FOREWORD

Conceptions of Natural Law Within the Philosophy of Adjudication—Metaphorical, Metaphysical, and Metatheoretical

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It is a great honor to introduce this Symposium in memory of my cherished colleague and dear friend, Edgar Bodenheimer.[1]

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[1] I discussed the nature of our collegial relationship and its inestimable benefit to me in my remarks at the Memorial Service in Honor of Edgar Bodenheimer held at our law school on June 2, 1991, and reprinted above. *See* John B. Oakley, *Remarks in Honor of Edgar Bodenheimer*, 26 U.C. DAVIS L. REV. 503 (1993). It is a matter of no slight regret that my present comments on the place of Edgar's work within modern Anglo-American jurisprudence honor him posthumously. I would have preferred to have shared these thoughts with him, and was extended the opportunity to do so in the form of an introduction to the *Festschrift* in his honor published in these pages in 1988. *See* 21 U.C. DAVIS L. REV. 465 (1988). But that invitation was conditioned on a publication deadline that unavoidably conflicted with the deadline for my voluminous briefing of a capital appeal in which I served as sole court-appointed counsel for the condemned. No one could have been more understanding than Edgar of the pain it occasioned for me to decline the invitation, or of the moral necessity of doing so. At the luncheon we shared shortly before his death, which I described at the Memorial Service, I remarked to Edgar that I looked forward to a time when I could discharge my standing debt to discuss his contributions to the philosophy of law. Only recently, after nine years of appellate litigation, the progress of the case in

The theme of the Symposium is the reemergence of natural law theory within the philosophy of adjudication, a jurisprudential development that began several decades ago,[2] and to which Edgar made many significant contributions.[3]

Throughout his long career in jurisprudence, Edgar relentlessly championed the importance of human rights to the validity of law and the legitimacy of legal systems. Trained as a lawyer by a culture that later claimed the legal right to reject his humanity, Edgar was understandably driven to introspection about law even as he was driven out of the country whose law he had learned and had hoped to practice.[4]

Edgar's jurisprudence focused distinctively on the nature and functions of law.[5] Edgar did not regard law as a natural object or in any other metaphysical sense as existing prior to its creation by human minds. He conceived of law as an artifact, created by humans to serve human purposes.[6] But although law is an invention, it is an involuntary invention, compelled by the metaphysical facts of life.

> History shows that, wherever human beings have created units of political or social organization, they have attempted to avoid unregulated chaos and to establish some form of livable order. This proclivity for orderly patterns of life is by no means an arbi-

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question to the stage of habeas corpus review has allowed me to stand aside in favor of successor counsel. The principal of my debt to Edgar is too great for me ever to repay, but I hope that this Foreword will be at least an installment of some interest.

[2] *See* EDGAR BODENHEIMER, JURISPRUDENCE: THE PHILOSOPHY AND METHOD OF THE LAW 148-62 (rev. ed. 1974); Martin P. Golding, *History of Philosophy of Law, in* 6 ENCYCLOPEDIA OF PHILOSOPHY 254, 263 (1967).

[3] *See, e.g.,* BODENHEIMER, *supra* note 2, at 31-59, 134-68, 214-22; EDGAR BODENHEIMER, TREATISE ON JUSTICE 10-17 (1967); Edgar Bodenheimer, *The Case Against Natural Law Reassessed,* 17 STAN. L. REV. 39 (1964).

[4] *See* Carol Bruch et al., *In Memoriam Edgar Bodenheimer, 1908-1991,* 39 AM. J. COMP. L. 657, 657 (1991).

[5] Since I feel that the philosophical analysis of the essential nature of the law and of the basic goals and values to be served by the legal order is an aspect of jurisprudential theory which has been somewhat neglected in the nineteenth and twentieth centuries, a substantial part of the present volume has been devoted to this critical area of legal thought.

BODENHEIMER, *supra* note 2, at viii (preface to the 1962 edition).

[6] For an interesting discussion of the conceptual nature of the claim that law is an artifact with purposes that set standards for evaluation, see THOMAS MORAWETZ, THE PHILOSOPHY OF LAW: AN INTRODUCTION 11-14 (1980).

> trary or "unnatural" striving of human beings, [but rather] is deeply rooted in the whole fabric of nature, of which human life is a part.[7]

Edgar reasoned that, since law is not a natural object but is a natural necessity, the validity of a proposition of law depends on its consistency with the fundamental purposes that inspire—and require—the creation of law. Thus law's attributes of purposiveness, invention, and natural necessity together set minimum criteria for legal validity that are natural in the following sense.

