AN HISTORICAL AND METAPHYSICAL STUDY OF NATURAL LAW THEORY APPLIED TO QUESTIONS OF FREEDOM OF EXPRESSION IN THE UNITED STATES

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Rev. Owen E. Finnegan, S. J.

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ABSTRACT

AN HISTORICAL AND METAPHYSICAL STUDY OF NATURAL LAW THEORY APPLIED TO QUESTIONS OF FREEDOM OF EXPRESSION IN THE UNITED STATES

by Rev. Owen E. Finnegan, S.J.

The purpose of this thesis is to develop through empirical investigation and historical study an ethic of the media of mass communication proper to the American political philosophy rooted as this is in natural law theory.

The empirical investigation proceeds along two courses: an analysis of the three basic ontological categories of essence, existence, and tendency as these are derived from experience; and an examination of relevant laws, practices, and codes of the media to the conclusion that the ethic is in the communications 'industry,' and can be discovered and explicated.

The historical study traces the theory of natural law through a complex of significant authors. And from a posture of verifiable criteria, an attempt is made to distinguish the several currents of natural law thinking that exercised discoverable influence in the political and philosophical formulations of the American experiment.

In its attempt to develop an ethic of mass communication proper to the United States, the thesis does not presume to detail a list of ethical directives for decision makers in the media. Rather, it essays

the task of demonstrating that an ethic of mass communications is a social ethic that can be used by men as a structure of standards rooted in the reality of experience and reflection to determine the objective goodness and/or badness of past, present, and future communications decisions.

The expression, American political philosophy, in this thesis is taken to mean the basic structure of the United States government in the account it makes of the nature of man, the nature of the state, and the nature of the relationship between man and the state.

Natural law theory functions as a framework throughout the investigation's attempt to inaugurate a meaningful and continuing discourse with the problems of total man as he endeavors to align himself, through information, with the dynamics of process in the world as it is.

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by

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CHAPTER I

INTRODUCTION

The phenomenon of information is as old as man, and as new as the urgency with which it puts its questions of rights and obligations to the age of the media of mass communication. Weiner defines it as "the content of what is exchanged with the outer world as we adjust to it, and make our adjustment felt upon it."[1] This will do, as a general definition, for the moment. However it may be conceived or defined, information is a man-involved thing, a basic human need, requiring study and understanding because it is a vital dimension of modern man. It is a premise of the present investigation that the phenomenon of information cannot be properly construed apart from the basis of its meaningfulness which is total man.

Neither biological man, nor psychological man, nor any other partial measure of man serves as a suitable focal point for the study of the dynamic reality of information. Rather soon, questions arise about the nature of man, the nature of the state, the nature of the relationship between man and the state, and the epistemological problems of truth and knowledge. Such questions are asked about man in his totality, in what he is and will be as man. This, at least, would seem to be the case, since the conscious subject of information is man in the concrete, really existent, moving with his multitudinous needs, drives, and purposes through time and space. And, he moves along his course with religious convictions and without them. He moves influenced by values, his own, and those of his environment,

sometimes affirming them, often denying them in practice. Total man, above all else, is in motion, moving constantly in an ever-changing world. The reality that he is, and towards which he tends is personal, domestic, social, and political, living and working out his destiny as best he may in the village he has made of the world.

Neither the nature of man nor his relationships to other persons, real and legal, have changed substantially in the age of mass media. Nor does information, as the report of events upon which these relationships depend, seem to be anything new. What is new may more clearly be seen, if Weiner's general definition of information can be brought into focus as a transportable package of facts and values rooted in the flux of reality that form man, change him, adapt him in his constant struggle for alignment with the world as it is, and as it becomes what it will be. This world is and becomes appreciably smaller as populations increase, and peoples become more and more interdependent. The mass media, in this view of the world, may then be conceived as both cause and effect of the new dimension of information with its current characteristics of velocity, quantify, and frequency.

The world as it was might be compared to a rather small airfield controlling its limited traffic of slowly moving bi-planes with a wind sock and an assortment of hand signals. The modern air terminal, as the world that is, contains the same essential ingredients, but there are many important changes. More people are flying in bigger and faster aircraft. These changes demand highly sophisticated traffic control procedures implemented by communication systems that must accurately and swiftly receive and transmit information in large quantity. The

consequences of a breakdown in the efficiency or in the responsible use of these communication systems seem sufficiently obvious.

Because the world in which he lives has become effectively smaller and faster in pace, man needs with an increasing urgency to be truthfully informed about public events and everything that impinges upon one or more of his roles in society.

Within each of the societies to which man belongs by nature, he will be seen in the course of this study to have obligations, duties to himself and to others. To fulfill these duties he must be possessed of rights some of which are his by nature, others which he acquires by enactment of positive law.

Since man is what he was, and, inchoatively, what he will be, a personal being of dynamic and tendential nature, often made manifest through what he needs psychologically and physically, he finds himself involved in a complex of relationships which largely determine, modify, and direct him. Without these relationships he would be other than he is, a human person, a social and political animal who can be taught to reason, and to know what is true.

This man, a living, thinking person in motion capable of discovering fact, truth, and value, stands at the center of this investigation of the modern phenomenon of information.

When a man speaks or listens, communicates or is communicated with, he does so as total man, the sum of his nature, his experience, his beliefs, his values, his knowledge, his ignorance, his bias, his capacity for truth, and his susceptibility to error. To be sure, there

may well be much more than the foregoing to the sum of total man in the practical order. It is highly unlikely that all of his potentialities are known at any given moment in history. He will be considered in this study to be capable of much that is presently unknown, much that is yet to be explored and discovered. For this reason, if for no other, any attempt to move more deeply into an understanding of human communication should not arbitrarily place aside any data of the human experience.

