and adequate basis for selecting the fact of suffering as the prime motive for the rule of conduct which becomes law. Either Duguit is being arbitrary and capricious, or he has identified suffering with the greatest evil. This identification, clearly a non-observable, non-verifiable normative judgment, seems to be indicated in Duguit's work. How else are we to understand the force of his assertion,

"... there is always some suffering in the world, and this yearning for the least evil is never satisfied." (38)

It is clear that from the mere fact that men desire to lessen human suffering and so band together, nothing can be concluded about the propriety or legitimacy of laws. It is not, in Duguit's own system, the conformity of rules to men's actual desires that makes them legitimate. It is conformity to what men ought to desire, i.e., social solidarity, that makes a rule into juridic law.

Duguit actually does give to solidarity a normative character in addition to whatever factual one it may have. But he does not apparently appreciate that this commits

38. Ibid., p. 283.

him to the very type of presupposition he was careful to reject. Duguit says of man:

"he desires solidarity because he cannot be other than solidary, and for that very reason he ought to desire solidarity." (39)

Duguit recognizes that the principal task in explaining law is to fix its universally obligatory nature, and that a choice among facts, the determination of a norm, is a necessary condition of obligation. But Duguit simply does not admit this; in fact he denies verbally what he actually proceeds to do. When Duguit writes that man is solidary with other men, the fact he is relating refers to the existence of needs and abilities and not to the complete realization of solidarity which would, he thinks, be accomplished by universal adherence to perfect laws regulating social relations. If the latter were intended, there would be no meaning to the remainder of his assertion that because man cannot be other than solidary, he ought to desire solidarity. For if man must be solidary, it is superfluous to assert that he ought to be solidary; and if in fact men do desire solidarity, there is no place for the ruler whose function is conceived by Duguit to place material coercion at the service of law. It is because Duguit realizes that man does rebel against the rule of conduct either from ignorance or

39. Ibid., p. 296.

40

egoism, that organized sanction is part of law. And this fact also makes significant the very proposition necessary to ground an obligation, i.e., that man ought to desire solidarity. We are left with the assertion that since man cannot be other than solidary, for that very reason he ought to desire solidarity. In this lies the concealed value judgment. Duguit has referred to suffering as the "eternal reality". But he does not argue that because man cannot live without suffering, for that very reason he ought to desire suffering. On the contrary, Duguit argues that man wishes to diminish suffering, and therefore ought to diminish suffering. This is because suffering is evil; it ought not to be - whether in fact it exists or not. It is clear, then, that the reason why man ought to desire solidarity is not, as Duguit says, because he cannot be other than solidary. It is because solidarity is good. It is not an intrinsic good. It is instrumental in diminishing suffering, and suffering is intrinsically evil. Only on these grounds can Duguit hold that

"as the consciousness of social solidarity becomes clearer, there is a simultaneous increase in the juridical obligations that seem to rest upon the State and the individual." (41)

40. Ibid., p. 307.

41. Ibid., p. 295.

Duguit is wrong to deny that the rule of law is a moral rule. A rule acquires its force of law, its legitimacy, only in so far as it is obligatory on all individuals. Duguit attempts, superficially, to ground the obligatory character of law on a fact. This is done in order to provide law with a basis that can be utilized by a positivistic theory of science. But the ultimate ground of Duguit's theory is the value judgment: Suffering is intrinsically evil. Thus cooperation in social solidarity appears in Duguit's theory as a duty, despite the fact that this is explicitly denied. If solidarity were merely a fact, Duguit could not succeed in establishing the foundation of law. For, in Duguit's own terms, the foundation of law is constituted by whatever determines the obligatory character of law. Social solidarity, like the notions of charity and fraternity, is an ethical precept - as it must be if the foundation of law is to lie beyond the fact of material coercion. The transition from solidarity as it is in fact to solidarity as desirable cannot be effected without the use, concealed or otherwise, of some normative proposition. Such a use results in the downfall of the "exclusively realistic method". Yet, it was the desire to employ this "fruitful" method in giving law a firm scientific foundation, and to purge law of all its metaphysical norms, that mo-

tivated Duguit to construct his theory. His failure in these respects can be traced directly to the requirements of the positivistic method.

Duguit's rejection of norms and Natural Law theories is merely terminological. It results from his desire to account for bilateral obligation on a factual and not a metaphysical basis. His positivistic epistemology requires that he reject whatever transcends the observable and verifiable and establish law on facts susceptible of direct proof.