The nature of humanity and the natural conditions of human existence, which Edgar studied at length under the rubric of philosophical anthropology,[8] make social organization a necessary precondition to human flourishing. It is one of the validating functions of law that it meet the human need for order, both in the organization of social life, and in the control over the forces of nature that social organization permits through collective and cohesive human action.[9] The second validating function of law is justice, such that social order is not pursued as a means of domination, but rather as a means of promoting human flourishing beneficial to all.[10] Although Edgar made clear that in only the most egregious situations would he deem a proposition of law invalid solely on the ground that it imposed brute domination

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7 BODENHEIMER, *supra* note 2, at 172.

8 *See* EDGAR BODENHEIMER, POWER, LAW, AND SOCIETY: A STUDY OF THE WILL TO POWER AND THE WILL TO LAW (1973); Edgar Bodenheimer, *Anthropological Foundations of Law, in* MAN, LAW AND MODERN FORMS OF LIFE 3 (Eugenio Bulygin et al. eds., 1985) (proceedings of the 11th World Congress on Philosophy of Law and Social Philosophy); *see also* Edgar Bodenheimer, *Philosophical Anthropology and the Law,* 59 CALIF. L. REV. 653 (1971).

9 *See* BODENHEIMER, *supra* note 2, at 172, 247.

10 While order . . . focuses on the formal structure of the social and legal system, justice looks to the content of legal norms and institutional arrangements, their effect upon human beings, and their worth in terms of their contribution to human happiness and the building of civilizations. Speaking of justice in the broadest and most general terms, it might be said that justice is concerned with the fitness of a group order or social system for the task of accomplishing its essential objectives. Without pretense of offering a comprehensive definition, it might be suggested that it is the aim of justice to satisfy the reasonable needs and claims of individuals and at the same time to promote productive effort and that degree of social cohesion which is necessary to maintain a civilized social existence.

Id. at 196.

incompatible with the fundamental purposes of law,[11] he did not shirk from declaring that "monstrous, inhuman, and palpably unconscionable decrees of a lawmaker" were invalid as a matter of "natural law."[12]

There is no modern canon of natural law, and Edgar's advocacy of natural conditions of legal validity was as idiosyncratic as the varied voices of naturalistic jurisprudence in the essays in this Symposium. In order to understand the sense in which there has been a "reemergence" of so ancient a notion as natural law, it may be helpful to place contemporary debate about natural law in the context of modern controversy about the nature of law.

The fundamental issue in twentieth-century jurisprudence has been whether the very idea of law as a set of determinate standards is a pernicious myth that obscures analysis of the virtue and efficacy of law as a means of social control of human behavior. No contemporary contributor to debate about the philosophy of law doubts the reality that there is in place in every modern functioning state a system of rules, courts, police and prisons that channels human behavior through the standing threat and occasional application of public coercion. The issue is how best to understand the dynamics by which such systems operate.

Under the rubric of legal realism and its intellectual offshoot, critical legal studies, some argue for a radically indeterminate theory of law that treats legal obligation as vacuous and equates judicial obligation with justice. By this account, the role of the judge is to resolve disputes about the legal obligations of parties to a lawsuit in whatever way will promote the greatest social justice. It

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[11] Bodenheimer explicitly rejected the positivist dogma that "a law is a law if it meets the test provided by the positive 'rules of recognition' of the state" despite the positivists' justification that this promotes the "overriding purpose" of legal certainty and stability. Although acknowledging the importance of promoting order, Bodenheimer contended that

> there are also good reasons for holding that the criteria of legal validity should not be altogether dissociated from the fundamental standards of justice. If it is the purpose of law to make existence on this planet livable for human beings and to aid them in the satisfaction of their basic needs, one may be justified in questioning the validity of certain laws in the event that, in the context of the relations between a government and its citizens or subjects, "the superior power uses its power for the reduction or destruction of the inferior power."

Id. at 268 (footnotes omitted).

[12] *Id.* at 222 (footnote omitted).

is a standing possibility, from this perspective, that the most just judicial decision will enforce and hence reinforce the more plausible of the parties' constructions of what preexisting law may have seemed to require. But the criterion of judicial decision by this account is essentially justice rather than law, and in the event that the most plausible expectation of the proper result as a matter of "law" conflicts with the preferred result as a matter of justice, the reality of justice must obviously control over the mythical force of law. Such an indeterminate view of law is, of course, agnostic as to the nature and interpretation of the theory of justice that constitutes the nerve of judicial obligation once legal obligation has been negated as the mere manifestation of myth.

The principal difference between the legal realists of the early decades of this century and the critical legal theorists of recent times is their respective attitudes towards the virtue and indeed the very coherence of judicial efforts to do justice. Whereas the legal realists saw their "realism" about the indeterminacy of law as a benign means of emancipating judges from mindless formalism and alerting them to take responsibility for the social consequences of their essentially unfettered judicial discretion, critical legal theorists are generally as skeptical about morality as about law. They deploy their deconstructionist techniques so as to unmask the way in which the legal system perpetuates the domination of the disempowered classes in society.