Philosophers in general, and moral philosophers in particular, have, in the main, ignored the problems of information so characteristic of modern society. Somewhat critically, Father Emile Gabel, former editor-in-chief of the French Catholic daily, La Croix, in an article written for America (August 10, 1963) admonishes the Catholic moralists who "...are more inclined to underline the abuses and ambiguities of the press than to stress the enriching and indispensable social function it performs." On the other hand, empirical scientists and their counterparts in philosophy may be incautious enough to discount as meaningless or irrelevant any philosophical investigation of the ethical and moral dimensions that permeate problems in human communication. This attitude springs in part from an uncritical acceptance of facts as logically atomistic, complete in themselves, as well as from a misunderstanding of what philosophy is and does, what it can and cannot do as it works in communication areas.

Freedom of information, and the right to know, elemental components of a free society, would be difficult, if not impossible, to study outside of philosophy which takes as its data the findings as well as the

presuppositions of other disciplines. These components of human society are ultimately rooted in man, in his nature, in the nature of human society, and the morally meaningful nature of man and his activity in society will not open up to investigation, analysis, and reflection unless the totality of man is taken to include his physical, intellectual, esthetic, and spiritual dimensions without which human nature, as it is known, would not be human nature as it is.

The natural law framework of this study, if it is to have any validity and make any presumption about setting up and attacking the elemental problems of communication, must rest upon a base of scientific inquiry, the only realistic foundation for a knowledge of human nature. These laws of nature will be shown to be anological as laws. They will also be shown to possess a demanding character upon the conscience of men. With the exception of the statement on the analogy of law, these are the basic postulates of sociologist Philip Selznick who represents a secular view of natural law that will be incorporated into the present investigation.

If Selznick's expression "scientific inquiry" means anything, it at least assumes that man is intelligent, that he has the capacity to make intellectual as well as physical contact with the world of which he is a part. This simply says that this world is knowable by and actionable upon the intellectual and moral operations of man.

Man belongs to two societies, both natural, the family and the state. He enters into neither the one nor the other by any act of his will, by compact or contract, but purely and simply because he has

physical and psychological needs that he can not meet by himself. Unlike other animals who band together in packs and herds for strength and protection, and this by instinct, man participates in the civil community, not by instinct, but by reason. As there is no civilization, no culture, no progress among animals, so there is among men. The evidence of this is a matter of historical record; the difference is the ability to reason, and the vehicle is the external communication which is public discussion, possible only to animals who can communicate about intellectual as well as physical needs.

> Now, that man is more of a political animal than bees or any other gregarious animals is evident. Nature, as we often say, makes nothing in vain, and man is the only animal whom she has endowed with the gift of speech. ...And it is a characteristic of man that he alone has any sense of good and evil, of just and unjust, and the like, and the association of living beings who have this sense makes a family and a state.[2]

It was the eighteenth century that witnessed the high point of natural law doctrine in its secularized form. During this period the two classic political documents of the West were written: the American Declaration of Independence, and the French Declaration of the Rights of Man. From that time through the first three decades of the twentieth century, natural law thinking went into decline and all but disappeared from sight. Conceived by many as a quaint survival of Graeco-Roman thought, and dismissed by one author (Morris L. Ernst) as "nothing but a bit of metaphysics," there is significant evidence of a growing interest in natural law. Robert Gordis puts it this way, "...natural law could help to dissipate the fundamental, ethical, and legal chaos of our age...Circles which have long looked askance at it - philosophers,

lawyers, and sociologists - are manifesting a desire to find the viable elements in the concept of natural law."[3]

Concerned about the vacillation that has marked the history of the law of speech and of the press in this country, Edward G. Huddon remarked that such has been the case "Due to a lack of a basic philosophy to serve as a stabilizing influence in the interpretation of the First Amendment." He goes on to point out that this situation has developed because of "...a neglect of the natural law environment from which the Constitution and the Amendment arose, and a reluctance to place both in their proper perspective."[4]

Although the questions of freedom of information and the right to know will be treated in this study within the context of the civil society of the United States, it should be noted in passing that these issues have become in recent years matters of increasing concern for such international bodies as the United Nations and the Catholic Church. Amid much disagreement and debate, the Universal Declaration of Human Rights was formulated in 1948, and two years later came the European Convention for the Protection of Human Rights and Fundamental Freedoms. In 1962, Pope John XXIII issued the encyclical, Pacem in Terris, listing among several of man's rights in the domain of knowledge and artistic creation that "...he has the right, finally, to be informed truthfully about public events." (NCWC Trans., p. 5) On December 4, 1963, the Second Vatican Council, through Pope Paul VI, promulgated its Decree On The Media of Social Communication.

That these are more than merely theoretical questions, freedom of information and the right to know, is evidenced in the continued efforts of the Communist states to block debates at the United Nations on the Draft Convention and on the Draft Declaration on Freedom of Information.

To have some understanding of human rights in contemporary American culture, it seems expedient to know what Jefferson and his contemporaries understood by them, what currents of natural law thinking influenced their own philosophy of government, and what, if any, correlation there is between the American consensus of the Declaration and the American consensus today.

It may well be, as Carl L. Becker put it, that "We are less sure than they were that a beneficient intelligence designed the world on a rational plan for man's special convenience. We are aware that the laws of nature, and especially the laws of human nature, are less easily discovered and applied than they supposed."[5]

The concepts of freedom and of rights intertwined with the questions of information and the right to know lead almost inevitably to the issue of fact and value, intimately related in natural law thinking, separated in most of modern social science.

The trend in social science areas has increasingly emphasized a quantitative posture typified by empirical observation and the development and refinement of measurement techniques. This urge for objectivity seems to have engendered a strong trend away from speculative investigation, and against the meaningfulness of studies in the fields of morals and ethics.

Rightfully, the social scientist strives to see the world and especially the human enterprise as these are, not as he wants or preconceives them to be. To this end, he attempts, in his models, to account for such factors as his own bias, susceptibility to error, and the imposition of personal values. In the hope of getting a clearer picture of reality, he has attempted to divorce fact from value, or treat them as if they are, in themselves divorced, largely eschewing the latter because values seem to lend themselves less to measurement and predictability than do facts.

