

# **Bodenheimer's Theory of Natural Law: The Conflict of a Divided Intellectual Allegiance**

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## **INTRODUCTION**

It is an honor and a pleasure to contribute to this Symposium dedicated to the memory and work of Edgar Bodenheimer. I do not say this simply because it is appropriate for the occasion or expected. Over the months of reading and reflecting upon his writings, I have developed a deep respect and even an affection for him. Although I have not had the pleasure of meeting Professor Bodenheimer, I can imagine the two of us whiling away the time with a good cognac, engaged in spirited but congenial philosophical discussion. Two qualities in his works are most responsible, perhaps, for the respect and kinship I harbor for him. The first is the breadth of learning that he brought to his discussions of ethical and social topics. He drew upon an impressive array of sources from the natural and social sciences, literature, religion, and philosophy. Yet, he was always their master: he drew water from the river as needed; never did he fall into it. The second quality is his intellectual honesty. Committed to the natural law tradition though he was, he remained open to arguments counter to his own, ignored no data that came to his attention, and was always ready to modify his own position where the evidence so dictated.

In what follows, I will explore what strikes me as a serious tension within Professor Bodenheimer's writings on the natural law. That it requires some criticism of his argumentation I do not think he would take amiss, though he might well criticize the criticism. My impression of the man is that he would greet such criticism in the spirit expressed by Aristotle when he criticized the

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doctrine of his master, Plato: "Piety requires us to honor truth above our friends."<sup>1</sup>

Bodenheimer's place in the current revival of interest in natural law theory cannot be fairly assessed apart from his defense of the theory against the criticisms of logical positivists, especially Hans Kelsen. He has incisively answered, point by point, the latter's attempts to separate the legal code from a moral foundation. But in the conduct of that defense, Bodenheimer unfolds a natural law theory that deserves to be included as an important part of that assessment. As a teleological argument based on the Aristotelian conception of nature as *phusis*,<sup>2</sup> it locates him in the tradition of the classical theorists of the ancient and medieval worlds, such as Aristotle and Aquinas, rather than in that of the social contract theorists of the modern period, such as Hobbes and Locke. The observations of a contemporary author focus the basic rationale for the classical viewpoint to which Bodenheimer subscribes:

[I]t is meaningless to speak of the "natural person," as if that referred to values found in nature itself. That, more than anything, is what the social contract theorists demonstrated. Human life as we know it is possible only in community; the contributions of nature are inseparable from the effects of some form of nurture. If some personal attributes seem more unalterable than others, more resilient or more intractable, even they derive their value and significance, positive or negative, from the community.<sup>3</sup>

Bodenheimer could not agree more that "[h]uman life as we know it is possible only in community; the contributions of nature are inseparable from the effects of some form of nurture."<sup>4</sup> It is precisely because human beings are *by nature* political beings that they need socio-political institutions for the actuation of their natural potentials. Care must accordingly be taken to avoid conflating the notion of "natural" employed by Bodenheimer and other advocates of the classical tradition with that implied by the "state

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<sup>1</sup> ARISTOTLE, *Nicomachean Ethics*, Book I ch. 6, in *THE BASIC WORKS OF ARISTOTLE* 939 (Richard McKeon ed., W.D. Ross trans., 1941).

<sup>2</sup> *Phusis* is nature construed as a natural entity's inborn, spontaneous striving for the fulfillment of its nature. ARISTOTLE, *Metaphysics*, Book IV chs. 4-5, in *THE BASIC WORKS OF ARISTOTLE* 755-57 (Richard McKeon ed., Benjamin Jowett trans., 1941); see *infra* text accompanying notes 47-48.

<sup>3</sup> LLOYD L. WEINREB, *NATURAL LAW AND JUSTICE* 241 (1987).

<sup>4</sup> *Id.*; see EDGAR BODENHEIMER, *PHILOSOPHY OF RESPONSIBILITY* 12-13 (1980) [hereafter *BODENHEIMER, RESPONSIBILITY*].

of nature" of the social contract theorists.<sup>5</sup> Clearly, "it is meaningless to speak of the 'natural person,' as if that referred to values found in nature itself,"<sup>6</sup> but neither Aristotle nor Aquinas nor their present day intellectual heirs suppose that what is natural for human beings is the spontaneous and unsocialized.<sup>7</sup>

Bodenheimer's conception of nature identifies his theory more closely with law as moral obligation (*lex naturalis*) than as individual right (*ius naturale*). Consequently, although he is clearly concerned about the protection of individual rights,<sup>8</sup> they do not enjoy pride of place in his conception of natural law. Instead, he locates rights within the broader context of political society as a moral institution and as the only place in which human flourishing is possible. This is to conceive a human being not primarily as an individual with rights against the State but as *zoon politikon*, to paraphrase Aristotle,<sup>9</sup> one who is neither a beast nor a god, but whose very being is unintelligible outside the life of the body politic. Bodenheimer's teleological argument for natural law expresses the time-honored riposte to the conception of law as merely conventional and therefore opposed to nature (*phusis vs. nomos*): how can legal and social institutions be contrary to nature if the very nature (*phusis*) of a human being requires society for its fulfillment? That argument offers food for thought to the partici-

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<sup>5</sup> Compare BODENHEIMER, RESPONSIBILITY, *supra* note 4, at 12-13 (positing inseparability of nature and nurture) with THOMAS HOBBS, LEVIATHAN, Part II ch. 17 (Oxford University Press 1965) (1651) (declaring dichotomy between nature and law). Whether Hobbes intended his "state of nature" to be interpreted as an actual historical stage or as an analytic model, he nevertheless opposes the *status naturalis* and the *status civilis* in such a way as to affirm the positivist dichotomy between nature and law. The only basis of rights that Hobbes recognizes is *contractual*, after which the justification for all laws is simply that they are enacted by the sovereign. This is legal positivism bottled in bond. *Id.*

<sup>6</sup> WEINREB, *supra* note 3, at 241.

<sup>7</sup> See, e.g., YVES R. SIMON, THE DEFINITION OF MORAL VIRTUE 1-18 (Vukan Kuic ed., 1986).

<sup>8</sup> EDGAR BODENHEIMER, JURISPRUDENCE: THE PHILOSOPHY AND METHOD OF THE LAW 222-29 (rev. ed. 1974) [hereafter BODENHEIMER, JURISPRUDENCE] (discussing justice and freedom); EDGAR BODENHEIMER, TREATISE ON JUSTICE 88-94 (1967) [hereafter BODENHEIMER, TREATISE ON JUSTICE] (discussing freedom and order).

<sup>9</sup> See ARISTOTLE, *Politics*, Book I ch. 2, in THE BASIC WORKS OF ARISTOTLE 1114, 1129-30 (Richard McKeon ed., Benjamin Jowett trans., 1941).

pants in the current libertarian-communitarian dispute<sup>10</sup> as well as to the jurists considering how long a leash advocates of privacy rights should be allowed in forging personal self-creation as the fundamental Constitutionally guaranteed right.<sup>11</sup>

Yet Bodenheimer's natural law theory is not all of a piece, for it reveals an intellect at war with itself. This duality manifests itself in the form of an unresolved tension throughout his writings. On the one hand, he subscribes to the *fact/value* distinction, holding that "probable validity" is the most that can be hoped for when seeking justification for moral and social norms; science alone lays claim to truth and certitude. On the other hand, he makes assertions which at least imply a defense of absolute moral norms. His failure to resolve this tension poses two difficulties for his natural law position. First, by locating moral and social norms outside the pale of truth and certitude, he leaves his theory tottering precariously on the brink of the logical positivism he so emphatically rejects as unreasonable. Second, he finds himself in the position of wishing to maintain that justice has absolute components, but he cannot see any way to reconcile them with the concrete cases of justice in the real world. The second difficulty is particularly problematic because Bodenheimer regards justice as the most important of all the norms.

The reason for this tension, it will be argued, is that Bodenheimer is heir to two antagonistic intellectual traditions: scientistic realism and classical philosophical realism. On the one hand, he seems to hold the view that, regardless of what common sense may tell us, science is the standard of all the rationally defensible knowledge we can have about the world.<sup>12</sup> This seriously compromises the intellectual respectability of philosophy and, as indicated above, poses serious problems for the rational defensibility of ethical pronouncements. His theory of natural law, on the other hand, presupposes a metaphysical and epistemological realism. This realism begins with Plato but is more completely and consistently embodied in the moderate realism of Aristotle and Thomas Aquinas, which holds that philosophy fur-

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<sup>10</sup> Charles Taylor, *Cross-Purposes: The Liberal-Communitarian Debate*, in *LIBERALISM AND THE MORAL LIFE* 159-82 (Nancy L. Rosenblum ed., 1989).

<sup>11</sup> Russell Hittinger, *Liberalism and the Natural Law Tradition*, 25 *WAKE FOREST L. REV.* 429, 486-99 (1990).