Just as A. J. Ayer, in rejecting the significance of norms, maintains that the so-called normative propositions express only a feeling, and may be effective in inducing a like feeling in others, Duguit writes:

"To speak of a norm as obligatory in a juridical sense means simply that, at a given moment ... if this norm is violated the bulk of the people feels that it is just, according to the feeling for justice that it forms for itself at this moment, that it (the norm) is necessary for the maintenance of social solidarity, that what there is of conscious force in the group intervenes to repress this violation." (42)

Thus, the normative character of law is reduced to feelings on the part of individuals who are conscious of solidarity, and in consequence, a violation of law will provoke a reaction from the mass of such individuals. But Duguit is not successful in his effort to reduce the norma-

42. Duguit, Traité de Droit Constitutionnel, vol. 1, p. 65.

tive element to the coercion which constitutes the law's sanction. For he recognizes that coercion may be arbitrary and illegitimate. Coercion, and the people's outraged sense of justice which is said to produce it, do not, as Duguit would like us to believe, constitute the meaning of an assertion predicating juridical value of any act. Duguit talks as if cooperation in social solidarity determines the rule of law on the ground that it is

"a fact which, as conceived by man, operates as a spring of action in consequence of his constant aspiration towards life, that is, towards diminution of suffering."

But this is incompatible with his view of law as independent and objective. Duguit is fully aware that the conception of the subordination of the State to law implies the conception of law as a rule anterior and superior to the state. Neither coercion nor the conditions which produce it form any part of the substance of legality. Duguit quotes with approval the argument of Gierke that

"it is indifferent for the idea of law that there are means of external power at its service, and the law without power and without action is none the less law ... Let coercion be incompletely organized, let it even, perhaps be impossible as a consequence of the lack of a power to coerce, and the idea of law will not disappear." (43)

And Duguit himself is quite explicit in asserting that "This rule of conduct ... even before its sanction is organized by

43. MFLP, p. 334.

society, is a rule of law."⁴⁴

The complete break-down of the "exclusively realistic method" can be further appreciated by a realization that in spite of Duguit's violent objections to Natural Law theories, his own doctrine is a clear exemplification of Natural Law. Here it will be demonstrated again that in order to meet the requirements of an adequate legal theory, Duguit has been forced to establish the foundation and nature of law on grounds which he began by expelling from his system.

There are two characteristics of Duguit's theory which make it one of the clearest illustrations of a Natural Law doctrine to be found in modern times. First Duguit has maintained, as we have noted in our previous argument, that the law exists prior to its formulation by a sovereign power.

"The state as legislator does not create the law, it formulates a pre-existing rule," (45)

and, again

"... it may well be said that just as physical laws existed before they were formulated by science, so the rule of law existed before men were conscious of it." (46)

44. Ibid., p. 317.

45. Ibid., p. 326.

46. Ibid., p. 317.

Second, what determines a rule's jural character, its lawfulness, is its conformity to a purpose which is determined by the fact that men living in society are and must be solidary. Thus law derives its validity from its conformity to the fundamental nature of things. Conformity to the fact of social solidarity is the basis of criticism, justification, and growth of the positive rules of conduct which are law.

Let us compare what Duguit has thus said about law with conclusions maintained by Grotius, one of the most famous representatives of the doctrine of Natural Law.

Grotius believed that the political situation in his time required a close study of the basis of international law. In the Prolegomena, he wrote:

"Such a work is all the more necessary because in our day, as in former times, there is no lack of men who view this branch of law with contempt as having no reality outside of an empty name." (47)

It is clear that Duguit would make just such a reference to the 17th Century view of a law of nature binding on all nations because of its intrinsic justice. For the clearly articulated concept of the Christian political writers unhesitatingly alluded to a non-observable and non-verifiable fundamental law which was said to validate the rules laid down within political communities. This, for Duguit, is purely metaphysical and, as such, has no place in any

47. Cf. Sabine, A History of Political Theory, p. 421.

emancipated positive science of law. Yet Duguit, like Grotius, based law on man's nature and his complete fundamental need of living in society. Where Duguit asserts that law

"is a rule which men possess ... because they live in society and can live only in society," (48)

Grotius finds that

"among the traits characteristic of man is an impelling desire for society"

and that

"this maintenance of the social order ... is the source of law properly so called." (49)

Duguit discovers the necessity and obligatory character of law, which is the foundation of law, to flow from the fact that

"if a man wishes to live, since he can only live in society, he should conform his conduct to the fact of social solidarity." (50)

Grotius defines Natural Law as

"a dictate of reason indicating that any act from its agreement with the rational and social nature of man has in it a moral necessity." (51)