A rival theory of law takes law seriously. This is the theory of legal positivism. The etymology of "legal positivism" is uncertain, and appears to draw both on the Benthamite conception of law developed by John Austin that distinguishes law from morality by deeming law to be a set of commands imposed or posited upon the governed by the superior political position of the sovereign, and on the broader Comtean conception of positive philosophy as dealing with propositions of truth that are subject to empirical verification.[13] The defining characteristic of positivism within modern legal theory is its insistence that law and morality are conceptually distinct. While positivists readily acknowledge that there will be a host of contingent and causal connections between the law of a particular jurisdiction and at least the conventional morality of that jurisdiction—without which there would be such a lack of efficacy of a legal system as to engender

[13] *See* H.L.A. Hart, *Legal Positivism*, *in* 4 ENCYCLOPEDIA OF PHILOSOPHY 418, 418-19 (1967).

its disintegration into anarchy or its overthrow by revolution—positivists deny that the justice of a law is a necessary element of its legal validity.

The positivist claim of a disjunction between law and morality entails no skepticism of the determinacy of either law or morality. Indeed, the leading nineteenth century exponent of legal positivism, John Austin, was a disciple of the utilitarian moral philosophy of Jeremy Bentham, and saw the separation of law and morality as a necessary step to reforming the law. By arguing that the law existed as an empirical fact and that no proposition of law had any necessary moral content simply in virtue of its validity as law, positivists sought to promote a standing process of reexamination of legal norms to determine if they advance or retard social justice. While utilitarianism of some form or other is closely associated with moral analysis of law from a positivist perspective, nothing in positivism demands that utility rather than some other theory of the good or the right be the standard by which to measure the morality of law.

As a reformist program, nineteenth-century legal positivism tended to stall at the first step of establishing the empirically verifiable determinacy of law. Perhaps because the associated morality of utilitarianism ties justice so closely to the order and efficiency of whatever system of rules is in place and is generally understood in a given society vis-à-vis the unpredictability and disorder of any wholesale uncertainty about the rules of conduct that will be enforced by courts, positivism led to moral complacency by judges and legislators. The legal ideal became the *status quo*, with an exaggerated insistence that the law be seen as a closed set of rules that did justice by avoiding doubt and rewarding settled expectations. The resulting era of legal formalism inspired the legal realists to point out that judicial rhetoric concealed the degree to which the determination of contested facts and the deduction of the legal consequences of the determined facts invested judges with a great degree of practical discretion that was far from morally inconsequential.

The corrosive effect of legal realism on lawyers' perception of *any* determinacy in rules of law, together with concern in the aftermath of World War II that the totalitarian régimes of the Axis powers had taken root in the complacent moral attitude that the law of an orderly society was *ipso facto* just, however oppressive it might be to minorities run over by railroads running on

time, led to the influential post-war reformulations of legal positivism by Hans Kelsen and H.L.A. Hart.

Kelsen was nearly sixty when the war began, and he had already developed most of his "pure" theory of law. But the events leading to the war led Kelsen, like Bodenheimer, to emigrate to the United States. It was after the war, when Kelsen was a Professor of Political Science at Berkeley, that his work—revised, extended, and published in English—attracted broad attention in Anglo-American jurisprudence.[14] Kelsen argued that it was a confusion of the scientific and the emotive to cloud analysis of legal systems with moral judgment of the validity of their laws. The normativity of law as a standard for official sanction was, for Kelsen, entirely a matter of the validity of propositions of law according to the internal hierarchy of norms of a particular legal system, capped by a basic constitutional norm, or "*Grundnorm*."[15] Kelsen's *Grundnorm* was not itself empirically verifiable, however. Its validity was assumed, and its content and existence were hypothesized from the otherwise observable features of the legal system in question.

Kelsen's rigorous positivism, although internally consistent, suffered from the somewhat mysterious nature of the *Grundnorm*, which, rather like the concept of a black hole in modern astrophysics, was the nonobservable source of the gravitational force accounting for the observable phenomena of law. The mystery of the *Grundnorm* was compounded by Kelsen's suggestion that the *Grundnorm*, since its validity was presumed, was a source of moral as well as legal obligation, such that it was logically inconsistent to claim that one could be morally obligated to disobey a valid legal rule.[16] Whatever its enduring influence in its own right, Kelsen's jurisprudence unquestionably influenced Hart, who upon a similar infrastructure, analyzing law as a system of rules rather than commands, constructed the dominant version of post-war legal positivism.

Hart's *The Concept of Law*, published in 1961, reflected his passionate rejection of Kelsen's moral agnosticism.[17] Hart defended

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[14] *See, e.g.*, HANS KELSEN, THE PURE THEORY OF LAW (1967); HANS KELSEN, WHAT IS JUSTICE (1960); HANS KELSEN, GENERAL THEORY OF LAW AND STATE (1949).