<sup>12</sup> BODENHEIMER, *TREATISE ON JUSTICE*, *supra* note 8, at 54-55. I am indebted to Professor Michael Torre of the philosophy faculty at the University of San Francisco for suggesting the term "scientistic realism."

nishes genuine knowledge about the world and thus validates moral and social norms. That duality would explain why Bodenheimer's prose betrays a sense of uneasiness with the *fact/value* distinction while, at the same time, suggesting an affinity for a realism that grounds normative claims in truth and certitude.

This Essay will argue that, once allowed to surface, the philosophical realism submerged in Bodenheimer's theory of natural law not only resolves the tension in his thought but is more consistent with it than is his scientistic realism. I shall approach that task in four stages. First, I shall present what seems to me to be the sum and substance of his natural law theory. Second, I shall focus on his treatment of the *fact/value* distinction and attempt to show how the philosophy that that treatment presupposes collides with his defense of natural law theory, particularly his theory of justice. Third, I shall attempt to show the points in his argumentation that presuppose philosophical realism and how the latter relieves the tension in his natural law theory. Fourth, I shall offer a sketch of how the philosophical realism presupposed by Bodenheimer's notion of nature addresses a problem which he himself treated with great sensitivity—the reconciliation of the natural law with concrete, changing circumstances.

### I. BODENHEIMER'S THEORY OF NATURAL LAW

Although Bodenheimer does not seem to have set forth a formal statement of his theory of natural law, he does present a characterization of post-World War II continental natural law thinking that, as will become clear, might well pass as a faithful encapsulation of his own position. The natural law approach to legal theory, he says,

rests on the assumption that there exists an immutable idea of law which is firmly grounded upon a rational order of the cosmos or the nature of Man and which remains the same throughout the ages. The diversities of social systems and the variations of social phenomena do not, in this view, modify or affect the fundamental notions and postulates of the law. Regardless of changes in the world of social life, certain essential contents of the legal order are invariable and foreordained, and deviations from these unchangeable precepts, although they may occur, are classed as manifestations of error and ignorance.<sup>13</sup>

The natural law, for Bodenheimer, is the common ingredient in

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<sup>13</sup> Edgar Bodenheimer, *Some Recent Trends In European Legal Thought - West and East*, 2 W. POL. Q. 45, 45 (1949).

what reasonableness acknowledges as the minimum permissible conduct requisite for human flourishing and "civilization-building."<sup>14</sup> He has in mind cultural uniformities such as respect for human life, bodily integrity, family life, property, and contracts.<sup>15</sup> The ground for those norms reveals itself in universal patterns of behavior which furnish "a high degree of probability, bordering on certainty, that these cultural uniformities have their roots in what may be called 'the common nature of man.'"<sup>16</sup> Bodenheimer appeals to the sciences of psychology and psychiatry to answer the nominalist denial of a common human nature: despite the many individuating differences among human beings, the latter nevertheless display common characteristics in their nature (*phusis*) and *psyche*.<sup>17</sup>

On the strength of this appeal to the data of human experience, Bodenheimer accordingly rejects the position that a defensible natural law theory must appeal to theology or an unverifiable metaphysical claim for the existence of God. Instead, he observes that "[i]mportant versions of natural law thinking were founded on a nontheistic basis," as in Grotius.<sup>18</sup> He goes on to say that "[n]atural law philosophy does not assert that norms are 'set' by nature or nature's God, but merely holds that there are some norms set by men which flow from certain attributes of human beings."<sup>19</sup>

He does not make clear, however, whether he holds that a theory of natural law is possible if there is no God or simply that the rational justification for it does not demand an appeal to the existence of God. An optimism regarding the powers of natural human reason to formulate norms of behavior dictated by the exigencies of human nature<sup>20</sup> is compatible with the view that God is the author of human nature and thus the author of natural morality. Bodenheimer's citation of Grotius' claim that it is enough to

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<sup>14</sup> BODENHEIMER, RESPONSIBILITY, *supra* note 4, at 120.

<sup>15</sup> Edgar Bodenheimer, *The Natural-Law Doctrine Before the Tribunal of Science: A Reply to Hans Kelsen*, 3 W. POL. Q. 335, 348-49 (1950)[hereafter Bodenheimer, *Reply to Kelsen*]; Edgar Bodenheimer, *The Case Against Natural Law Reassessed*, 17 STAN. L. REV. 39, 41-42 (1964) [hereafter Bodenheimer, *Natural Law*].

<sup>16</sup> Bodenheimer, *Natural Law*, *supra* note 15, at 42.

<sup>17</sup> *Id.*

<sup>18</sup> *Id.* at 52.

<sup>19</sup> *Id.* at 53.

<sup>20</sup> *Id.*

appeal to human essence for the defense of natural morality does not answer the question. It is quite plausible that Grotius himself appealed to human essence as the *proximate* ground of natural morality; God remained the *ultimate* ground.<sup>21</sup>

The question cannot be ignored inasmuch as the concept of law implies the concept of a lawgiver; the concept of a transcendent, unchanging law implies the concept of a transcendent, unchanging lawgiver; the affirmation of an actual law implies the affirmation of an actually existent lawgiver; the affirmation of an actual law possessing the aforesaid properties implies the affirmation of an existent lawgiver possessing those properties. That Bodenheimer cites Grotius, a theist,<sup>22</sup> and does not cite any atheists perhaps eliminates the plausibility of interpreting him to mean that natural law theory is compatible with atheism.

In order to establish the existence of universal norms, Bodenheimer does not think it necessary "to show a universal agreement among all peoples with regard to certain standards of conduct."<sup>23</sup> It is sufficient to show that "*civilized and mature societies*" acknowledge the same fundamental moral and social norms. For example, according to Bodenheimer a comparison of the criminal codes of civilized nations reveals just that. These societies condemn and punish as crimes actions such as murder, theft, assault, robbery, rape, deceit, and arson, while none of them sanctions such actions.<sup>24</sup> But even between the criminal codes of civilized and primitive societies the differences are not so great as might be supposed.<sup>25</sup>

Thus it is fair to say that Bodenheimer subscribes to the position that moral, social, and legal norms are derived from the nature of human beings and the requirements of maintaining a civilized society. But that must be qualified, for he does not hold that a *value* (an ought) can be derived from a *fact* (an is). Given his ambiguous position on the *fact/value* relationship, it is probably more faithful to his thought to say that norms are *grounded* in human nature in the sense that they are efficacious responses to its expressed needs.

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<sup>21</sup> See HEINRICH A. ROMMEN, *THE NATURAL LAW* 197-98 & n.11 (Thomas R. Hanley trans., 1948).

<sup>22</sup> *Id.* at 70-74; see also Bodenheimer, *Reply to Kelsen*, *supra* note 15, at 336-39.

<sup>23</sup> Bodenheimer, *Reply to Kelsen*, *supra* note 15, at 347.

<sup>24</sup> *Id.* at 347-48.

<sup>25</sup> *Id.* at 348.

While maintaining that facts and values inhabit two different realms, he rejects the attempts by logical positivists, such as Kelsen, to dichotomize them. For the characteristics of human nature seem to harmonize with the content of the law. For example, the law's recognition and protection of the family springs from the natural love and affection of parents for their offspring; the prohibition of assaults and acts of violence arises from the human dislike of injury; the restriction of incest is grounded in the realization that the practice would undermine family life.<sup>26</sup> In short, human reason validates the proposition that "outrageously antisocial conduct" should be curbed. No rational being could credibly argue that indiscriminate killing, rape, robbery, and the breach of contracts should be permitted.<sup>27</sup>

Bodenheimer's exact thinking on the binding force of moral and social norms is somewhat clouded. Noted above was his denial of certitude to those in favor of a very high degree of probability "bordering on certainty" and his assertion that we can attain no more than "probable validity" for them. Elsewhere he writes that moral and social norms are not absolute but rather "hold good in the large majority of instances."<sup>28</sup> Yet those assertions seem inconsistent with others he makes, such as, "[I]t can never be just for a man to torture an innocent child,"<sup>29</sup> and "Justice is an absolute value in the sense that its opposite cannot legitimately form the chosen good of social action."<sup>30</sup>

The contexts in which some of the denials occur show that his intention is not to challenge the certainty or absoluteness of moral norms but rather to call attention to the difficulties that inevitably accompany the application of abstract principles to concrete situations in the face of the latter's myriad variations. As an example, he cites the case of a man whose wife is in danger of dying within a few hours if she does not receive a certain medicine. The druggist, knowing of the urgency and hoping to profit from the husband's desperation, asks an exorbitant price for the medicine, thereby putting it beyond the couple's financial reach. Realizing that there is no other druggist in the area and that time does not permit any effort to persuade the druggist to lower his price, the husband breaks into the pharmacy at night

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<sup>26</sup> *Id.*

<sup>27</sup> *Id.* at 348-49.

<sup>28</sup> BODENHEIMER, RESPONSIBILITY, *supra* note 4, at 95.

<sup>29</sup> BODENHEIMER, TREATISE ON JUSTICE, *supra* note 8, at 260.