In spite of the fact that normative systems need not demand a personal commitment by the observer, "...there is an odd reluctance on the part of social scientists," according to Selznick, "to deal with normative systems." The same author goes on to say that "...the disposition is to reduce such phenomena to arrangements that can be studied without assessment by the investigator, even when the assessment would entail nothing more than applying a culturally defined standard as to how far an implicit ideal has been realized."[6]

The question of normative systems and their relevance for communication theory arises from another premise of this study, i.e., communication theory as this is surfaced in practical decisions, both of policy and of impulse, will tend to reflect the basic philosophy of the political entity in which it, the communication theory, is operative, e.g., the public attitude towards the nature of man, the nature of the state, the nature of the relationship between man and the state, and towards the problem of truth and knowledge. These attitudes in turn are reflected primatively in public opinion.

There would seem to be a tendency in current communication research to reduce public opinion to nothing more than a distribution of attitudes in a population, which attitudes are only the result of suggestibility or emotional rapport. This does not give man his due as a free, rational, though frequently conditioned agent. A curious by-product of this point of view is that it puts the communication research people in the awkward position of saying implicitly that they are able to study, measure, and predict scientifically (intellectual and rational operations) about other men who have not or very seldom employ these capacities. In addition, public usually means more than a gathering, group or multitude of people. It often presumes some coherence of interests and objectives that are the objects of discussion and debate at either high or low level. This in turn says a human, rational struggle to apply principles and values to new situations as these come upon the social or political horizon.

This struggle of principle and values to meet new situations in the human community points up a distinction between two terms or concepts that are often mistakenly used synonomously, public consensus and public opinion.

The conclusions that a public may reach, howsoever they of the public may reach them, are made on the basis of general, unstated premises which have somehow come to be accepted by the community. This is what is taken here to be the public consensus, a difficult thing to get at, hard to define. Yet, its presence in a community can be discovered and tested. In content it seems to be a loosely knit texture of idea sets widely held by the community containing principles, rules, standards of

judgment which if codified would appear as a record of experience and attitudes. The public consensus, in a sense, thus becomes a body of doctrine drawn from experience and reflection, never static, always dynamic, constantly feeding upon new data of experience transported to it as information. It is a kind of private conscience grown large, and it could be no other, if human nature means anything real (conceptus universalis cum fundamento in re). And, insofar as the public consensus is national, social and political, it is the public philosophy that guides the political, economic, educational and social systems of a body politic.

Public opinion, on the other hand, is the application of the public conscience to concrete situations as these rise to the level of more or less widespread consciousness.

Public opinion, thus conceived, is the stuff of reaction, discussion, and argument, flowing between the public experience and the public judgment of conscience. This stuff gets tested by the standards of the consensus, and may or may not move through debate among the leaders to a place as modifier of the consensus. Such at least is the present writer's attempt to explain the dynamism of consensus.

The customs and laws of a political community stand up as the more or less clearly visible manifestations of the public consensus. These are above ground, as it were, having roots not as clearly known or manifest. The roots are the capacity of a people to judge their own laws and customs, to extend and except from them as experience and reflection demand.

For John Courtney Murray, "...only the theory of natural law, rightly understood, can give an account of the moral experience which is

the public consensus, and thus lift it from the level of sheer experience to the higher level of intelligibility."[7] Such a course Father Murray presumes to be the aspiration of the mind of man.

The American civil society, one people derived from several cultures, is religiously pluralistic, and to a large extent relativistic morally and ethically. External evidence and the consensus enunciated in the Declaration and the Bill of Rights substantiate, at least for workable purposes in this thesis, religious pluralism. It does not seem that as clear a case can be made for moral relativism, not at least as a radical philosophical posture to the exclusion of a basic ontol or psychic unity underlying the diversity of moral and ethical positions.

It is Selznick's contention "...that man has morally relevant needs, weaknesses, and potentialities is supported, not contradicted, by anthropological evidence."[8] In speaking of psychic unity, noted above, Selznick points to features beyond drives of hunger and sex to those that are more directly relevant to what is universal in social organization and pervasive in human values, such as search for respect, for affection, for relief from anxiety, for the enlargement of social insight and understanding, reason, and esthetic creativity.

The importance of establishing with some degree of certainty the existence of this psychic or underlying unity amid moral diversities takes on meaning and relevance in a study of communication ethical issues in a pluralistic society. What is right and wrong, good and bad, what should be published, what should not be broadcast will require more than positive law and codes of practice for settlement. Account must be made

of moral and ethical diversity, and some account is possible, beyond positive law in an investigation and development of natural law theory.

In the relationship between the citizen and his society there will frequently exist a tension between the citizen's need and right to know and the government's right and need, under some circumstances, to and for secrecy. Emile Gabel, cited above, puts the problem this way: "Every government, of course, needs silence. It is not even entitled to convey all the news, immediately to the public; efficiency, justice, and prudence dictate discretion. On the other hand, there is no doubt that the normal tendency of every government and every administration is to expand these zones of silence. There will always be tensions about news between a government and the public - the latter having the right to know, and wanting to know everything; the former having the duty to keep certain things secret, and being inclined to keep as much secret as possible."[9]

A tension similar to that existing between the individual and his government also is given in the information or news area between individual citizens, a tension involving the right to know and the right to privacy.

These tensions need not be resolved necessarily, and perhaps in many cases cannot be so resolved. They may, in fact, prove to be living elements of the social organism, essential to the continued life and growth of the social order. Whether such tensions may legitimately be explained in this manner or not, they cannot be left altogether alone in a kind of no man's land. An attitude such as this would not only be a denial of the reality of social and political interaction, but would imply a demise for public argument, and the end of human freedom, at least of

speech and of the press. Many, perhaps most, of the solutions will continue to be attempted on the level of positive law alone. Yet, as Huddon has remarked regarding First Amendment tests, "...none of the tests that have prevailed at different periods during the history of the Amendment has stood the test of time for more than a decade."[10] He was referring to "liberty versus license," "clear and present danger," and the current "balancing of interests."

When a man knows, the what that he knows very often involves, directly or indirectly, other men and their social productivity or lack of it. The right to know, then, encompasses other men and their roles in society. Given the premise that no right is absolute, what acts of man are his personal property and which belong to the public domain? Man, as social and political, is in possession of rights and obligations, but he is also and equally individual.

