

## PRAGMATIC NATURAL LAW THEORY

Our nature, our roles, and our environments are subject to our critical analysis and to our constructing cogent conceptions of them within the bounds of our willingness for others to model their activity in accord with such conceptions; and these conceptions carry with them normative advice for our conduct. Law, as an expression of a collective effort to construct a legal reality, is subject to this same constraint, and, as such, is part of an ever-present moral reality. The construction I refer to is where pragmatic theory enters this view of law; the essential moral component is where natural law theory enters.

I came to this view by way of investigating the foundations of what I found to be some very desirable procedural features of legal ethics.<sup>1</sup> I observed in the literature on legal ethics how the various rules of conduct for attorneys are constantly tied to conceptions of attorneys and to their varying roles within the scope of their role as attorney — the lawyer *qua* adviser, *qua* advocate, etc. And I observed how these varying conceptions were constantly being re-thought with subsequent changes in the advice tied to them. Ultimately I was led to explore the theoretical underpinnings of this view which, as things turned out, led to a universal ethic.

Looking at the matter in a slightly different fashion, suppose we think about our most general role as subject to this critical construction — our role as human beings. Is there any sense to treating human nature as the analogue to how lawyers in an ongoing process create conceptions about their professional roles? Can this procedural aspect of legal ethics provide a model for a general ethic? The considerations that allow us to answer this in the affirmative are the very ones that allow us to establish the ground for legal ethics.<sup>2</sup> Basically, I draw attention to the huge number of views of human nature many of which seem quite plausible to us and many of which are subscribed to by peoples of the world. Moreover, I show how these views, whether coming from philosophy, religion, or literature, all carry with them normative advice for our conduct as persons.<sup>3</sup> From this I infer that a most general feature of our nature is that we can and do see ourselves in varying ways and that it is reasonable, in light of this, to inquire into the best or most fruitful fashion of doing so.

I argue that in making decisions about what to incorporate into these conceptions, we choose among competing values, and in so choosing we both adopt new values and reflect upon those to which we are

already committed. For example, currently there is a lively debate over the profit/service orientation of the attorney. On this value conflict, as with a host of others, there is no “given” on the matter except the choice that one must make in constructing a conception of oneself as attorney. The same goes for debates over our more general nature as humans, whether, for example, we are basically competitive and aggressive or basically cooperative and peaceful. In either case, what we choose to adopt commits us at once in general terms to how we will and ought to act. This is immediately obvious upon our observing the absurdity of one’s doing otherwise, namely, selecting to see humans as peaceful because, among the alternatives, this feature seems optimal, and then openly claiming to heed some admonition to act always in a combative fashion.

Because of the reality of role modeling, we know that our choices of how we see ourselves and how we are to act influence the conduct of others. There is thus a compelling reason why we should act only as we would be willing to have others act — they may very well act like us and we are directly contributing to their doing so and to bringing about a world where this activity is commonplace. Here enter the moral imperative and moral dimension of this view.<sup>4</sup>

At this point I introduce the pragmatist’s insight about how reality and various aspects of it are a function of a pragmatic conceptual framework.<sup>5</sup> I bring out how this can be rethought in terms of how we have talked about human nature and our roles, and that a consistent theory governing all of this can be had. The main insight is that these external environments are extensions of how we are choosing to see ourselves — in these cases, how we choose to see ourselves in the world.<sup>6</sup> Once this move is made, these constructions too can be seen as carrying with them normative advice for conduct, subject to the same constraint of universalization as our conceptions of our nature and our roles.

At long last, but with no apology, I come to how this all ties in with a theory of what law is. I say this because I think that the best attempts to characterize law have been synoptic endeavors showing how law fits into a larger understanding of reality and human experience. In general, I worry about the fact that too few of our broad, systematic philosophers have done any philosophy of law and that too few of our philosophers of law make any comment on the larger, philosophical issues.

The legal order is the expression of a collective participation in this constructive process which, to this point, I have tied to individuals in thinking about their nature, roles, and environs. It results from a group effort to create a reality, the legal reality, and it may well be the primary mode in which the public actively exercises its powers to make a world. Evidently when a number of people engage in an activity analogous to one performed by a single individual, a phenomenon of a different sort is occurring and needs further describing.

The group effort is one that more immediately provides a test for the proposed way of thinking of things. Presumably an individual with some notion of how best to think of himself or herself as a human person may be able to go on for some time without gauging how others react to the concept or whether it should be modified in any way. In contrast, when the group makes the legal reality, at least at the level of the legislative enactments of a democracy, any proposal before the group is immediately tested by the group as it considers the fate of the proposal; and this fate will in part hinge on whether we want a society in which everyone follows the proposal, for that is the consequence of its becoming law. As law-making becomes more the province of a single person, say, that of a monarch's decree or that of a judge crafting a rule to govern a case of first impression, the process becomes more analogous to the individual constructing notions of self and society.

When the latter occurs, we have a good opportunity to observe another feature of law that distinguishes it from other constructive enterprises. Part of law's nature is that it maps out a formal set of institutional consequences for failing to comply. In criminal law this amounts to the sanctions of the sys-

tem. In other areas it may amount to a contract, will, or transaction being voided. The emphasis is on formal and institutional, since evidently individuals can impose what sanctions they like in their interactions with others as they strive to make credible their understanding of themselves and their worlds.

By approaching the nature of law as we have, we see how it is one of a number of ongoing, constructive enterprises of persons in their best attempts to structure various aspects of reality. With this pragmatic view we conjoined the view that any construction we adhere to must be one we would be willing for others to embrace and act in accord with; therein lies the element of natural law theory in our approach to law and hence the establishment of a pragmatic theory of natural law.



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<sup>1</sup>See my "Is Legal Ethics Unique?" *Southwest Philosophical Studies*, vol. VII, 1982. See also my *A Case for Legal Ethics: Legal Ethics as a Source for a Universal Ethic*. Albany: State University of New York Press. 1993.

<sup>2</sup>See my "Cultural Morals and the Moral Attorney," *Memoria del X Congreso Mundial Ordinario del Filosofia del Derecho y Filosofia Social*, vol. III, 1981.

<sup>3</sup>See my "Human Nature and Ethical Standards," *Dialectics and Humanism*, vol. XVII, no. 1, 1990.

<sup>4</sup>See my "Morality Educating Our Lawyers," *Southwest Philosophical Studies*, vol. VI, 1981.

<sup>5</sup>See my "Pragmatic Ethical Theory," *Southwest Philosophical Studies*, vol. VIII, no. 3, Spring 1988.

<sup>6</sup>See my "The Social Obligations of the Attorney," *Sociological Jurisprudence and Realist Theories of Law*, Berlin: Duncker & Humblot. 1986. ♦