<sup>30</sup> *Id.*



and takes the medicine. Bodenheimer regards this as a case of justifiable stealing and hence as an instance where the prohibition against stealing breaks down.<sup>31</sup>

But that assessment seems mistaken. Traditional moral thought has defined stealing as taking by stealth what belongs to another when he or she is *reasonably* unwilling to surrender it.<sup>32</sup> The above case describes someone who is *unreasonably* unwilling to surrender a medicine. It is not that the prohibition against stealing has broken down but rather that the prohibition simply does not apply to the case that Bodenheimer describes.<sup>33</sup>

Bodenheimer's focus on human nature to support his arguments of the natural law may, at first glance, give the impression of standing on its own. But it is, in fact, subsumed under a larger argument. The primary rationale for his theory of natural law is teleological: the universal prohibition of certain kinds of behavior presupposes that "a civilized society is preferable to an order of barbarism and bestiality."<sup>34</sup> If such conduct were permitted, life in society would be intolerable.<sup>35</sup>

Any thought that this argument is utilitarian is dispelled by Bodenheimer's sense of what is natural conduct for human beings. Although admitting that the realities of human nature dictate legislative efforts to make human beings more cooperative and social-minded, he nevertheless points out that legal restraints do not obstruct social progress. On the contrary, social progress is facilitated by placing restraints on the violent and destructive forces in human nature. Granting that it may be "natural" for human beings to kill and steal, it remains equally natural for them to prohibit such actions. Granting that human nature contains destructive, anti-social drives, it must also be granted that humans boast a rational faculty whereby they understand that organized

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<sup>31</sup> BODENHEIMER, RESPONSIBILITY, *supra* note 4, at 96-97.

<sup>32</sup> See THOMAS M. GARRETT, BUSINESS ETHICS 102 (1966) (discussing topic of stealing in practical context).

<sup>33</sup> See YVES R. SIMON, THE TRADITION OF NATURAL LAW 146 (Vukan Kuic ed., 1992) (stating extreme necessity changes nature of an act). The application of ethical principles to concrete situations is a matter for the virtue of prudence. From Aristotle and Aquinas to the present day the tradition persists of regarding prudence (*phronesis*, *prudentia*) as the primary ethical virtue insofar as it provides the insight in the concrete situation for the proper action. See JOSEF PIEPER, *Prudence*, in THE FOUR CARDINAL VIRTUES 3, 6-8 (Richard Winston & Clara Winston trans., 1965).

<sup>34</sup> Bodenheimer, *Natural Law*, *supra* note 15, at 45.

<sup>35</sup> *Id.*

human society can exist and continue to exist only if these destructive drives are suppressed.<sup>36</sup>

Furthermore, the fact that there is a divergence of legal orders from natural law norms does not, in Bodenheimer's judgment, count as evidence against the claim that there are universally prescribed norms of human behavior.<sup>37</sup> Nothing in that claim means that those natural law norms cannot be infringed upon by an empirical legal order. The claim that there are universal moral postulates is entirely compatible with a situation in which the legal order of State A conforms to the natural law and that of State B deviates from it. The inference that Bodenheimer draws from that divergence is that the legal order of State B "will suffer crises, breakdowns, and eventual disintegration unless it is brought into conformity with the existential needs of human beings."<sup>38</sup>

For the above reasons, Bodenheimer cannot accept the view that the negative, destructive drives in human nature are just as natural as the positive, civilization-building drives. Moral codes that restrict behavior cannot, accordingly, be accounted for simply in terms of external imposition or by fear of punitive retaliation. The process of "internalization," by which mature individuals accept society's moral code, indicates that moral and social conscience are grounded in the psychological structure of a human being. Anthropological evidence that all peoples, from the earliest times, have developed ethical codes, convincingly shows a deep-seated need for normative control of instinctual and irrational behavior.<sup>39</sup> The fact that the constructive human inclinations do not manifest themselves spontaneously only indicates that they must be elicited and developed by legal and social institutions.<sup>40</sup>

All of the above shows that Bodenheimer is not content to make the mere fact of human need for legal and social institutions the foundation of moral norms. Had he done so, his argument would be no different from the utilitarian argument of David Hume, who maintained that "moral" and "immoral" refer to feelings of approval and disapproval that society has conditioned us

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<sup>36</sup> Bodenheimer, *Reply to Kelsen*, *supra* note 15, at 340-41.

<sup>37</sup> *Id.* at 346-47 (discussing universally prescribed norms of human behavior).

<sup>38</sup> Bodenheimer, *Natural Law*, *supra* note 15, at 40-41.

<sup>39</sup> *Id.* at 41-42.

<sup>40</sup> *See id.* at 49.

to experience upon performing or witnessing certain kinds of actions. The rationale for the conditioning is not that human actions can be intrinsically moral or immoral but rather that some of them disrupt social life.<sup>41</sup> But Bodenheimer argues for more than that. His position, clear enough from the above, is that the goal of human fulfillment, which is to say, the development of the intellectual, moral, and aesthetic potentials of human nature, is desirable, (i.e., *good*) and its opposite undesirable, (i.e., *bad*).<sup>42</sup> He goes so far as to say that individuals have a moral responsibility to use their free will to actualize their human potentials.<sup>43</sup> Not only does human fulfillment require a life in a *civilized* society, individual fulfillment is inextricably tied to what he calls "civilization-building."<sup>44</sup>

By positing human flourishing and civilization-building as the goals of human striving, Bodenheimer advances a teleological argument for natural law which locates it in the tradition starting with Plato<sup>45</sup> and including Aristotle, Thomas Aquinas and, in the present century, Jacques Maritain, Yves Simon, and John Wild.<sup>46</sup> When he uses the term "human nature," he explicitly ties it to the

<sup>41</sup> See DAVID HUME, A TREATISE OF HUMAN NATURE 533 (L.A. Selby-Bigge ed., 1951).

<sup>42</sup> BODENHEIMER, TREATISE ON JUSTICE, *supra* note 8, at 262.

<sup>43</sup> BODENHEIMER, RESPONSIBILITY, *supra* note 4, at 62.

<sup>44</sup> See *id.* at 12-13.

<sup>45</sup> Rommen would begin that tradition with Heraclitus. ROMMEN, *supra* note 21, at 5-8.

<sup>46</sup> Compare BODENHEIMER, RESPONSIBILITY, *supra* note 4, at 13, 120-35 (An individual has an "obligation to promote the values of human civilization in its technological and cultural aspects.") with JOHN WILD, PLATO'S MODERN ENEMIES AND THE THEORY OF NATURAL LAW 143 (1971) ("We have already called attention to the tendential character of all finite existence. Each being is incomplete and tending toward fulfillment or good."); ROMMEN, *supra* note 21, at 171 ("The teleological conception, grounded in the metaphysics of being, is therefore the goodness of the essential unity of being and oughtness, of being and goodness."); JACQUES MARITAIN, MAN AND THE STATE 86 (1957) ("[T]here is, by the very virtue of human nature, an order or a disposition which human reason can discover and according to which the human will must act in order to attune itself to the essential and necessary ends of the human being. The unwritten law, or natural law, is nothing more than that."); SIMON, *supra* note 33, at 47 ("Wherever there is nature there is direction towards a state of accomplishment, and in order to get rid of teleological considerations mechanism has first to replace nature by something, e.g., extension.").

Greek word for "nature," *phusis*.<sup>47</sup> The conception underlying that term sees nature itself as teleological: a striving for fulfillment (*hormé*) is attributed to all natural entities, including human beings. What allows an entity to actualize the potentials of its determinate nature, its essence, and thereby to attain its perfection (*telos*) is natural and therefore good or desirable; what frustrates its actualization is evil or undesirable.<sup>48</sup>

Yet, despite being both conversant and sympathetic with the aforementioned natural law theorists, whose positions manifestly depend on the view of nature as *phusis*, Bodenheimer, although referring to it, does not exploit it in presenting his own theory. In the following Part of this Essay, that omission will be attributed to his understanding of the scope and limits of human reason. Nevertheless, the notion of *phusis* is implied throughout his writings and especially in his dismissal of the view that all human drives, both constructive and destructive, are "natural" and hence are all morally neutral. Consider, again, his claim that legal systems that diverge from the moral postulates of the natural law will suffer crises and ultimate collapse unless they return to a natural law foundation. Such admonitions presuppose a division between actions that are natural and unnatural insofar as they imply that laws which harmonize with the former maintain and enhance the social institutions that human beings need for their flourishing while those that do not destroy them.

Finally, Bodenheimer can fairly be regarded as a minimalist natural law thinker, for he recognizes only a few genuine natural law norms, including those already cited, such as respect for human life. Thus, even though he thinks justice the most important of the moral and social norms, he writes:

the words "justice" and "natural law" should not be used as synonyms. The natural law forms merely the rock bottom layer of a system of justice, comprising those minimum standards of fairness and reasonableness without which there can be no viable order of law. The concept of justice, on the other hand, also includes norms and principles which a particular political and social system regards as just, whether or not these norms and principles have found express recognition in a formalized source of law. Finally, there is a third and top layer, consisting of

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<sup>47</sup> Bodenheimer, *Natural Law*, *supra* note 15, at 42-43; *see supra* note 2 and accompanying text (discussing *phusis*).