Following Karl Rahner's line of thought[11] man is measurably an individual "...by demarcation from many more like him; a man, one individuated human being (for only mankind can be man as a whole); and he is merely individual who is one among many more, one example of countless others, so common that he is just one like the rest, of no particular importance, and so all by himself and lonely." However, man is at the same time a spiritual, non-measurable personality, "...that is, he is more than an individual example of many more of the same, more than one individuation of a common kind. He is a genuine individual, who is truly unique and irreplaceable, and who, when he comes into contact with another does not form a society or group of like beings, but a community of different, unique beings."[12]

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The right to know, then, will be regulated, rather broadly, in its limits by the recognition of an individual's uniqueness, and by some reasonable justification of the need to know. This recognition will manifest itself to the extent that another man is not treated as a property of another, a non-human thing. Reasonable justification in the need to know will attempt to strike a balance between a genuine need to know, and an unbridled, prying curiosity that is both destructive of the purpose of the right to know, and a violation of the right to privacy enjoyed by the other person.

The technological revolution, including the mass media, has wrought vast changes in every area of the human enterprise. During the last century, and increasingly during the past three decades, man has fashioned a world for himself, through rapid discovery in the fact dimension, building a record of achievement too complex and too vast for comfortable enclosure in existing legal, social, and perhaps even in contemporary ethical and moral molds.

From the certainties of Newton's world to the statistical and probabilistic world of Heisenberg, from the world of palpable substance to the world of energy, man has moved, less on the basis of personal experience, and more and more as a dependent upon the geometrically increasing body of information about the world and its course.

Man simply will not be able to hold himself firmly in meaningful personal existence as a rational animal unless he is loosed from artificial shackles, unless he is wisely trained to know, to build bodies of knowledge, and to employ this knowledge in a free society. This will be an open-ended enterprise needing experience, insight, and an ethical base established in the nature of man and of society.

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[12] Ibid., p.

Footnotes

[1]The Human Use of Human Beings, p. 17.

[2]Aristotle, Politics, trans. Benjamin Jowett, The Basic Works of Aristotle, ed. Richard McKeon (New York: Random House, 1941), 1253[a] 10, 15.

[3]Natural Law and Modern Society, p. 241.

[4]Edward G. Huddon, Freedom of Speech and Press in America (Washington: Public Affairs Press, 1963), p. 172.

[5]Carl L. Becker, Freedom and Responsibility in the American Way of Life, (New York: Vintage Books, 1945), p. 47.

[6]Natural Law and Modern Society, p. 160.

[7]Natural Law and Modern Society, pp. 71-72.

[8]Natural Law and Modern Society, p. 169.

[9]Gabel, op. cit., pp. 134-135.

[10]Huddon, op. cit., pp. 172-173.

[11]Nature and Grace, p. 14.

[12]Ibid., p. 14.

CHAPTER II

HISTORICAL STUDY

Natural law theory, the framework and measure of this thesis on information and its implicated rights, has had a long and speckled career. From its earliest formulations, as far back in history as the pre-Platonic era of Heraclitus (536-470 B.C.) and the early sophists, to the time of Jefferson's drafting of the Declaration of Independence this theory has been a basic ingredient in the ethical and legal traditions of Western civilization. During the past one hundred and fifty years it has generally been neglected[1], and "For some time it became increasingly the fashion in philosophical and legal sources to deny the existence of the natural law, and, in fact, to scoff at it."[2] Since the second decade, a denial of natural law has prevailed in this country, a denial underscored by Chief Justice Vinson in Eugene Dennis et al v. United States of America, (341 U.S. 494; 508:)

> Nothing is more certain in modern society than the principle that there are no absolutes, that a name, a phrase, a standard has meaning only when associated with the considerations which gave birth to the nomenclature. (See Douds, 339 U.S. et 397.) To those who would paralyze our Government in the face of impending threat by encasing it in a semantic straitjacket we must reply that all concepts are relative.

LeBuffe and Hayes, in citing the above, comment that "Justice Vinson here enunciated a principle that undermines our traditional American philosophy of law and leaves us in the quicksands and quagmires of relativism where there is nothing certain except the chameleon uncertainty

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In addition to the statement made by Roscoe Pound in 1911[4] that "...it is not an accident that something very like a resurrection of natural law is going on the world over,"[5] Charles G. Haines' The Revival of Natural Law Concepts, 1930; and Otto Gierke's Natural Law and the Theory of Society, 1934, it is still reasonable to assume that the tragic and crude experience of mankind during much of the twentieth century has forced upon increasingly growing numbers of reflective men the necessity to search in the rubble of human events for answers to perennial questions about man, his value, dignity, his rights, and his proper place in the temporal society. Perhaps with a kind of inevitability this search has led to an old nineteenth century grave where it was thought would be found the relics of a body several times buried. But natural law theory was found to be very much alive. The only difference seems to be that more people are aware of the fact.

This theory occupies a central place in the social and moral works of Plato (427-347 B.C.) and Aristotle (384-322 B.C.) It is fundamental to the thought of the Stoics, Cicero (106-43 B.C.) and Marcus Aurelius (121-180 A.D.) It permeates the sacred writings of the Jewish people, a source frequently overlooked by scholars since the eighteenth century.[6] It is found in the writings of St. Paul and such Church Fathers as Ambrose (340-397), Jerome (340-420), Augustine (354-430), and Gregory I (540-604). Natural law reached its apogee in the writings of Aquinas (1225-1274), Vittoria (1430-1546), and Suarez (1548-1617), and remained vital, though not as influential through the works of the Anglican

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theologian Richard Hooker (1553-1600), Hugo Grotius (1583-1645), and Thomas Paine (1737-1809). Through these later years, the theory became confused and confounded in European and to a lesser extent in Anglo-Saxon thought due to the impact of Thomas Hobbes (1588-1679) and John Locke (1633-1704).