48. MFLP, p. 251.

49. Grotius, Prolegomena, sect 6, 8, cited Sabine, loc.cit. p.423.

50. MFLP, p. 259.

51. Grotius, De Iure Belli ac Pacis, Bk I, Ch. 1, 10. 1., cited Paton, Jurisprudence, p. 89, N2.

Thus both men derive the idea of law from the conformity or agreement of conduct with certain facts pertaining to the nature of man. The difference between the two theories in this respect is superficial only. Grotius explicitly grounds his requirement of conformity between rules and the nature of man in the existence of norms. He confesses his ultimate basis is a value judgment; for Grotius a peaceful and productive social order is an intrinsic good. And there are no logical difficulties in finding a basis for the obligatory character of law. Duguit attempts to deny a place to norms and reject the relation of law to ethics. But we have seen that the real basis of the law's obligatory character in Duguit's system is the ethical judgment that suffering is intrinsically evil. Thus there is no significant point of difference between Duguit's theory of law and that of Grotius with respect to the concept of
 52
 Natural Law.

The inconsistency between the contents of Duguit's legal theory and the positivistic method it is supposed to exemplify reflects a basic dependence of law on concepts which positivism rejects as non-significant. If Ayer and Duguit are correct in their metaphysical assumption that

52. Of course, Grotius recognized good as a constituent of reality determining Natural Law. Duguit's system rests on evil only.

reality contains only what is observable, that the factual, the experiential, and the real, are in principle co-extensive, then it must be denied that there is any genuine juridical law. But if, as a matter of fact there is law, then the philosophical principles which determined Ayer's value theory are incompetent. And the assertion of the positivist that propositions are meaningful only if they are tautological propositions of logic or experimentally verifiable propositions of fact is false.

The fact is that juridic law exists. It produces, as Duguit plainly sees, a bilateral obligation where it exists. Indeed, this character is a necessary condition of its existence as juridic law. If value judgments are reduced to factual judgments, or to emotive expressions merely, then the obligatory character essential to law is, in turn, reduced to a psychological feeling of compulsion. But as even Duguit has argued, this is inadequate as a basis to account for the substance of legality. For the legitimacy of a rule cannot be founded on the feelings of any individual, whether he be the ruler or the ruled. It is for this reason that Duguit was compelled surreptitiously to introduce non-observable values in accounting for the facts of law. And if the value judgments thus

introduced do not succeed in fixing the foundation of law beyond men's feelings, i.e., if as Ayer says, normative propositions are non-significant, emotive expressions only, then there is no genuine juridic law. If, in place of significant value judgments, there were only the emotive expressions of men's psychological compulsions as a basis of political rules, we might have, as Cardozo maintained,

"a benevolent despotism if the judges
were benevolent men."

But there would be an "end to the reign of law."⁵³ The fact is that law does reign, and jurisprudence must explain its nature and its source.

53. Cardozo, The Nature of the Judicial Process, p. 136.

CHAPTER VI: CONCLUSION

Ever since the time when Socrates maintained that a necessary condition of successful political practice was the transformation of kings into philosophers or of philosophers into kings, philosophers have been reminding other theorists of the vital need for a critical analysis of their special methods and assumptions. But philosophers must be prepared with a method of testing the soundness of their own intellectual instruments. Consequently, the principal aim of this dissertation has been to propose and illustrate a criterion which is competent to do this task in the field of generic value theory.

I have shown that the major alternative positions in value theory result from special metaphysical and epistemological presuppositions. Since we lack the means of verifying these antecedent principles, the crucial problem in testing theories of value is one of establishing a criterion that is neutral with respect to the foundations of opposing theories. The criterion I have employed was determined by the common logical requirement that any valid hypothesis must be capable of explaining the facts which give that hypothesis its distinctive function. Since value theory is devised to explain facts of the kind which are found in legal relations, the law is an appropriate context

within which to test the peculiar character of any value theory.

In the course of the dissertation it was shown that Leon Duguit was confronted with two problems of particular importance to his goal in legal theory. The first was to provide an explanation of the bilaterally obligatory character of law. The second was to use positivistic principles in giving this account. For Duguit believed it was only in this way that he could achieve an "exclusively realistic" method of producing a theory that would give an adequate explanation of law without introducing false concepts. This combination of Duguit's clear recognition of certain facts to be accounted for, and his firm conviction that his "exclusively realistic" method is the only instrument that should be employed, makes the success or failure of his theory a test of the competence of positivistic value theory. The peculiar legal facts which Duguit undertakes to explain are juridic relations possessing value character, i.e., Duguit's specific task is to show what it is that justifies the imperative nature of law. Duguit sees that no authority can be juridic which does not have to justify itself as lawful. He finds in examining political power that, by itself, "it has no quality of either legitimacy or of il-

legitimacy."¹ Thus his problem is to account for a jural principle which is superior to the state, which forbids the state from doing certain things, and which commands it to do others. This problem Duguit defines as the task of legal theory.