<sup>48</sup> ARISTOTLE, *Physics*, Book II ch. 1, in *THE BASIC WORKS OF ARISTOTLE* 236-38 (Richard McKeon ed., R.P. Hardie & R.K. Gaye trans., 1941).

blueprints for a better and more ideal order which the positive law of the state has fallen short of achieving.<sup>49</sup>

Not only does Bodenheimer see the content of natural law as minimal though foundational, he also acknowledges the incompleteness of our moral knowledge in any given historical period. Thus he refuses to accept the criticism that by claiming absolute principles for natural law, he endorses a system that obstructs progress. He insists, on the contrary, that the natural law is quite compatible with the imperatives of social progress. Their reconciliation is a matter of historical experience and auspicious socio-cultural conditions, including the increase in scientific knowledge, all of which confer a fuller, more accurate understanding of basic values, such as respect for human life and justice.

## II. THE TENSION IN BODENHEIMER'S NATURAL LAW THEORY

It was noted in the Introduction to this Essay that Bodenheimer is heir to two conflicting intellectual influences: his formal understanding of the range of human reason is clearly that of scientific realism and, indeed, borders on the positivistic; yet, his theory of natural law presupposes a classical metaphysical and epistemological realism. In this Part, I will attempt to identify the areas in Bodenheimer's thought where that tension is strongest and show how it erodes his natural law theory.

The chief indication of Bodenheimer's scientific realism is his difficulty with the *fact/value* relationship. He insists that "probable validity" is the most that we can hope for when seeking rational justification for moral and social norms: science alone furnishes truth and certitude. Appealing to Kant's definition of "truth" as "the concordance of a cognitive insight with the object of cognition," Bodenheimer finds himself confronted with the difficulty of establishing a correspondence between the *ought* of a normative proposition and the *is* of reality, inasmuch as the object of the former is an *ought* not an *is*. In a factual statement, such as "snow is white," there is a correspondence between the statement and "the facts of ontological reality." But statements involving an *ought*, such as "life on this earth ought to be continued" or "indiscriminate killing is evil," have no corresponding reality; instead,

[t]hey refer to values, which are non-material configurations, and (enhancing the element of ideality) they point not to values which have found an actual realization, but to valuable aims

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<sup>49</sup> BODENHEIMER, JURISPRUDENCE, *supra* note 8, at 222.

which, in the opinion of the person making the statement, *should* be pursued and attained. Such value judgments cannot be verified by showing that they conform to the facts but, if at all, can be validated only by offering rational and plausible arguments, based to the greatest possible extent on empirical data, which are so convincing and so superior to potential counter-arguments that reasonable men are prone to accept them and act upon them. Value judgments substantiated in this fashion may be claimed to be "valid" or "right," while the opposite judgments may be asserted to be "invalid" or "wrong."<sup>50</sup>

Thus, according to Bodenheimer, if normative statements can be validated at all, it is by fashioning arguments that are "rational and plausible" and which are, as much as possible, based on empirical data. The statements that form the conclusion of such arguments can be called "valid" or "right," their opposites "invalid" or "wrong."

It is clear from the above passage that, although acknowledging the radical difference between fact and value, Bodenheimer does not wish to dichotomize them. He holds, on the contrary, that values are grounded in and shaped by facts. For example, the natural and social sciences can lead to the repeal of racist legislation by showing that there is no evidence to support claims that the members of the disfavored race are inferior, or the repeal of legislation that deprives women of voting rights by showing that women have the same education as men and that there is no evidence for supposing them inferior in intelligence.<sup>51</sup>

Nevertheless, Bodenheimer's success in avoiding the dichotomizing of facts and values is questionable. He regards social philosophy, including the philosophy of ethics and law, as somewhere between the realms of science and religion, although, more often than not, it is closer to the former than the latter. But proximity to science is apparently as close to intellectual respectability as philosophy can come, for in science alone do we insist on "certainty of proof" wherever we can.<sup>52</sup> The probable validity of a conclusion is the best that philosophy seems to be able to offer us. What we strive for in social, moral, and legal philosophy, therefore, is "a strong possibility of correctness buttressed by an impressive array of well-developed reasons [that] will sometimes pass muster before the critical judgment."<sup>53</sup>

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<sup>50</sup> BODENHEIMER, *TREATISE ON JUSTICE*, *supra* note 8, at 52.

<sup>51</sup> *Id.* at 53, 85.

<sup>52</sup> *Id.* at 55.

<sup>53</sup> *Id.*

But surely Bodenheimer wishes to say more than what phrases like “strong probability of correctness,” “probable validity,” and “arguments so convincing and so superior to potential counter-arguments that reasonable men and women accept them and act upon them” indicate. Such phrases seem more suited to statements based on contingent data; for example, “If the Federal Reserve Bank raises interest rates, inflation will decline” or “Oat bran in the diet lowers cholesterol levels.” There is something odd about the position that the best arguments in support of normative statements like “indiscriminate killing is evil” are in the same category. That would imply that acceptance of such a normative statement does not preclude the possibility that, in the end, it may be false, that indiscriminate killing may not be evil after all. Yet Bodenheimer insists that no reasonable person would accept such a conclusion. After all, what would count as evidence justifying that reversal? The discovery of new data, such as what led to the conclusion that oat bran possesses therapeutic powers or to the discovery of black swans in South America, which falsified the long-standing belief that all swans are white?

The assertion that imputes cholesterol-lowering powers to oat bran belongs to a class of statements that are not intended to be true in every case but rather to possess statistical validity: in the groups of people studied, significant numbers of those who regularly ate oat bran had lower levels of cholesterol than those who did not include it as a regular part of their diet; however, the assertion does not imply that there will not be avid oat bran-eaters with high levels of cholesterol. It is thus an inductive generalization the validity of which is based on statistical frequencies.

As noted in the prior Part, Bodenheimer does say that, rather than signifying absolute laws, universal moral norms resemble statistical laws in that they hold in the large majority of instances. But it was pointed out that he seems there to be referring to the problems connected with applying universally valid principles to variable, concrete situations, which call into play other, different principles, without denying the absoluteness of the former ones.

In principle, the correlation between oat bran and cholesterol levels is liable to change because of the presence of hidden variables among the study's subjects. The assertion that falsifies the statement, “All swans are white,” belongs to a class of statements that depends on contingent data, for there is nothing in the concept of a swan that necessitates its being one color rather than another; thus such statements are not *necessarily* true but are in

principle falsifiable, pending whatever data may be waiting over the horizon.

There is ample evidence that Bodenheimer would not agree that universal norms belong to either class of statement. He clearly intends more than what the phrases "strong probability of correctness" and "probable validity" indicate. These phrases cannot be reconciled with passages like the following, which appear frequently enough in his writings:

Who, for example, would be willing to defend the thesis that the protection of life, limb, and property against crime should be left to the individual rather than entrusted to government, or that in the administration of the legal system integrity and honesty on the part of judges should be discouraged rather than fostered?<sup>54</sup>

[I]t can never be just for a man to torture an innocent child  
.....<sup>55</sup>

Justice is an absolute value in the limited sense that its opposite cannot legitimately form the chosen goal of social action.<sup>56</sup>

Those assertions cannot be squared with the view that normative statements do not warrant the status of *truth*, *certainty*, and *absolute-ness*. The first implies that its denial is unreasonable; the second baldly asserts that its moral injunction admits of no exceptions; the third states that justice has absolute components.

Bodenheimer cannot have it both ways. If it runs counter to reason to deny the validity and universality of some moral and social norms, that can only be because they are *true*, *certain* and *absolute*. It will not do to temporize by appending terms like "probable validity" to normative statements that one wishes to defend as universally binding. Bodenheimer's claim, "[I]t can never be just for a man to torture an innocent child," is a case in point. If he is willing to assert such universally binding injunctions, how does he reconcile that with the statement that normative propositions can properly lay claim only to "probable validity" and never to "truth"? By definition, "probable" means "uncertain," so that the statement, "X has probable validity," implies the statement, "X has probable invalidity"; it is merely a question of greater or lesser probability. But the statement, "[I]t can never be just for a man to torture an innocent child," asserts *certitude* and thus invites the preface, "It is true that . . . ."

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<sup>54</sup> *Id.* at 259.

<sup>55</sup> *Id.* at 260.

<sup>56</sup> *Id.*



If "It can never be just for a man to torture an innocent child," then the statement, "It can sometimes be just to torture an innocent child," is false. For in the case of two mutually contradictory statements, one must be true and other false; there is no third possibility since mutually contradictory statements exhaust the whole gamut of possibility.