Where there is not almost total ignorance of natural law today, there remains such misunderstanding that even a standard reference book such as Hastings Encyclopedia of Religion and Ethics identifies it with a metaphysical or theological theory of natural order imposed by the command of God. While it is true that the theory grows out of a metaphysic, as it must to justify its claim of radical empirical methodology, religious and theological questions are peripheral issues, and such a definition distorts both the structure and the history of natural law theory. John Wild puts it well when he comments that,

> ...the basic issue between the defenders of natural law and its opponents has never been that of theism versus non-theism. This is a peripheral metaphysical issue. The basic issue concerns the nature of moral norms. Are they grounded in something which exists independently of human interest and opinion, or are they man-made? The philosophers of natural law are moral realists. They hold that certain moral norms are grounded on nature, not merely on human decree.[7]

It is a premise of this study that no lasting and satisfactory results are possible in any attempt to cope with the complex problems of freedom of speech of the press in the United States without something more than a passing acquaintance with the natural law environment of the Declaration of Independence, the Constitution and the First Amendment. "The American Revolution, as it ran its course from 1764 to 1776-from the

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first beginnings of resistance down to the Declaration of Independence and the creation of new colonial constitutions - was inspired by the doctrines of natural law."[8]

Apart from whatever influence the later Scholastics may or may not have had upon the Founding Fathers, it is all but undeniable that they were the immediate heirs of the British Common Law tradition. Henry de Bracton (d. 1268), who seems not to have been aware of the work of his contemporary, Thomas Aquinas, used natural law to achieve much the same kind of synthesis in his compilation of the civil and common law of England. In part he inherited the natural law thinking of his legal contributions from Canon Law which grew out of Roman law in the form of the Corpus iuris civilis, and Gratian's Decretum. This contact with the classical authors of civil and canon law would put Bracton directly in the mainstream of classical-Christian natural law that immediately preceded the efforts and achievements of the early and late scholastics. His De legibus et consuetudinibus angliae (1567-1569) has been called "the crown and flower of English medieval jurisprudence, which had no competitor in literary style or completeness of treatment till Blackstone composed his Commentaries five centuries later."[9]

Richard O'Sullivan, in the Grotius Society Transactions (1945) has indicated the continuity from Bracton's time of the natural law tradition in English common law:

> The validity of a system of natural law and of essential human rights was taught, and even taken for granted, by all the great common law lawyers from Bracton, Fortescue and Littleton, through Thomas More and Christopher St. Germain, to Coke and on to Holt. For all these men, law is founded on ethics...This conception of the law of nature or of reason...was taught

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> at the Inns of Court in the fifteenth and sixteenth and seventeenth centuries when the Inns of Court were a truly legal university. The tradition survived into the eighteenth and nineteenth centuries and is not absent in the twentieth century.[10]

What then is natural law, as this theory will be exposed and applied in this study? Maritain defines it as "...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 necessary ends of the human being. The unwritten law, or natural law, is nothing more than that."[11] Aquinas defines it as "...the participation of the eternal law in the rational creature."[12] John Wild offers as his definition of natural moral law, "...a universal pattern of action, applicable to all men everywhere, required by human nature itself for its completion."[13] Because Wild's study of the subject seems more compatible with the modern mind, his definition and treatment will be more constantly referred to in the analysis of natural law that will follow this historical examination of the theory.

However it may be defined, the theory of natural law grew up in the realistic tradition of philosophy, radically empirical in its methodology, and claiming to derive all of its basic concepts from the observation of experienced facts.[14]

It would be both naive and historically inaccurate to assume that the tradition of governance and law of reason at any period existed for long completely unchallenged by the tradition of positivism and the law of will and power. It would likewise be an oversimplification of the case to maintain that order and rights discovered by reason by that fact received a kind of immunity from the necessity of protection by might. The power of enforcement and protection does not constitute the foundation,

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meaning, or nature of rights and the law of reason, but rather offers itself as the defender of a belief against those forces who would destroy it. This is one way of saying that the bombs of the United States are not its democracy but are very real symbols of American determination to defend its philosophy of government against those who would employ force to destroy it.

Haines writing in 1930[15] quotes Roscoe Pound on a point both relevant to the present time and to the present study as follows:

> ...the cycle is complete. We are back to the state as the unchallengeable authority behind legal precepts. The state takes the place of Jehovah handing the tablets of the law to Moses, or Manu dictating the sacred law, or the Sun-god handing the code to Hammurabi. Law is law by convention and enactment - the proposition, plausibly maintained by sophists, which led Greek philosophers to seek some basis that made a stronger appeal to men to uphold legal order and the security of social institutions.

Before the time of Socrates, Plato and Aristotle, the Epicureans, the first legal positivists, taught a sensistic epistemology that left no room for metaphysics, insisted that it could not be certain that anything could be objectively and naturally right. Utility and pleasure became for these philosophers the sole principles of ethics and law. Their proposition that justice exists only in agreements to prevent mutual injuries would again appear in history with the very similar propositions of Hobbes and Locke.

After the time of the three intellectual giants of Greek philosophy, the Skeptics, the positivists of their day, taught that the senses do not convey true knowledge but only illusion, and even reason itself does not guarantee the truth and certainty of knowledge. Consequently, if

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truth can be discovered by neither the senses nor by reason, it is unattainable. Thus, all law, whether of art, speech, morality or right, are arbitrary. So have spoken Brandeis, Holmes, Vinson, and the legal positivists of the contemporary period.

To understand the issues involved in the problem of information and the rights of free speech and free press, then, it is both helpful and perhaps necessary to place these first in their historical perspective and then to analyze them as Wild has so well succeeded in doing as he set up the five basic doctrines of moral realism against opposing positions in philosophy, ethics, and law.

1. The world is an order of divergent tendencies which on the whole support one another. 2. Each individual entity is marked by an essential structure which it shares in common with other members of the species. 3. This structure determines certain basic existential tendencies that are also common to the species. 4. If these tendencies are to be realized without distortion and frustration, they must follow a general dynamic pattern. This pattern is what is meant by natural law.[16]

The natural law philosophy of the Founding Fathers stands rather close to the geographical center of this thesis. It is, in more than a poetic sense, a bridge between the several currents of natural law tradition in Western thought and the basic philosophical tenets of contemporary American legal and political theory.