[15] HANS KELSEN, GENERAL THEORY OF LAW AND STATE, *supra* note 14, at 110.

[16] *See* H.L.A. HART, THE CONCEPT OF LAW 245-46 (1961).

[17] *Id.*

the moral imperative of distinguishing law from morality as the best way of guarding against moral complacency by populations governed by iniquitous law.[18] Hart rejected the idea of Bentham and Austin that law operates as a set of commands or orders backed by threats. He used techniques of linguistic analysis to demonstrate the existence and special normative features of social rules of obligation, which in any complex society will include a set of distinctly legal rules that are, in Hart's view, the central feature of a legal system. In addition to primary legal rules imposing legal obligations or conferring the power to create legal obligations (as by the making of contracts) directly on the citizenry, Hart identified secondary legal rules of recognition, adjudication, and change (legislation) which operate institutionally to create and validate the primary rules enforced by officials in court and elsewhere.[19] Hart's rule of recognition, unlike Kelsen's *Grundnorm*, is strictly empirical and hence verifiable. It exists in virtue of acceptance rather than validity, and like any of a legal system's other legal rules (whose validity all depend on the empirically verifiable terms and acceptance of the rule of recognition), it is subject to moral evaluation that may make it morally obligatory to disobey the law.

A major feature of *The Concept of Law* was the demonstration of the incoherence of the legal realists' skepticism of the determinacy of legal rules as they affect the vast amount of legally obligatory behavior routinely acknowledged and manifested in the day-to-day lives of the citizens of functional legal systems.[20] Less well developed was Hart's own theory of adjudication. He admitted that judges would occasionally have to perform a gap-filling legislative role by an exercise of "discretion" in making "a fresh choice between open alternatives" when confronted by the inevitably "open-textured" nature of the pre-existing set of legal rules.[21] Where there is doubt about the content of the rule of recognition itself, as in the United States where the rule of recognition consists of acceptance of the quite open-textured language of the Constitution, Hart concluded that the validity of judicial decisions about the Constitution depends ultimately only on what the public will accept.[22]

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18 *Id.* at 203-07.
19 *Id.* at 91-95.
20 *Id.* at 132-44.
21 *Id.* at 124-25.
22 *Id.* at 149.

If, at least in controversial constitutional cases of the sort that dominate American public attention to the business of courts, judicial obligation is not quite coextensive with the legal obligation imposed on judges by pre-existing rules of law, Hart's theory of law-as-fact leaves undecided important questions as to the source of the fresh law that judges must manufacture to decide the novel or unanticipated case. Although Hart suggests that the range of judicial discretion to resolve indeterminacy about legal obligation is limited by the surrounding terrain of the determinate law,[23] within this range the only obligation of the Hartian judge is moral rather than legal.

While the Hartian version of legal positivism takes law seriously, it does not, in the famous phrase of its most prominent critic, Ronald Dworkin, take rights seriously.[24] The idea of a right makes sense in a democratic society only as a "trump" of the general welfare, that is, as a reason why some political decision that would enhance the general welfare is nonetheless unjustified because it infringes on the right in question.[25] Judges who view the law as consisting of a set of determinate rules punctuated by occasional embarrassing lapses in which judicial discretion controls are likely to exercise that discretion as if they were puisne legislators, attempting to resolve indeterminacy in the law in the fashion of the legislature that might have, but did not, anticipate the unanticipated case. At least when this scenario runs its course in the legal system of a democracy, the result is judicial lawmaking more sensitive to policy concerns for maximizing aggregate welfare—the sort of concerns that motivate politicians intent on reelection—than to concerns of moral principle that subordinate claims of collective good to claims of individual right.[26]

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[23] *Id.* at 124, 141-43.

[24] *See* RONALD M. DWORKIN, TAKING RIGHTS SERIOUSLY (1977).

[25] *Id.* at xi.

[26] Hart refers to courts as engaging in "creative or legislative activity" when they adjudicate the occasional hard case, in which the content of the law is in doubt. H.L.A. HART, *supra* note 16, at 131; *see also id.* at 141 ("law-creating power" of courts when they decide hard cases); *id.* at 200 ("creative activity which some call legislative"). Dworkin develops the distinction between arguments of policy and arguments of principle at length. DWORKIN, *supra* note 24, at 82-100. He contends, however, that Anglo-American judges characteristically *do not* (and should not) decide hard cases on the basis of arguments of policy. *Id.* at 84, 87, 101. Dworkin's claim, which he calls the "rights thesis," is limited to "standard civil cases" where both parties claim a right to win, and is inapplicable in contexts such as

Dworkin's response, inspired by the legal traditions of the United States, with its written Constitution and tradition of judicial review of the constitutionality of legislative acts, has been an antipositivist campaign for recognition that law and morality are not conceptually distinct, and that adjudication necessarily entails complex moral reasoning about the legal rights of the parties.[27] While admitting that the right answer to a hard case will be controversial and not subject to objective proof, Dworkin denies in principle the existence of indeterminacy in law. In his view, the institution of law commits judges to an egalitarian principle of integrity, which requires them to resolve a "hard case" according to whichever outcome is best justified under that scheme of moral principle that most coherently explains and justifies the essential features of the legal system within which the case arises.