But Bodenheimer's instinctive sense that such normative statements are universally, absolutely, and certainly true collides with his position on the *fact/value* question. Although he resists the view that the two realms are dichotomized, arguing, on the contrary, that values are grounded in facts, the dichotomy persists in dogging him. His conception of the boundaries of human knowledge leaves him no choice but to restrict the terms "truth" and "falsity" to statements of fact. But if normative statements cannot be true, then their connection with factual statements can be no more than rhetorical and, like it or not, they are dichotomized. What could be the bridge between the realm of the true and the realm of the probably valid? Between statements that have a corresponding object in reality and statements that do not? If it means anything to say that values are grounded in facts, there must be an identity of terms indicating an ontological continuity between thought and thing.

An examination of Bodenheimer's prose reveals that his defense of natural law carries him to the very threshold of continuity, but his scientistic realism bars him from going further. For when he speaks of "facts," the examples he uses are drawn from the empirical data that the sciences furnish, data that consist in measurable, which is to say, material or physical, properties of things rather than their ontological structure. The science of biology, for example, provides important information about human beings, but among that information no evidence can be found to support the claim that human beings possess a special dignity or a claim to rights.<sup>57</sup>

Recall the juxtaposition Bodenheimer makes between the statements "snow is white" and "indiscriminate killing is evil." In the former statement, there is a correspondence with the "facts of ontological reality," whereas in the latter statement, a corresponding reality is, according to him, absent. But something else is missing; namely, statements about the ontology of human beings, such as "A human being by nature is rational and autono-

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<sup>57</sup> RAYMOND DENNEHY, *REASON AND DIGNITY* 5-27 (1981).

mous and therefore a being possessing rights and worthy of respect"; or "a human being, as rational and autonomous, is by nature self-governing." The latter statements belong in the same realm as statements like "snow is white," insofar as they, too, are assertions about reality, in this case the reality of men and women. Yet, although Bodenheimer frequently appeals to descriptive claims about human nature as the basis of moral and social norms, he stops short of an exploration of human ontology. Had his philosophical presuppositions not persuaded him that a true and certain knowledge of reality is the exclusive preserve of the sciences, he might have seen a clearer path to grounding those norms in the reality of human nature.<sup>58</sup>

How close Bodenheimer comes to that ontological grounding is apparent in his discussion of justice. As noted earlier, he writes that "[j]ustice is an absolute value in the limited sense that its opposite cannot legitimately form the chosen goal of social action."<sup>59</sup> Elsewhere Bodenheimer is more specific, indicating that absolute value is the "readiness to give everyone his due." Where he says, "In this sense justice denotes, above all, *an attitude of the mind*,"<sup>60</sup> he does not mean that the demand for justice is a characteristic associated with the peculiar structure of the human mind and thus lacks any basis in reality. Bodenheimer does say that "the feeling for justice is innate in the child and deeply rooted in its sense of personality."<sup>61</sup> But by that he means only that all human beings, from childhood on, rebel against what is "unequal by caprice." For he adds, "Such reactions are neither 'subjective' nor 'irrational,' but reflect objective conditions of human nature with which those who lay down the law for any social group must reckon."<sup>62</sup>

That appeal to the objective imperatives of human nature presupposes an ontology undergirding the "readiness to give everyone his due." The obligation to pay what is due to another presupposes that there is something distinctive about human beings that entitles them to be treated in certain ways and not to

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<sup>58</sup> For instance his appeal to biology to refute the claims of racism is well taken, but he never appeals to philosophy's claims for human equality. See, e.g., BODENHEIMER, *TREATISE ON JUSTICE*, *supra* note 8, at 52-53.

<sup>59</sup> *Id.* at 260.

<sup>60</sup> Bodenheimer, *Reply to Kelsen*, *supra* note 15, at 350.

<sup>61</sup> *Id.* at 351.

<sup>62</sup> *Id.*

be treated in other ways. Without that ontological basis, the emphasis on equality in justice has no connection with reality.

Thus, contrary to Kelsen's assessment, the natural law conception of justice is not deduced from the idea of equality.<sup>63</sup> If I attend to one-half of my lawn by watering and fertilizing it while ignoring the other half, I cannot reasonably be accused of injustice for my unequal treatment of the two halves. Nothing in a blade of grass contains the basis of a right and thus of a corresponding duty determining the manner in which it ought to be treated. If, however, I feed one of my four children while refusing to feed the other three, I am guilty of injustice. But the injustice is not that I have treated my children unequally but rather that I refused to honor the right of *each* of the other three to adequate nourishment. If one child has a right to food because he or she is a human being, then each of the others has a right to food if he or she is a human being.

Equality is an imperative of justice when it is a matter of dessert or of opportunities required for self-fulfillment, but even then the demand is premised on the distinctive needs of human beings. Given adequate resources, everybody ought to have an equal opportunity for education, employment, and health care; everyone of legal age, who is not under punishment for a felony, ought to have the opportunity to vote. All such rights flow from a single ontological source—the rational, autonomous nature of human beings.

The problem with trying to deduce rights from the abstract idea of equality is not that the concept is too broad and indiscriminate in its embrace but that, absent an ontology that grounds moral categories, the demand for equality is merely a logical dictate. The concept of paying another her due is not implied in the concept of equality; rather, the latter concept is implied by the former. The rule for equality of application can be formulated thus: "Of things that are essentially identical, what applies to one of them in its essentially defining quality necessarily applies to all of them." For example, any theorem that applies to the concept of triangle as such necessarily applies to any polygon that is a triangle, regardless of its kind, that is equilateral, isosceles, or scalene. But to violate that theorem is to violate the laws of logic,

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<sup>63</sup> HANS KELSEN, *GENERAL THEORY OF LAW AND STATE* 439-41 (Anders Wedberg trans., 1961).

not morality or justice. One is not morally obliged to treat all polygons equally.

Since the logic of the above formulations is universal, pertaining to all things that are essentially identical, it applies to human beings. That the failure to observe it in human affairs is a violation of morality as well as logic flows from the peculiar ontology of a human being. Thus any right that belongs to a human being *as such* necessarily belongs to every human being. So much for the *logical* application. To say that a human being *ought* to be treated in a certain way, however, is to say that specific things are due him or her. In other words, the foundation of justice belongs to a different category from that of equality and, in human affairs, is antecedent to it. It is the ontological category of *human beingness* that furnishes the grounding rationale for the primary principle of justice: "Pay each his or her due."

As noted, that principle is the component in justice that Bodenheimer regards as absolute; also noted were his frequent appeals to the universality and constancy of human nature and its drives. Yet, for all that, Bodenheimer shies away from denominating any moral norms as "true" or "certain," even though his own assertions on behalf of them imply the applicability of those terms. The latter point derives additional support from the above argument that to insist that each person is to be paid his or her due is to affirm a reality about human beings. If that reality is universal and constant, why would Bodenheimer not acknowledge it as a "truth" or "certitude" about human beings that rationally justifies the bedrock principle of justice?

The answer can be found in the epistemology underlying Bodenheimer's problematic stance on the *fact/value* question. Despite his rejection of the dichotomizing of facts and values, his attempt to show that the latter are grounded in the former collapses under his argument that only science can provide statements that are true and certain, while the best that philosophy can hope for is "probable validity." For him the reason for that discontinuity, it will be recalled, is rather straightforward: while statements like "snow is white" have a corresponding reality, normative statements like "indiscriminate killing is evil" do not.

But the discontinuity becomes critical when Bodenheimer tries to bridge the gap between the absolute component that he attaches to justice and its relative, contingent components. The primacy that he assigns to justice as a moral and social norm coupled with his clear sensitivity to the variability of the circum-

stances that justice must address and with the changes in our understanding of what constitutes justice show how crucial his efforts at overcoming that discontinuity are to the coherence of his natural law theory.

Bodenheimer's claims that the absolute component in justice as expressed in the formula, "readiness to pay everyone his due," and the statement, "Justice is an absolute value in the sense that its opposite cannot legitimately form the chosen goal of social action," are problematic. In his concept of nature as *physis*, which Bodenheimer uses yet leaves untapped, lies a philosophical realism that maintains that normative statements do have a corresponding reality.

### III. PHILOSOPHICAL REALISM AND THE METAPHYSICAL STRUCTURE OF NATURE AS PHYSIS

The philosophical realism referred to in this Essay as the foundation for the teleologically oriented natural law theory that Bodenheimer espouses can be reduced to three basic claims: (1) there is a world and things that make up that world which exists independently of human knowledge or endeavor; (2) the human mind can know the essential being of those things, albeit not perfectly, but truly and certainly; (3) it is from that knowledge that objective, universally binding norms of human conduct are derived.<sup>64</sup> To know the essential being of things is to know them on their primary, ontological level; for all things are reducible to being insofar as being is that which is, either actual (the green tree outside my office window) or possible (my seventh grandchild). Knowledge of a thing as being depends, however, on our knowing two fundamental aspects of it: what it is (its essence) and that it is (its existence, either possible or actual).<sup>65</sup> There is no such thing as a generic reality; what would it look

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<sup>64</sup> This is a variation of the realist platform as set forth by John Wild. JOHN WILD, INTRODUCTION TO REALISTIC PHILOSOPHY 6 (1948). Implied in that platform is the foundational principle of epistemological realism: Things are the measure of mind; mind is not the measure of things. See Raymond Dennehy, *The Ontological Basis of Certitude*, 50 THE THOMIST 121 (1986).