It seems neither necessary nor possible to show beyond a reasonable doubt that Jefferson, Wilson, Hamilton, Madison, Jay, Otis, Franklin, Patrick Henry, Samuel, and John Adams, to mention a significant few,

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held to and expressed with a clear consistency a specific, detailed theory of natural law. What is significant to the present study is that these men and their generation in the American Republic did substantially subscribe to natural or 'higher law' as a basis for the then new political philosophy. Before proceeding to a selection of citations that will point up the similarities and dissimilarities of natural law positions among the Founding Fathers it may be appropriate to discuss briefly here and at greater length later, as need indicates, several of the immediate sources of American theories of natural law.

Natural law thinking which had become to a large extent secularized in Europe in the years immediately following the Protestant Reformation shifted, in the North American colonies, back again to a theologically oriented structure of law. This was largely, if not entirely, due to the efforts of the Puritan clergy of New England. As Wright explains this brief, one generation, period it was a time in which was developed a considerable body of political writing that dealt in a philosophical manner with such traditional questions of politics as the nature of functions of governments, the relation of liberty to authority, and the nature of law itself.

The thought and preoccupations of the leaders of the early New England settlements was primarily of a religious character. Since, however, the problems of religion were almost invariably interwoven with politics, the earliest Americans considered politics a handmaiden of religion and hence worthy of serious discussion. Most of these leaders were educated men; many had trained at Emmanuel College, Cambridge, and a few came out

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of Oxford. The circumstances, then, of their religious convictions, the place of their training, (a hotbed of Puritanism, as Wright refers to Cambridge), the motives of the first groups in leaving their homeland, all contributed to the foundation of political thought that would be more clearly and consistently articulated more than a century later in the founding of the new republic.

At this period, it was generally accepted that the only true law was that of God's making, and this law was to be found in the Sacred Scriptures as interpreted by the clergy. All other laws were transitory, inferior agreements entered into by human beings with limited human understanding.

This identification of law with Scripture was clearly expounded by John Cotton, one of the most influential men in Massachusetts Bay for more than twenty years. Although Cotton expressly advocated that the government of the state and the government of the church not be confounded he asserted with considerable force that theocracy was the best form of government for both.[17] To this end, Cotton cited with approval the statement of William Perkins to the effect that the "scriptures of God doe conteyne a short upoluposis, or platforme, not onely of theology, but also of other sacred sciences, (as he calleth them) attendants, and handmaids thereunto, which he maketh ethicks, eoconomicks, politicks, churchgovernment, prophecy, academy."[18]

In the year 1636, Cotton proposed a code of law for New England that demonstrates his ideas of human laws and the need to base them on interpretations of the Scriptures. Among other points he stated that the law of inheritance by which properties pass to the next of kin is a "Law

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of Nature, delivered by God." Throughout his sections on crime and punishment he provided Biblical citations as his source of authority, leaving little room for doubt that the natural law of which he spoke was a law of nature given by God.

Another figure of this period who followed much the same line of thought in political philosophy was John Eliot. His position in "The Christian Commonwealth: or, The Civil Policy of the Rising Kingdom of Jesus Christ" (1659) would cast civil government in the mold of the American political party, the lowest leaders being elected by the populace, with each successive level of government being elected by their peers in government. The highest rank would then interpret the laws of God and these laws would be final and binding on all within the political society. Wright continues, "For he (John Eliot) repeats his belief that the 'written Word of God is the perfect System or Frame of Laws, to guide all the Moral actions of man, either towards God or man.' Human legislation is not needed. The civil rulers should be judges, who, with the aid of Scripture and good conscience, apply to every cause the appropriate law of God."[19]

This first generation of political leaders, with the exception of John Winthrop, Puritan ministers, drew their political philosophy almost exclusively from experience measured by the Bible. A later generation in the following century would draw upon Aristotle, Cicero, Locke, Pufendorf, Milton, Burlamaqui, Montesquieu, Blackstone and numerous other political philosophers of both the 17th and 18th centuries. Before passing on to a brief treatment of this period, it might be well in passing to note the

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contribution of Winthrop to the political structure of American thought. He held that although the laws of God are basic in matters both sacral and civil, they are not sufficient in themselves to constitute a complete code of rules for civil governance. In his "Speech on Liberty and Authority"[20] he remarks that "The covenant between you and us is the oath you have taken of us, which is to this purpose, that we shall govern you and judge your causes by the rules of God's laws and our own, according to our best skill." The basic or fundamental laws, then, are given to man by God. The details, however, must be worked out by the judge, the jury, and the legislature. As long as the general rule is observed and the best skill of the governors employed in "deductions to particular cases...the Government is regular & not Arbitrarye."

This kind of thinking to be found again in the Founding Fathers, a combination of Faith, reason, and experience, is essential to the fabric of political thought out of which the First Amendment developed, the natural law environment that Huddon asserts has been much neglected as a stabilizing influence in the interpretation of the Amendment.[21]

Some knowledge of this early American thought must be in the possession of one who would understand what the American government is, without which frame of reference little or no intelligible account can be given of the political and social structure of this country. Ignorance of this kind would make all but impossible a discovery of the general ethic peculiar to the American contempory scene, and consequently impossible the discovery of an ethic peculiar to the media of mass communication in this country.

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The above, then, is a sampling of the strong religious influence upon early American political thought, a rather primitive form of natural law theory, as often implicit as explicit. Another, and perhaps stronger current came in from the Continental jurists and political philosophers of the 17th and 18th centuries. Three of the most widely read works of this period on the subject of natural law were the De Jure Belli ac Pacis (1625) of Hugo Grotius, Pufendorf's De Jure Naturae et Gentium (1672) and Burlamaqui's Principes du droit naturel (1748) which appeared in English translation in 1752. In all three of these works there is a basic agreement despite variance in particulars, and one of the more general of these is a shift away from a recourse to the Scriptures in the establishment of law. Grotius, for example, defines natural law as "the dictate of right reason, indicating that any act from its agreement or disagreement with the rational nature, has in it moral turpitude or moral necessity."[22] Pufendorf states much the same thing as he holds that natural law is the rule of right reason determining what is right and what is wrong in human society.