Duguit's adherence to positivism cuts him off from any consistent argument as to what should be the law. But he cannot escape from the need to provide such an argument, and the Natural Law which he rejects as metaphysical nonsense finally makes its appearance in his system thinly disguised as the "fact of social solidarity". Like Ayer, Duguit seeks to explain the expression of duty, the sense of justice, and the jural behavior of individuals solely in terms of empirical concepts. But what Duguit declares to be an observable and verifiable basis of law turns out on inspection to be an a priori concept of the intrinsic evil of suffering. This fundamental normative judgment Duguit attempts to conceal under the empirical assertion that social solidarity is the end which gives law its content. But even if this were true it could not be the basis of law. Duguit sees that simply to trace the evolution of a rule would not justify its existence. A "law" without justification could not be distinguished from mere

1. Duguit, Traité de Droit Constitutionnel, Vol. I, p. 37.

power which, as Duguit himself is careful to point out, has no quality of legitimacy. To be lawful, force must be exercised according to law. Thus law must somehow exist prior to power. I have shown that in order to explain legal facts, Duguit found it necessary to depart from his positivistic ideals. He expelled Natural Law and values from his system at the outset on the same grounds that Ayer, Carnap, and Schlick have rejected them, i.e., propositions concerning them are not verifiable by observation. But Duguit finally achieves a logically sufficient explanation of law only by tacitly reintroducing these rejected notions. This inconsistency is not accidental in Duguit's legal theory. It is the product of the inadequacy of positivism in the face of certain facts. The essence of legal theory is to explain the basis of the law; and the concept of juridic law includes the concept of "what should be". It is clear that unless "what should be" is contained somewhere in the premises, it cannot logically be found in the conclusion. Thus if the positivism which determined Ayer's theory were consistently applied in legal theory, it would defeat any attempt by the latter to account for certain facts which both legal theory and value theory have in common as their function to explain.

Thus, what this dissertation has shown is as follows:

- 1) When the test of comparison with immediate data is applied to Ayer's value theory, it proves unsound. It is seen that the function of both value theory and legal theory is thwarted by the positivistic limitation of "fact" to what can be observed, and by the positivistic equation of meaning and verifiability. Juridic law has a normative character which theory must explain, but which observable data cannot explain. To deny the normative character of law on this ground is to pervert the function of theory.
- 2) The reduction of normative propositions to empirical propositions is false, whether it is done by defining value in empirical terms, as the naturalist does, or by denying that value judgments have any literal significance over and above their possible empirical content, as the positivist does.

We cannot consistently argue that we must reject as meaningless or false whatever is not open to investigation by purely scientific means. For the use of purely scientific means is itself either an arbitrary selection of instruments, or it presupposes a basis of choice which science cannot verify. Ayer, and the positivists generally, do not model their instruments after those of science arbitrarily. Their decision in this matter rests upon the

antecedent conviction that a "non-observable fact" is a self-contradiction, as a "four-sided triangle" is a self-contradiction. But just as Ayer simply and properly denied Hume's equation of "good" with "general approval", I deny that the proposition, "X is a fact and is non-observable" is a self-contradiction. There are no adequate grounds for believing that whatever is real is phenomenal. The results we may achieve by convenient verbal stipulations and unwarranted delimitations of the possibilities of reality, will not compensate for the consequent inability to explain certain facts.

The positivist wants clarity and simplicity. He wants men to be able to know what they are doing. This is not incompatible with philosophic ideals until clarity and simplicity replace truth as the final end of philosophic endeavor. The positivist is fond of distinguishing himself from the metaphysician in terms of James' well-known classification of philosophers as those who are "tough-minded", and those that are "tender-minded". The "tough-minded" philosopher is said to be a "lover of facts", as distinguished from the "tender-minded" dogmatist and devotee of abstract and eternal principles.² But the positivist, while

2. James, Pragmatism, p. 9; cf. Feigl, "Logical Empiricism", Readings in Philosophical Analysis, p. 3.

he acclaims himself "tough-minded", appears to be frightened by the fact that we possess knowledge beyond our explanatory ability. He thus, as if he were one of the "tender-minded" dogmatists, constructs a comforting rule which asserts that whatever is non-observable and non-verifiable is artificial and meaningless.