<sup>65</sup> For example, from a distance I see chalk marks on the blackboard; as I get closer to the board, I see that the chalk marks form a configuration of some kind; as I get yet closer, I see that the configuration is an equilateral triangle.

like? How would one know about it without knowing some of its characteristics?

The ability to grasp a thing in terms of its essence and existence is the ability to grasp what cannot be expressed in terms of material properties. To know, for instance, that Jane is a human being is, indeed, to know her in terms of her physical properties, but it is also to know more than them. What physical property or set of properties constitutes humanness? In contrast, scientific realism, because it accepts the data and methods of science as the standard of our knowledge of reality, is confined to the physical properties of things in its inquiries. That is why no physical or social science can provide a rational justification for claims about human dignity and rights. It is also doubtless one of the reasons why Bodenheimer's argument for basing values on facts is confined to scientific data.

With regard to essence as nature, a distinction must be drawn, for a significant difference separates the conceptual and the real worlds from each other. The inhabitants of the former are abstract and static, while those of the latter are concrete and dynamic. It is accordingly necessary to note two ways of looking at essence: as formal definition and as nature. In the former case, essence does not change; consider a triangle: triangularity itself neither comes into existence nor passes out of existence, nor does it grow. Drawing a triangle on the blackboard does not count as an instance of "triangular development" since what thereby comes into existence is a particular representation of triangularity, not triangularity itself. In the latter case, that of the real world, essence is dynamic: a rose seed, for example, does not stay a rose seed; it either develops into a rose bush or it atrophies.

The conception of essence as a nature may be summed up as an inherent, dynamic striving for fulfillment (*phusis*).<sup>66</sup> The specific kind of striving that an entity displays (*hormé*) is determined by its specific nature; for example an acorn develops into an oak, a pollywog into a frog, a human baby into a human adult.<sup>67</sup> Thus the dynamism that conception ascribes to nature, although accompanied by randomness, is essentially purposive or teleological. The acknowledgement that natural entities strive for fulfillment means

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<sup>66</sup> ARISTOTLE, *Physics*, Book II ch. 1, *supra* note 48, at 236-37; *see supra* note 2 and accompanying text (discussing *phusis*).

<sup>67</sup> ARISTOTLE, *Metaphysics*, Book V ch. 4, *supra* note 2, at 756; ARISTOTLE, *Physics*, Book II ch. 8, *supra* note 48, at 249.

that they change. But change is a phenomenon whereby a thing surrenders some characteristic or set of them in favor of another and yet in an important sense stays the same. In other words, change is not "creation," whereby a thing comes out of nothingness, or "annihilation," whereby it goes into nothingness. The ontology behind nature as *phusis* accordingly sees the being of the things that populate the universe as composed of a principle of *actuality* and a principle of *potency*. The former accounts for the present reality of the thing, the latter for its capacity to undergo modification.

From repeated experiences of particular entities, we acquire an increasingly fuller knowledge of them. As Aristotle observed, "[A] child begins by calling all men 'father,' and all women 'mother,' but later on distinguishes each of them."<sup>68</sup> By the same principle, animal breeders come to know which stock is desirable for breeding; they have learned to discriminate good horse flesh from bad because they have acquired an understanding of that nature which we call "horse."<sup>69</sup> That understanding includes not only a knowledge of the horse's capacities but also which capacities are more desirable than others. Such discernment is possible because knowing *what* a thing is, or acquiring a knowledge of its essence, also furnishes a knowledge of its *telos* or perfection. Thus the essence of a natural being, its *phusis*, is at once *real* and *ideal*, and the latter is grounded in the former. The fact that a being is actual does not mean that the potencies inherent in its nature are completely actualized. As long as it remains incompletely actualized, it has not realized its *telos*.

Nominalists will, of course, deny the premise that things really possess essences or natures. In his riposte to them, Bodenheimer correctly points out that the universality of patterns of behavior leads to the conclusion of a common human nature.<sup>70</sup> Further support for his position can be found in three examples from recent history: woman suffrage, the Nuremburg Trials, and the civil rights movement. It is not in the first instance wrong to deny the vote to people because they are women; it is not wrong, in the first instance, to imprison, torture, and murder people because they are Jews; it is not wrong in the first instance to violate people's civil rights because they are African-Americans or members

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<sup>68</sup> ARISTOTLE, *Physics*, Book I ch. 1, *supra* note 48, at 218.

<sup>69</sup> MARITAIN, *supra* note 46, at 87.

<sup>70</sup> Bodenheimer, *Natural Law*, *supra* note 15, at 42.

of other minority groups. It is because women are human beings that it is wrong to deny them the vote; it is because Jews are human beings that it is wrong to imprison, torture, and murder them; it is because African-Americans and other minority members are human beings that it is wrong to deny them their civil rights. There is a spectacular inconsistency in the thought of a nominalist who is a civil rights worker.<sup>71</sup>

It can be said, that it is "good" for a thing to attain the fulfillment dictated by its nature and "evil" for it to miss the mark. Some will object to the use of "good" and "evil" to describe occurrences outside the domain of actions flowing from free will, but that can be explained in terms of conventional connotation. Those terms have in fact traditionally been used to indicate ontological goods and evils.<sup>72</sup> Has not a being, a dog for instance, whose natural faculties include that of sight, but is, in fact, blind suffered an evil insofar as its blindness constitutes a privation? And is it not "good" for the flower to find the sunlight?

"Good" and "evil" assume a moral meaning at the level of beings possessed of free will. An agent must take responsibility for actions that he or she freely performs. Admittedly to acknowledge free will is not to commit oneself to the position that one is totally free and absolute master of one's life and circumstances. But, although one is not always free to determine what one's circumstances will be, one is nevertheless free to decide how one will respond to those circumstances. And to be more or less autonomous is to be more or less self-perfecting. Human beings accordingly can and ought to take the actualization of their nature into their own hands. Bodenheimer himself emphasizes a human being's responsibility to use his or her freedom to actualize the potencies of his or her nature.<sup>73</sup>

But when he claims that normative statements lack a corresponding object in reality, he is in conflict with the metaphysics underlying his use of nature as *phusis*. Even on the latter premise, however, there is a sense in which his claim is partly true. For he quite correctly observes that *ought* statements, such as "You ought to protect the helpless," refer to values that are only "ideals"

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<sup>71</sup> See YVES R. SIMON, *PHILOSOPHY OF DEMOCRATIC GOVERNMENT* 144-94 (1951).

<sup>72</sup> See SAINT AUGUSTINE, *CONFESSIONS*, Book VII ch. 12-15 (Henry Chadwick trans., 1991) (providing *locus classicus* for the argument for "natural" goods and evils as opposed to moral goods and evils).

<sup>73</sup> BODENHEIMER, *RESPONSIBILITY*, *supra* note 4, at 62.



insofar as they have not yet been realized. Descriptive statements, on the other hand, such as "snow is white" or "the earth revolves around the sun," have as their objects things that exist prior to them; they are so whether anyone knows it or not.

On the premise of nature as *physis*, however, the ideal urged by the *ought* statement does not belong to a realm severed from reality nor is it a pure ideal; thus Bodenheimer's claim is also partly false. The ideal is grounded in the nature of the actual human being, which is the essence *as actualized*; the ideal is simply the essence *as potential*, which is to say, the same essence insofar as it is not yet fully actualized. The striving (*hormé*) of a natural being for fulfillment is its stretching to become more fully what it is already rather than what it is not. As stated earlier, Bodenheimer stands at the very threshold of the philosophical realism underlying that notion of nature, as is evidenced by his repeated claims that human choosing and legal systems derive their justification from the goal which they make possible, namely human flourishing and civilization-building.

At this point one would like to be able to say that the above explication dissipates the tension in Bodenheimer's natural law theory by bringing to the surface the philosophy that is consistent with it. After all, he thereby has at hand a rational justification for such claims of his as "[I]t can never be just for a man to torture an innocent child." The conception of essence as a nature (*physis*), and thus as at once real and ideal, abolishes the dichotomy between fact and value. That should give Bodenheimer the rationale for what he apparently wishes to do, but does not draw on the philosophical wherewithal to do, when he argues that the normative statements supporting the legal systems of civilized societies are derived from the nature that human beings have in common. In short, it enables the derivation of an *ought* from an *is*. Human nature as at once real and ideal is the ontological basis for asserting that normative statements are "true" or "false," for it shows that they have a corresponding object, namely, human nature.