According to Wright in his American Interpretations of Natural Law[23], Burlamaqui's synthesis of the natural law school was one of the most popular of political treatises among Americans in the second half of the eighteenth century. His general point of view, as quoted from Wright, is as follows:

> My design is to enquire into those rules which nature alone prescribes to man, in order to conduct him safely to the end, which every one has, and indeed ought to have, in view, namely, true and solid happiness. The system or assemblage of these rules considered as so many laws imposed by God on man, is generally distinguished by the name of

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> Natural Law. This science includes the most important principles of morality, jurisprudence, and politics, that is, whatever is most interesting in respect as well to man as to society.

Wright gives ample evidence that the Founding Fathers were thoroughly acquainted with these Continental writers, including a citation from Hamilton's pamphlet, "The Farmer Refuted" (1775) in which he urges his readers, "Apply yourself without delay to the study of the law of nature, I would recommend to your perusal Grotius, Pufendorf, Locke, Montesquieu, and Burlamaqui."[24] James Otis, in his pamphlet, "Vindication," draws most heavily upon Locke, but often quotes and refers to Vattel, Grotius, Pufendorf, Rousseau, Coke, and the Bible, in addition to other sources.

A third current of influence on the natural law theory as it was developed in early America, perhaps more important than the writings of the New England clergy of the first generation and the Continental writers mentioned above, was the thought of the English lawyers and political theorists.[25] Among the lawyers, the figures of Coke and Blackstone were prominent, while Locke was probably the most influential of the English political theorists. Until the time of the younger generation of American lawyers of the Revolutionary period, Coke-Lyttleton was 'the universal lawbook of students.'[26] This text was supplanted in mid-eighteenth century America by the Commentaries of Sir William Blackstone, the apostle to America of the Hobbesian gospel of legislative sovereignty.

Through Coke, American theory of natural law traced back to the traditional Graeco-Roman-Medieval doctrine via Sir John Fortescue's De Laudibus Legum Angliae (In praise of the laws of England) to Henry de Bracton in the thirteenth century. This tradition became modified with

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the grafting on of Locke's doctrine of the Social Contract and its corollary notion of the State of Nature. In Coke and Locke, then, America received, for the most part, cautions and safeguards against power, whereas in Blackstone and Hobbes the claims of power are exalted. Thus, one of several apparent contradictions got woven into the fabric of early American political philosophy.

It may be convenient at this point to attempt a sampling statement from the works of the four men indicated above, plus Grotius and Pufendorf which six can rather safely be claimed as being among the most important and influential sources, apart from the early New England clergy, in the development of natural law theory in America. Then, it will be shown that all such sources gradually took on a unique American coloration in the hands of the Founding Fathers.

Hugo Grotius (1583-1645) may mark, in the estimation of several reputable natural law scholars, a transition from the metaphysical to the rationalist natural law. A famous passage from the De jure Belli ac pacis libri tres quoted in translation below makes a case for this position. "What we have been saying would have a degree of validity even if we should concede that which cannot be conceded without the utmost wickedness, that there is no God, or that the affairs of men are of no concern to him." On the other hand, according to Rommen[27], Grotius did not profess the implied complete autonomy of human reason as the sole and proximate source of the natural law. In fact, he considered God to be the highest source of this law, and he regarded the Sacred Scriptures to be on an equal footing with reason as a principle of knowledge. Furthermore, he understood recta ratio in the same sense as Suarez and the great Spaniards of the period of

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The famous definition runs as follows:

> The law of nature (ius naturale) is a dictate of right reason which points out that an act, according as it is or is not in conformity with rational (and social) nature, has in it a quality of moral baseness or moral necessity; and that, in consequence, such an act is either forbidden or enjoyed by the author of nature, God.[28]

Rommen continues from this point with the comment that the above is nothing more than Vasquez' doctrine of lex indicans combined with Suarez' intention to bring out the character of the lex naturalis as lex, which, in its coming into force or in its existence, is derived from the will of God. The inclusion by Grotius of 'social' in his definition, an important qualifier is strangely missing in Kelsey's English translation (The Classics of International Law, ed. J. B. Scott, Oxford-London, 1925) and the Latin edition (1646) on which this translation is based. This adjective is vital because it occurs in the same manner among the Late Scholastics for the purpose of distinguishing and contrasting lex naturalis and ius naturale. In Grotius' thought the socialitas of rational nature was not as yet, as it was to be in Pufendorf, the only source of natural law.

The note of sociality is especially significant today in any consideration of an ethics of mass communication in view of the need to base the present social responsibility theory of the press in framework of natural law theory, without falling into the trap set by the militaristic individualism of natural rights theory, a considerably different animal.

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Grotius then is seen to be important in shifting as he does the emphasis in natural law theory to reason and away from a concentration on faith and belief. This does not say, as indicated above, that he denied the proposition that God was the ultimate source of natural law.

John Wild places Grotius squarely in the realistic natural law tradition of the West. Before, however, exploring Wild's contention it seems important for clarification to return for a moment to the critical significance of 'social' in Grotius' definition in the section preceding. It is this note that distinguishes natural law in the realistic tradition from the natural rights variety of the 17th and 18the centuries, with its heavy emphasis on the individual and his rights as against society. This kind of thinking, as will be shown below, developed historically in periods of revolution against existing orders, and was based philosophically on an artificial and abstract notion of a state of nature that preceded somehow man's ordered community life; thus Locke, Hobbes, Pufendorf and the many who followed this line of thinking in natural law theory. But, as Haines considers the question, the whole concept of natural rights (and not traditional natural law) came into disrepute and waned as enthusiasm for political radicalism went out of fashion in America and France. "To the conservative leaders who took charge of the political destinies of European nations after the French Revolution the inalienable rights doctrine was 'an invitation to insurrection and a persistent cause of anarchy.'"[29] And when the reaction from the practices and the political philosophy of the American and French Revolutions gained ascendency in the United States one of the chief objectives was to discredit Thomas Jefferson and the tenets of the Declaration of Independence. Both in

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politics and religion, conservatism was in control, and men were disposed to welcome theories which made for social stability."[30] Again with a reference back to Grotius and his insertion of the word 'social' in his definition of natural law, eighteenth century natural law developed anti-social tendencies by making the individual conscience the ultimate arbiter of political and legal obligations. This was no mere accident; rather it was a natural consequence of the Protestant Reformation (among other causes) in its break from the establishment of Rome, a move from teaching authority to individual interpretation. The advance proposed in this paper towards the discovery of an ethic for the communications media in contempory American society will not be seen then as an arbitrary return to an older philosophical position, but rather as a correction and adjustment necessary in a period of societal emphasis of the individual emphasis that came to the fore in periods of revolt.