Dworkin's work has been a focal point of debate within Anglo-American legal philosophy for the past two decades, not only generating a cottage industry of criticism focused on Dworkin's work in its own right,[28] but also serving as a common point of attack for rival theories of adjudication inspired by moral ideals that are attractive to both the right and left wings of contemporary politics. From the right, majoritarians argue that rights-conscious judges impede democracy, libertarians argue that judges should use their moral latitude to protect property rights, and wealth-maximizing utilitarians argue that hard cases should be resolved so as to promote economic efficiency. From the left, various schools of communitarian thought attack the idea of individual rights as an obstacle to radical social reform or to the empowerment of politically marginalized groups.

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criminal prosecutions where society at large, which cannot coherently be conceived of as a rights-holder, is opposed in court by an individual litigant. *Id.* at 100; *see also id.* at 94, n.1 (noting distinction between rights against state and rights against fellow citizens).

27 Dworkin's capstone work on the philosophy of adjudication, which reconceptualizes law as an interpretive practice and adjudication as an exercise in constructive interpretation governed by ideals of justice, fairness, procedural due process, and, above all, integrity, is RONALD M. DWORKIN, LAW'S EMPIRE (1986).

28 *See, e.g.*, John B. Oakley, *Taking Wright Seriously: Of Judicial Discretion, Jurisprudents, and the Chief Justice*, 4 HASTINGS CON. L.Q. 789, 790-809 (1977). For collections of critical essays and responses by Dworkin, see RONALD DWORKIN AND CONTEMPORARY JURISPRUDENCE (Marshall Cohen ed., 1984) and *Jurisprudence Symposium*, 11 GA. L. REV. 969 (1977). *See also* STEPHEN GUEST, RONALD DWORKIN (1992).

In the midst of this cross-fire, it is easy to overlook how naturalistic contemporary legal philosophy has become. The conviction of the determinacy of law that characterized nineteenth-century legal formalism was hostile to moral reasoning by judges. The repudiation of formalism by the legal realists invited attention to the moral consequences of adjudication, and thus brought to the center stage of jurisprudence consideration of the moral reasoning essential to the judicial task. The postwar reformulation of positivism led to renewed consensus that for the most part established legal systems enforce determinate legal rules, but that in at least those cases complex enough to occupy the attention of the highest courts, decision depends upon the exercise of judicial discretion from among some set of open alternatives, with the choice necessarily to be justified on moral rather than legal grounds. Dworkin's contention that law is, at least in principle, a "seamless web"[29] did not banish morality from law but made it internal to law. The ensuing debate over the relationship of law and morality and the moral concerns that should inform and influence adjudication has, as this Symposium explores, made natural law once more a central issue within the philosophy of adjudication.

Debate about natural law and its relevance to adjudication is not always accompanied by a careful definition of terms. References to "natural law" may be to one of three distinct and by no means equivalent forms, which I shall call the metaphorical, the metaphysical, and the metatheoretical forms of natural law. These distinctions, together with the author's position on the crucial issue of the determinacy of law, provide an analytical framework for assessing the common ground and disputed points in the essays that follow.

Natural law in the metaphorical sense treats natural "law" not as law at all, but as a set of principles of natural justice. These principles of justice are referred to as "law" only in the weak, nonsociological sense that we use when we speak of the "laws" of physics, as derived from observation of the natural order of things. I refer to this as metaphorical because it demands no necessary connection between the truth of a proposition of law in a given society, and the truth of a proposition about the justice of that law. There is no contradiction when a committed positivist invokes natural "law" in this metaphorical sense as a reason for a citizen or judge to disobey or subvert morally iniquitous but

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[29] DWORKIN, *supra* note 24, at 116.

legally obligatory rules of law,[30] or by way of explaining how all functioning legal systems have certain common features attributable to the human condition in the natural world.[31] But when natural law in the metaphorical sense is invoked by a legal positivist within the philosophy of adjudication, this weak form of natural law functions only externally, as a guide to moral action outside the law or as a constraint on the survival and efficacy of a legal system.