But "corresponding object" bespeaks the second difficulty, alluded to earlier,<sup>74</sup> showing that the duality in Bodenheimer's thought must be addressed as an epistemological problem as well as an ontological one. This becomes clear as he struggles to

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<sup>74</sup> See discussion *supra* part II.

bridge the gap between the absolute, universal idea of justice and the contingent, relative circumstances of the real world.

The problematic nature of Bodenheimer's claims that "readiness to pay everyone his due" is the absolute component in justice and "justice is an absolute value in the sense that its opposite cannot legitimately form the chosen goal of a social action" emerges in his *Treatise on Justice* where he advances what is perhaps his most sustained attempt to harmonize the idea of justice with the contingencies of practical life.<sup>75</sup> Here, as elsewhere,<sup>76</sup> he insists that justice is not reducible to "subjective reactions," as the logical positivists claim, while at the same time he acknowledges that the concept is conditioned by "external and contingent factors." However, Bodenheimer also rejects the Platonic view, advocated by thinkers like Scheler and Hartmann, that values, including justice, are "ideal, timeless objects which exist independently of subjective human acts of valuation and are experienced through intuitive perception."<sup>77</sup>

For one thing, Bodenheimer points out that the contingent and dynamic aspects attendant on the concept of justice do not seem compatible with the conception of it as a timeless, unchanging, subsisting ideal. For another, value-realism cannot be defended on the strength of the manifestations of its essentially similar form among human beings; for that can be accounted for by the uniformity of the human psychic and mental structures. Again, value-realism elevates intuitive perception to the height of being the exclusive faculty for the discernment of values. Yet, certainly with regard to the value of justice, the nonintuitive methods of rational argumentation and the comparison of counterarguments play a predominant role.<sup>78</sup>

But if "a metaphysical hypostatization" of the concept of justice is not required to account for the notion of justice, what is? Here is Bodenheimer's answer:

Although we must recognize a general concept of justice apart from individual just actions, this general concept need not be thought of as having an existence independent of human consciousness. Concepts are constructions of the human mind which, by way of generalization, abstraction, or classification, reflect the realities of the material, psychological and spiritual

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<sup>75</sup> BODENHEIMER, *TREATISE ON JUSTICE*, *supra* note 8, at 261.

<sup>76</sup> Bodenheimer, *Reply to Kelsen*, *supra* note 15, at 351.

<sup>77</sup> BODENHEIMER, *TREATISE ON JUSTICE*, *supra* note 8, at 260.

<sup>78</sup> *Id.* at 261-62.

modes of being. This is the position of conceptualism, which can be conveniently employed in the analysis of justice.<sup>79</sup>

With this passage Bodenheimer would solve the problem of reconciling justice as an absolute, universal idea with the concrete instances of human affairs where we might suppose that justice would apply. But in fact what he has done is destroy the bridge between the mind and the world. Conceptualism seeks to strike a mediating position between nominalism and realism by maintaining that

different individuals cannot indeed share a common nature, because no common natures but only individuals exist, but that nevertheless we form concepts which somehow correspond with each of a number of individuals, and by their means we are able to have a general knowledge, i.e., (on this view) knowledge about an unlimited number of individuals at once.<sup>80</sup>

According to this passage, our concepts are *representations* of things; the object of our knowledge is thus the concept or representation, not the thing that is supposedly known. If concepts are mental constructions, there is no way of telling how faithful they are to the things they represent; and *a fortiori* Bodenheimer is in no position to know if the absolute, universal concept of justice, which he so greatly prizes, has anything in common with the concrete instances of human relations where one would suppose that justice applies. This discontinuity seriously compromises his attempt to ground the absolute component of justice in reality. How can he avoid the charge of the logical positivists that the "absolute, universal" concept of justice is no more than an empty logical shell whose meaning depends on subjective responses and culturally relative interpretations?

More devastating yet, Bodenheimer's conceptualism vitiates whatever success he has attained in grounding values in reality. He has argued vigorously that the evidence is overwhelming in favor of the reality of a common human nature.<sup>81</sup> But as long as he holds that ideas are constructions of the mind, he has no final answer to the Kantian-like objection that we know reality only in

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<sup>79</sup> *Id.* at 262.

<sup>80</sup> H.W.B. JOSEPH, AN INTRODUCTION TO LOGIC 32 (2d ed. rev. 1950). In a footnote Bodenheimer cites this text, presumably as mirroring his own view, though Joseph himself rejects conceptualism in favor of moderate realism. BODENHEIMER, TREATISE ON JUSTICE, *supra* note 8, at 262.

<sup>81</sup> See Bodenheimer, *Natural Law*, *supra* note 15, at 45; BODENHEIMER, TREATISE ON JUSTICE, *supra* note 8, at 114.

terms of the way our mind organizes the data of sensation according to its own logical forms and rules. Specifically, the dignity and value that we have traditionally assigned to human beings is reduced to the status of an imposition dictated by the peculiarities of the human psyche. But, as noted already, Bodenheimer rejects that interpretation.

The problem of relating concepts to things is created by the problem of universals, remarked on earlier. How are the universal concepts of our knowledge to be reconciled with the concrete, particular things of the outside world, which are the putative objects of that knowledge? The answer advanced by Thomas Aquinas, and seconded by contemporary natural law theorists like Yves Simon,<sup>82</sup> offers an approach which, if incorporated into Bodenheimer's theory, would provide him with a rational justification for the connection between the universal component of justice and its concrete instances, between its absolute component and its historically and socially conditioned ones. Given Bodenheimer's approval of the natural law theories of Aquinas and Maritain, it seems fair to bring what those theories presuppose into the discussion.

Aquinas points out that neither universality nor particularity is part of the essence or nature of anything (except, of course, the essence of universality and particularity). An examination of the concept of human being, for example, reveals many components: rationality, free will, capacity to laugh, learn, and teach, but not universality or particularity. These latter components are, he says, acquired by the conditions requisite to existing in a certain modality. Human nature, as embodied in real human beings, exists according to the conditions of the existent, namely, as concrete and particular; when residing in the intellect as an abstraction from the concrete, particular thing, it exists there according to the conditions of the intellect, namely as abstract and universal.

To understand how that approach establishes the ontological bridge between the universal idea and the concrete particular, it is necessary to see universality and particularity for what they are—existential accompaniments of the essence or nature, not essential parts of it. Otherwise the idea, justice itself in this case, is nothing but an empty logical shell and its application to concrete cases

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<sup>82</sup> THOMAS AQUINAS, ON BEING AND ESSENCE 45-50 (Armand Maurer trans., 1968); SIMON, *supra* note 71, at 144-94.

becomes increasingly ambiguous and arbitrary. The abstract universal and the concrete particular would then form dichotomous realms; as abstract and universal, the idea acquires the status of the a priori—independent in its nature from the things of the world; it is absolute, static, and univocal in meaning, whereas real things are relative, contingent, and multifaceted in their meanings. But, according to the moderate realism of Aquinas' view, the essence of justice logically precedes universality and particularity. As such, it possesses the wherewithal to unify thought and thing since the universality of the idea is simply the mind's expression of an essential component of human relations.

That the approach of moderate realism furnishes the ontological foundation for doing what Bodenheimer clearly wishes to do, namely, to infer absolute, universal statements about justice from the nature of human beings and their relationships, evinces itself in the following considerations: (1) He argues that there is a common human nature, as evidenced by universal patterns of human behavior, which patterns are not only transcultural but transhistorical as well; (2) he argues that moral and social norms, which are the foundation of legitimate legal systems, are derived, in some sense, from that common human nature;<sup>83</sup> (3) from those two premises, it is plausible to infer that Bodenheimer seems to hold that human nature does not change, although our knowledge of it changes as a result of social and historical experience, which includes progress in scientific knowledge; (4) therefore, if human nature is unchanging and universal, and if the thing (an individual man or woman in this case) and the idea of it are but two different modes of the one nature, then that is the ontological bridge enabling the derivation of absolute, universal moral and social norms from a knowledge of that nature.

The fourth consideration escapes the clutches of Platonism<sup>84</sup> because the unchanging universal properties it attributes to essence or nature do not rest on any claims that it enjoys its own

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<sup>83</sup> Bodenheimer, *Natural Law*, *supra* note 15, at 45; Bodenheimer, *Reply to Kelsen*, *supra* note 15, at 346-48; BODENHEIMER, *TREATISE ON JUSTICE*, *supra* note 8, at 114.