The cure for dogmatism in value theory, as in any other field, is not to be had by replacing familiar ungrounded assumptions with new ones. As a result of Duguit's failure to give a consistent account of the law in positivistic terms, we may logically reject Ayer's position with as much confidence as we reject the denial of communication by Gorgias. Communication exists, and the problem is to explain how it takes place. Law, too, exists, and it possesses a bilaterally obligatory character; the problem is not how to deny this fact, but how can the fact be explained. It is as clear as any empirical concept that the notion of intrinsic value has some genuine application. If the only alternative to Ayer's theory is to assert what we cannot observe and verify, then this is simply a fact to be acknowledged. The justification for such an assertion will rest, not upon any positive showing, but upon the grounds that without it, certain facts which can be verified must be ignored. Such a basis has been the sole justification for many hypotheses

operative in science. Finally, it should be observed that if the positivist knows that whatever is real can be explained in empirical terms, he has a source of knowledge not accessible to philosophers in general.

A dissertation concerned with the testing of value theories can have only as much importance as value theories themselves. Some philosophers have expressed the belief that the ethical theory of right action is of little or no consequence. C. D. Broad, for example, believes that an interest in theoretical ethics might be just "quite good fun for those people who like that sort of thing."³ Broad points out that although theorists have made the fact of right action inexplicable, quite simple people often act rightly in quite complicated situations. "How", Broad asks, "could they possibly do so if the problem is so involved as we have made it out to be?" His own answer is to compare the relation of ethical theory and right action to the mechanical and hydrodynamical theory involved in the action of a tennis racket and a properly played ball.

"The good player responds, without explicit analysis or calculation, to a highly complex situation by actions which an observer possessed of superhuman powers of analysis and calculation would deduce as the solution of his equations." (4)

3. Broad, Five Types of Ethical Theory, p. 285.

4. Ibid.

Broad's analogy is inept and does not commend itself to reflection. It is true that the tennis player does not have to understand the mathematical theory of the flight of a ball to accomplish his ends. The realities upon which his efficiency depends are exhausted by experience. This is not the case in ethics. At least, if it is, then Broad's own theoretical conclusions about ethics are wrong. If Broad believes that the moral philosopher, like the tennis player, may discover the discrepancy between right and wrong, or good and bad, by merely examining the facts disclosed to him by his experiences, then this belief must be reconciled with his ethical conclusions stated elsewhere. Broad has written:

"I therefore think it very likely ... that Ethical Naturalism is false, and that ethical characteristics are sui generis. If such terms as 'right', 'ought', 'good', etc., be sui generis, I think it almost certain that the concepts of them are a priori and not empirical."(5)

The tennis player can learn what to do from experience because he already knows what constitutes the end and purpose of his particular activity. In ethics, it is the frequent need for this knowledge that first prompts the theoretical constructions. It is not the case that we always know what the good is, as the tennis player knows a rightly played ball, and that all the theorist must do is amuse himself by learning

Ibid., p. 281.

how what is good happens to be what it is.

It should be further noted that the only similarity between "right" action in an ethical sense, and playing a ball "rightly" in tennis is the use of the term "right". But the two uses must be distinguished. In the first case the term is an ethical predicate implying a value judgment; but to say, in the second case, "the ball was played rightly", is to express an efficiency rating, and not a value judgment. This distinction between the two separate uses of such terms is frequently neglected. The goodness or rightness of an instrument is obviously to be determined by the goodness of what is achieved by the instrument. But apart from this, we may decide how effective the instrument is in producing its end. Such decisions are conventionally expressed in value terms. It has been held, for example, that sophistry is a "good" tool for the statesman; that Socrates made a "bad" defense at the Athenian court. This usage tends to obliterate the radical difference between a description of causal efficacy and the value of a thing or of its consequences. It may be maintained that Socrates' "bad" plea was as it ought to have been. And Plato, for one, thought it was bad to be a "good" Sophist.

As is indicated by the late Justice Cardozo's

ominous prediction that ethical nihilism would put an end to the reign of law, there may be practical consequences resulting from a reduction of value terms to empirical ones. If there is no real entity rendering anything independently desirable, but only psychological states of desire, then conflicting judgments are without a valid arbiter, and the fate of men might be left entirely to some of the pernicious potentialities of unenlightened impulse and emotion.

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