Natural law in the metaphysical sense is the much stronger, traditional version associated with St. Thomas Aquinas[32] and, more dubitably, with Aristotle.[33] By this account principles of natural justice, whether discovered by reasoned reflection on the nature of things or revealed by divine inspiration, furnish the ultimate criterion of legal validity. The conventional apparatus of the positive law will give rise, in a moderately just society, to presumptively valid rules of law. But the mere fact of positive legislation does not make an unjust law valid, and the application of even a normally just law may be invalidated if it is inequitable in the particular circumstances of the case.[34]

Natural law in the metatheoretical sense is the version of natural law espoused by Bodenheimer[35] and Dworkin.[36] It incorpo-

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[30] Of course, it does not follow that a legal positivist must necessarily subscribe to natural law in this weak sense. One can be a legal positivist while subscribing to some non-naturalistic theory of justice, or while debunking all objective theories of morality as illusions or inventions utterly unconnected to the natural world.

[31] *See, e.g.*, H.L.A. HART, *supra* note 16, at 189: "[U]niversally recognized principles of conduct which have a basis in elementary truths concerning human beings, their natural environment, and aims, may be considered the *minimum content* of Natural Law, in contrast with the more grandiose and more challengeable constructions which have often been proffered under that name."

[32] BODENHEIMER, *supra* note 2, at 22-26.

[33] *See id.* at 10-12.

[34] That this is the "traditional" view is affirmed in JOHN M. FINNIS, NATURAL LAW AND NATURAL RIGHTS 363-66 (1980). Finnis also argues, however, that this traditional view is in fact a misleading caricature that mistakes the invalidity of an unjust law (which he contends is not a tenet of traditional natural law, properly understood) for the lack of political obligation of an unjust law. *Id.*

[35] *See* BODENHEIMER, *supra* note 2, at 355. In a contribution to a symposium to which both Hart and Dworkin were fellow contributors, Bodenheimer expressly affirmed that, despite differences on other points, he "tend[ed] to side, by and large, with Dworkin" in holding that "the general principles [of policy or justice] on which the judge relies in deciding

rates into the concept of law, as a precondition to legitimacy and the justification for political obligation, respect for basic human rights founded upon human equality and the minimum conditions for human flourishing through communal association. In this sense it conditions not the validity of particular propositions of law but the validity of the legal system as a whole, conferring legality on what would otherwise be merely a system of political coercion.[37] Natural law in this metatheoretical sense incorporates morality into law, providing a framework for resolving hard cases according to the best justified theory of the rights enjoyed by the parties in virtue of their communal association.[38]

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hard cases are part of the law," and that judges are "bound to give due consideration" to such "genuine sources of law." Edgar Bodenheimer, *Hart, Dworkin, and the Problem of Judicial Lawmaking Discretion,* 11 GA. L. REV. 1143, 1162, 1170 (1977).

[36] Everyone likes categories, and legal philosophers like them very much. So we spend a good deal of time, not all of it profitably, labeling ourselves and the theories of law we defend. One label, however, is particularly dreaded: no one wants to be called a natural lawyer. Natural law insists that what the law is depends in some way on what the law should be. This seems metaphysical or at least vaguely religious. In any case it seems plainly wrong. If some theory of law is shown to be a natural law theory, therefore, people can be excused if they do not attend to it much further.

In the past several years, I have tried to defend a theory about how judges should decide cases that some critics (though not all) say is a natural law theory and should be rejected for that reason. I have of course made the pious and familiar objection to this charge, that it is better to look at theories than at labels. But since labels are so much a part of our common intellectual life it is almost as silly to flee them as to hurl them. If the crude description of natural law I just gave is correct, that any theory which makes the content of law sometimes depend on the correct answer to some moral question is a natural law theory, then I am guilty of natural law.

Ronald M. Dworkin, *"Natural" Law Revisited,* 34 U. FLA. L. REV. 165 (1982); *see also* DWORKIN, *supra* note 27, at 97-98, 263 (acknowledging that interpretive concept of "law as integrity" is "reminiscent" of "natural law theories" insofar as it holds that "when the content of a political decision is unclear, justice plays a part in deciding what legal rights in fact follow from that decision").

[37] *See* John B. Oakley, *The Legality of a Political System: Positivism, Political Morality, and the Point of Theories of Law, in* 9 RECHTSTHEORIE BEIHEFT: SOCIOLOGICAL JURISPRUDENCE AND REALIST THEORIES OF LAW 83 (E. Kamenka et al. eds., 1986).

[38] I am conscious that it may appear to be an exaggeration to refer to this sense of natural law as "metatheoretical" rather than as merely theoretical. I confess to a desire for literary parallelism in distinguishing between the

In the first of the essays that follow, Anthony D'Amato presents a characteristically colorful[39] argument for the metatheoretical version of natural law, grounded in a radically indeterminate con-

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metaphorical, the metaphysical, and the metatheoretical, but poetic license is no excuse for philosophical license. I concede that I do not mean that the metatheoretical sense of natural law is metatheoretical in the strongest sense of a theory about the use of theories in general. But I think that the use of the "meta-" prefix is justified nonetheless, since my claim is that metatheoretical natural law is a second-order theory about the relevance to adjudication of first-order theories of law and of morality.