<sup>84</sup> Plato held that scientific and philosophic inquiry is concerned with the supraphysical realm of purely logical entities such as: beauty, equality, goodness, justice, truth, as well as mathematical propositions, entities that are timeless and unchanging. PLATO, *The Republic*, Book VI, in *THE COLLECTED DIALOGUES OF PLATO* 721 (Edith Hamilton & Huntington Cairns eds., Paul Shorey trans., 1985).

existence. Human nature itself does not exist. What exists are individual men and women. Human nature exists only as the essential structure of individual human beings or as an idea in the mind of the knower that has been abstracted from individuals. The immutability and universality that pertain to human nature, as to all essences, mean only this: in spite of all the differences among individual human beings, the latter are nevertheless essentially human. Truly, they are more or less intelligent, industrious, healthy, and talented, but it makes no sense to say that they are, or can be, more or less human beings. Unlike those attributes, human beingness does not lend itself to more or less, for, as the essential characteristic, it does not lend itself to degree. What would it mean, for example, to call a polygon "more" or "less" a triangle? It could be said that an adult frog is more of a frog than is a pollywog, but that would only be a manner of speaking. Living things possess an essence that is a nature (*a physis*), decreeing that they pass through stages of development as their potencies unfold enroute to full development, unlike the static, formal essences of mathematical entities. Yet, strictly speaking, a pollywog is not less a member of the frog family for all its immaturity; it was not its essence that underwent the changes but its being.

The racist would like us to think otherwise, but that is because racism presupposes nominalism. The denial of the reality of essences and natures allows the racist to conceive of human beings as mere clusters of individual properties, such as intelligence or robustness, and by arbitrarily seizing on one of them as primary, concludes that to possess more or less of it is to be more or less human.<sup>85</sup>

By establishing the ontological connection between the idea and the thing, the philosophical realism submerged in Bodenheimer's natural law theory is allowed to surface. The problematic nature of the relation he wishes to establish between fact and value is resolved and with it the difficulties that beset his efforts to determine the connection between justice, as an absolute, universal norm, and its application to the real world are resolved as well.

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<sup>85</sup> Raymond Dennehy, *Always the Metaphysician: Maritain's Ontology of Anti-Racism*, in *MARITAIN AND THE MYSTERY OF ISRAEL* (University of Notre Dame Press forthcoming 1993).

## IV. NATURAL LAW IN A CHANGING SOCIETY

Alongside his argument for absolute, universal norms, Bodenheimer displays a keen sensitivity to the contingencies and variations of the human situation. He repeatedly finds occasion to remark on the incompleteness of knowledge and the misconceptions that dog society in all its epochs. Trial by combat, for example, was supposed by medieval jurisdictions to be a reliable and just way to determine innocence and guilt; for centuries, the institution of slavery was the cornerstone of western society's economy; and only in the present century was legislation introduced that repealed laws that deprived women of the right to vote. Positive historical and social experiences, together with advancements in scientific knowledge, have unmasked the misconceptions underlying those and other similar practices. But between the mandates of social progress and the precepts of the natural law, Bodenheimer sees no incompatibility.

He says, for example, that the principle that we are to pay everyone his or her due is not falsified by the fact that in times past humankind entertained a naively optimistic confidence in God's readiness to ensure justice in criminal cases by guaranteeing that the innocent party in the combat would emerge victorious and the guilty one would suffer defeat. Nor is it falsified by the institution of slavery, in which human beings were used as mere instruments of another's enrichment or when, by denying women the right to vote, society kept one-half of its adult members in a perpetual state of childhood. The error was not in the fundamental conceptions of justice but in the machinery of adjudication and imperfect understanding of human nature and the latter's socio-political implications.<sup>86</sup>

To borrow Maritain's terminology, a distinction must be drawn in such cases between the *ontological* and *gnoseological* aspects of the natural law.<sup>87</sup> The former refers to what that law really is, what human nature is and what its drives for fulfillment are; the latter term refers to a people's understanding of them at any given historical moment. Obviously, the two aspects do not perfectly conform to each other. What a people sincerely believe to be moral action may in fact be immoral, as in denying women the vote.

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<sup>86</sup> See MARITAIN, *supra* note 46, at 89-90.

<sup>87</sup> *Id.* at 85-94; Raymond Dennehy, *Rescuing Natural Law Theory from the Rationalists: Maritain's Restoration of Credibility to Natural Morality and Natural Rights*, 10 VERA LEX, Winter/Spring 1990, at 14-16.

This approach harmonizes with Bodenheimer's view that we can progress in our moral knowledge as our scientific knowledge progresses. A progressively deeper understanding of human nature, as that knowledge has unfolded over generations and centuries, has yielded a clearer understanding of the meaning of paying everyone his or her due.

The supposition here is a fundamental premise of the philosophical realism underlying the traditional natural law theory: the understanding of the essentially human, just, and good is objective and certain, although a jungle growth of vagueness, misconception, and error surrounds it. Bodenheimer says as much when he points to the universality in the patterns of human behavior and uniformities of legal codes in civilized nations. It was argued in Part II of this Essay that the ontological knowledge that grounds ethical and social norms differs markedly from empirical knowledge, which yields statements such as "Oat bran lowers cholesterol" and "All swans are white." The latter is in principle under constant threat of falsification and replacement owing to its reliance on contingent data. The former, although the product of experiential knowledge, is a knowledge of the essential being of things.<sup>88</sup> And while it can deepen, thereby yielding implications

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<sup>88</sup> All knowledge of the world is contingent in the sense that there is nothing in things that necessitates their existence. The existence of Jane Smith is contingent, for her parents did not have to meet; they did not have to unite sexually; the 23 chromosomes from each did not have to combine as they did. But all these things did happen, so that her existence has a *contingent necessity*: since she does exist, she necessarily exists. Truly, if a white swan exists, it is necessarily a white swan; but it could have existed without being white since white is not an essential constituent of its being; and if Jane Smith is 5'5" tall, she is necessarily 5'5" inches tall; nevertheless she might have been taller or shorter. But she could not have existed as anything other than a rational, autonomous being, for these are essential constituents of human nature. Thus the knowledge of her essential being is a knowledge that is *necessarily* rather than contingently true. Equally, the imperative to treat her justly, which is based on that knowledge, is necessarily valid: as long as she exists, she necessarily exists as a human being; and as long as she exists, she must therefore be treated justly. Because the empirical sciences derive their knowledge from the measurable properties of things, and because such properties do not have to be bundled together in any necessary way, they attain a contingent knowledge. Philosophy, on the other hand, attains a necessary knowledge to the extent that it grasps the ontological, i.e., the essential beings of things. See Raymond Dennehy, *The Philosophical Catbird Seat: A Defense of Maritain's Philosophia Perennis*, in *THE FUTURE OF THOMISM* 65, 66-67 (Deal W. Hudson & Dennis W. Moran eds., 1992).



hitherto unseen, it is not dependent on contingent data. Bodenheimer is quite correct when he writes, "It can never be just for a man to torture an innocent child." Does one suppose that statement to be contingent, liable to falsification by the discovery of new data about human beings? Are the prohibitions against slavery and genocide contingent truths that may one day be shown to have been false? To echo Edgar Bodenheimer, no reasonable person would think so.

This approach simultaneously accommodates both absolute-ness and progress since our path to the ideal of human nature is asymptotic. No matter how humane or civilized a society, it can always become more so. Constrained, as we are, by the forces of space and time, our knowledge of things cannot escape historical and cultural conditioning. But if our social and historical experiences should prove auspicious enough to point our heads in the right direction, we can continue to move toward an ever deepening understanding of what it is to be a human being and accordingly disavow social, economic, and political institutions that prove inadequate as instruments for the realization of that clearer conception.

This approach is not rulebound or legalistic but rather, as Bodenheimer maintains, the natural law norms are minimal in number. Contrary to what the rationalist theorists of the enlightenment supposed, the moral law is not inscribed in human nature waiting transcription to the books of morals and jurisprudence. There are no moral laws contained in human nature. Rather, as Maritain argues,<sup>89</sup> each historical period confronts society with new challenges. How we meet them depends on society's understanding of human nature. Moral laws and principles are derived from our answers to the question, "Will the proposed action that I am about to perform (or the policy society is about to validate) lead me to my fulfillment as a human being or frustrate that striving?" If the answer is "yes," the action is moral; if "no," it is immoral. The trick is not only to harbor a correct view of human nature and its finalities. What is also needed is a fortuitous set of historical circumstances that challenge existing personal behavior and social institutions. Fortunately the latter follows from the former. It was a felicitous moment in the history of the West when the institution of slavery came under scrutiny.

Thus to agree that we can and will always learn more, so that

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<sup>89</sup> MARITAIN, *supra* note 46, at 88-89.

practices that we once supposed were moral and civilized are seen in the contrary light, is not to admit that the prescriptions of the natural law such as "Do not murder" or "Pay each her due," are falsifiable. Rather, progress in our understanding of the natural law is a matter of gaining a firmer grasp of those prescriptions and hence a better understanding of their application. A case in point is the broadening of our sense of what counts as unjustifiable homicide. Time was when the direct killing of innocent and noncombatant members of another clan, tribe, village, or nation was not considered an act of murder. But thanks to hundreds of generations of experience such homicide is now understood to be as murderous as that perpetrated against one's own people. The prohibition against murder is as valid as ever it was.

#### CONCLUSION

I cannot assume that Edgar Bodenheimer would agree with any of my proposed emendations. In their defense I can only repeat that they seem to reflect the philosophical realism that is consistent with his theory of natural law, whereas his manifest scientific realism does not. It also seems to me that the natural law was what was important to him.