A judge who deploys moral reasoning from the ground up, who thinks that the truth of any proposition of law necessarily entails that it is true that that proposition of law is just, is a metaphysical natural lawyer. A judge who denies moral reasoning any role in the determination of the truth of propositions of law, but who acknowledges a moral obligation to resort to principles of justice as a "tie-breaking" mechanism when the outcome of a lawsuit depends on a proposition of law that is neither true nor false, is a metaphorical natural lawyer.

A judge who is a metatheoretical natural lawyer, as I use the term, not only has a first-order theory of the formal sources of law within his or her jurisdiction, but also a first-order theory of the moral justification for the legitimacy of those formal sources of law. When those formal sources of law are indeterminate as to the truth of a contested proposition of law, the judge must construct a second-order, and in this sense metatheoretical, theory of decision to reach the result entailed by the best-justified extension of the first-order theory of the formal sources of the law of the judge's jurisdiction in light of the best moral justification of that law.

In his earlier writing, Dworkin drew a similar distinction between a first-order theory of legal "fit" and a second-order theory of legal "justification." *See* Ronald M. Dworkin, *Seven Critics*, 11 GA. L. REV. 1201, 1252 (1977). In his later writing, first-order consideration of both "fit" and "justification" is presented as a general feature of the process of constructive interpretation of a social practice. After a "preinterpretive" stage at which the interpreter identifies the central features of the practice to be interpreted, interpretation moves to an "interpretive" stage at which the interpreter deploys first-order criteria of both "fit" and "justification" to decide upon the interpretation of the practice that fits its central features and offers the most attractive justification for them. This leads to the resolution of interpretive doubt—*i.e.*, to the decision of a hard case—at the second-order "postinterpretive" stage in which the interpreter "adjusts his sense of what the practice 'really' requires so as better to serve the justification he accepts at the interpretive stage." DWORKIN, *supra* note 27, at 66; *see also id.* at 139, 230-31, 239, 255-57. Dworkin concludes, in vindication of my "metatheoretical" label, that his interpretive theory of law, "law as integrity," thus "unites jurisprudence and adjudication." *Id.* at 410.

[39] *See, e.g.*, Anthony D'Amato, *Can/Should Computers Replace Judges?*, 11 GA. L. REV. 1277 (1977) (noting unsettling implications of using silicon judges to administer truly determinate system of legal rules).

ception of the positive law applicable to adjudication. It is contestable whether D'Amato's account of law is "natural" at all, since his argument for the primacy of justice is not contingent on the naturalism of the conception of justice deployed by a judge to decide who wins or loses in court, and appears instead to recommend reliance on the principles of conventional morality accepted by the population of the jurisdiction in question. But his account of adjudication has the key metatheoretical attribute of making positive law, which he treats as "topographical,"[40] a part of the calculus of justice that determines the legally correct result of adjudication in a hard or testing case in which positive law and principles of justice give the judge conflicting guidance.

Virginia Black's essay presents a powerful counterpoint argument that radically indeterminate conceptions of law pay inadequate heed to the idea of legal justification within the philosophy of adjudication. Although Black views natural law as a theory of justice, her arguments for the coherence of the idea of legal justification demonstrate that, for her as for Edgar Bodenheimer, natural law plays a metatheoretical rather than metaphorical role within her philosophy of adjudication. For Black, natural law is an exercise in moral philosophy[41] that is not external to law but an integral part of it. For a judge who subscribes to her view of natural law, the argument in a hard case "will be about morality and not about power."[42] D'Amato's judge is instructed routinely to exercise a general equitable jurisdiction to temper such perceived injustice as may arise from the application of conventional law to unconventional circumstances. By contrast, Black's judge is instructed to be alert to the moral dimension of law itself, a dimension that complicates—occasionally but not routinely—judicial determination of just what the law really does require of those it governs.

Raymond Dennehy's graceful yet probing essay seeks to reconstruct and gently reform Edgar Bodenheimer's conception of nat-

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[40] Anthony D'Amato, *On the Connection Between Law and Justice*, 26 U.C. DAVIS L. REV. 527 (1993).

[41] "We are not, after all, doing moral theology when we study natural law. We are doing moral philosophy." Virginia Black, *Natural Law, Constitutional Adjudication and Clarence Thomas*, 2 FIDES DIREITO E HUMANIDADES 43, 46 (1991) (reprinted herein with revisions and a postscript by the author).

[42] Virginia Black, *A Way Out of the Realist Indeterminacy Morass*, 26 U.C. DAVIS L. REV. 583 (1993).

ural law. Dennehy aims to resolve an apparent contradiction in Bodenheimer's account of the truth of propositions of natural law, in the sense that propositions of natural law furnish the underpinnings—what Bodenheimer called the "rock bottom layer"[43]—of a fully developed theory of justice. It should be noted that there is no contradiction in ascribing metaphysical status to principles of natural justice, and yet according them only a metatheoretical role in adjudication. Dennehy is not concerned with the function of natural law within Bodenheimer's philosophy of adjudication, but rather with the metaphysical objectivity of the conception of natural law that Bodenheimer thought judges should deploy metatheoretically when adjudicating hard cases in which the interpretation of law requires consideration of principles of justice.

Cole Durham's essay also deals with the tension and complexity of the overlapping strands of positivism and naturalism in Edgar Bodenheimer's philosophy of law, but Durham is more concerned with how natural law figured in Bodenheimer's theory of adjudication than with the nature of Bodenheimer's conception of natural law. Durham cogently argues that Bodenheimer's style of "architectronic argumentation"[44] served to subordinate science to prudence in the determination of legal validity.

Cornelius Murphy's essay complements Durham's essay in its discussion of the dialectical structure of Bodenheimer's theory of adjudication. For Murphy, as for Durham, the key to understanding Bodenheimer's approach to adjudication is Bodenheimer's emphasis on the deliberative nature of the judicial function, in which prudence is the cardinal virtue. Murphy's view of natural law is essentially metaphorical, and he is skeptical that principles of natural law can be adequately justified by objective metaphysics rather than subjective preference. Thus for Murphy the prudent judge should be extremely reluctant to distort the law to be applied in court by viewing it through the prism of natural justice. Although my understanding of Bodenheimer's conception of prudence would give greater leeway than Murphy would like to the influence of justice on interpretation of the law, Murphy's account of the primacy of prudence within Bodenheimer's theory of adjudication corroborates the sense of duality and tension that both

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[43] BODENHEIMER, *supra* note 2, at 222.

[44] W. Cole Durham, Jr., *Edgar Bodenheimer: Conservator of Civilized Legal Culture*, 26 U.C. DAVIS L. REV. 653 (1993).

Dennehy and Durham identify as a general feature of Bodenheimer's philosophy of law.

David Forte's illuminating essay elaborates a virtue fundamental to Edgar Bodenheimer's personality, and which was a subtle but important element of his theory of natural law. The degree to which principles of justice are natural or contingent on culture is often described as a debate between "nature" and "nurture" in the epistemology of values. Forte's personal yet powerful argument that nurture is a natural necessity for human flourishing reveals "nature versus nurture" to be a false dichotomy. Arguments of natural justice deal not with the status of humans as individuals vis-à-vis nature, but with the status of humans vis-à-vis the communities that empower humans to mitigate the caprice of nature. It would be bizarre to speak of a natural right of a human being not to be starved by a drought or drowned by a flood, but it is meaningful both to claim that human communities are naturally good in virtue of their superior collective ability to reverse the sovereignty of nature over humanity by managing the effects of weather and geology on human populations, and to condition the justice of the structure of such communities on respect for the humanity of the individuals of which they are composed. Forte identifies the concept of nurture as an essential moral link between individual and community, for it is only through nurturing—first parentally and then communally—that the individual acquires the qualities of identity, self-esteem, responsibility, and civic virtue that enable humans to form just societies.

The Symposium concludes with an exchange of views by Juha-Pekka Rentto and Virginia Black on the role that natural law theory played in the hearings that culminated in the confirmation of Clarence Thomas as an Associate Justice of the Supreme Court of the United States. Rentto's essay takes as one of its starting points an article about the Thomas hearings written by Black before the reopening of those hearings to take testimony from Anita Hill. Rentto disputes Black's contention that natural law has become essentially conventional, and argues that hostility to Thomas was parasitic on hostility to natural law. Rentto proceeds to present an unabashedly metaphysical defense of natural law in which he argues that polities are well served by a judge who subordinates positive law to natural law, provided that the judge properly understands the Thomasian nature (Rentto's pun, not mine) of natural law.

With the gracious consent of Virginia Black and the editor of

the Portuguese journal, *Fides*, in which her article on the Thomas hearings originally appeared, we reprint Black's article on those hearings and append to it a postscript in which, at our invitation, she replies to Rentto.

Even a Foreword merits a conclusion. Mine is to remark on the renewed sense I have gained, in reviewing the jurisprudence of Edgar Bodenheimer, that the life of a scholar is not ended by death. Those who live by the creed "cogito ergo sum" remain alive for so long as their ideas remain accessible and interesting. In that sense Edgar is very much with us today, still "the living embodiment of the scholarly ideal."[45]

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[45] *See* Oakley, *supra* note 1, at 504.