To return now to John Wild on Grotius; the Dutch philosopher and legalist held "that individual animals, including men, are marked by tendencies which lead not only to their own preservation but also to the welfare of others. In man this social urge is spontaneously clarified and strengthened by his intrinsic power of rational insight."[31]

Grotius as quoted by Wild holds that man's tendencies are necessarily determined by the essential nature and the existence of each entity. "For as the existence of things after they are brought into being, and the essential nature by which they are, do not depend on anything else, so it is with the properties and tendencies which necessarily follow this existence."[32] This kind of thinking will be shown to be critical to the

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metaphysical basis of the present thesis, as is the following citation of the same Grotius. "This natural law is so immutable that it cannot be changed by God Himself...Thus God cannot make twice two not to be four; and in like manner He cannot make what is intrinsically evil not to be evil." What has just been noted is in direct opposition to the Occam position of the absolute authority of the will of God which came bursting forth in Hobbes in the form of the absolute will of the monarch. These positions of Occam and Hobbes are ultimately a denial of ideas, a denial of reason and a denial of a discoverable content in natural law that will serve as directives of moral and ethical actions which can win the confidence of man.

Grotius offers two ways of demonstrating that something is a law of nature. "This may be proved a posteriori with a high degree of probability if it is found that all races and nations, or at least all that are civilized, believe it to be morally binding. It may be strictly and exactly proved only in the light of a clear and adequate conception of human nature and its essential tendencies. A mode of action which is necessarily required for the realization of such tendencies is a law of nature. Such principles lie at the root of individual and social ethics."[33] Finally, from the same source: "Co-operative activity which fulfils the nature of man is good. That which frustrates or obstructs such activities is unjust and evil. Thus, to take from another for the sake of one's own convenience is against nature...because if this were ordinarily done the common life of men would be impossible."

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Whether there was in fact a direct influence that would account for the philosophical similarity between Pufendorf, and Locke, or whether this similarity resulted from or was a product of the political atmosphere of the time, the two men taken together can be shown from intrinsic and extrinsic evidence to have had more influence in the American colonies than Grotius. They are more or less contemporary, born within a year of each other, and Locke wrote his Second Treatise about three years before Pufendorf's death when the latter was near his sixtieth birthday.

With Thomasius, Pufendorf led the new school of natural law that differed from the natural law theory of the Scholastics in three decisive ways.

> The first is the individualistic trait manifesting itself in the predominance of the doctrine of the state of nature as the proper place in which to find the natural law. The second is the nominalist attitude which found expression in the separation of eternal law and natural moral law, of God's essence and existence, of morality and law. The third is the resultant doctrine of the autonomy of human reason which, in conjunction with the rationalism of this school, led straight to an extravagance of syllogistic reasoning, of deductively construed systems that served to regulate all legal institutions down to the minutest detail: the civil law governing debts, property, the family, and inheritances as well as constitutional and international law. And, in contrast with the imperfect historical law, these legal systems possessed the inestimable merit and value of emanating from the pure rational nature of man.[34]

Even granting what is most improbable that this sort of thing might work in a world that was static and reducible to palpable substance, it certainly finds little to recommend it in a world of constant flux, and tendency.

Although, as Wild notes, most reference works suggest that the doctrine of natural law originated with the Stoics, or that its

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antecedents are vague, the modern idea that natural law is best expressed in Stoicism can be traced back to Samuel Pufendorf, the German codifier. Although this scholar did not deny that the theory could be found in Plato and Aristotle, he felt that the Stoic version was far superior and took pride in the fact that his teaching was, as he thought, very close to that of the Stoics.[35] This view seems to be supported by Hastings Encyclopedia of Religion and Ethics which states that, "The term 'law of nature' in its modern acceptation is seldom used by Plato and Aristotle; it was especially among the Stoics that it took a more prominent place, and here the idea of divine laws led to that of natural laws." The Catholic Encyclopedia seems to make the same mistake, by omission, as the preceding.

Regarding Pufendorf's claim, it would be more than difficult to reconcile his philosophy of natural law with that of Marcus Aurelius (A.D. 121-180) and the later Stoics, and a somewhat less difficult task to reconcile himself with the early Stoics (400-200 B.C.) in spite of their materialistic adaptation of Plato and Aristotle, and the resultant trend towards a determinism that would be hard to reconcile with moral freedom. Presumably Baron Pufendorf did not associate himself with the latter component of Stoic philosophy.

With Locke, Hobbes, and Rousseau, Pufendorf holds that man is not essentially social. In his concept of man's nature, he did not take man in his teleologically determined totality of human nature. Thus, as was noted on the first page of these notes he does not start with the basis for understanding modern man, or man in any period, a concept expressed in these pages as 'total man.'

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Man for Pufendorf, then, is not an animal sociale but an animal sociabile who should become social because this is to man's advantage. What had been in the traditional realistic currents of natural law philosophy signs of man's internal and natural tendencies, observed as facts, and then related to a development of the idea of nature, became in the newer natural law mere capability or impulse unrelated to anything like essence or nature. Such a position, of course, presupposes man as an isolated being in a state of nature, a position for which there is no empirical evidence whatsoever, and which amounts to a gratuitous denial of a basically empirical, realistic philosophy that preceded the work of Pufendorf.

As Rommen comments, Pufendorf describes the procedural law in the state of nature, and he indicates the norms of distraint which must find application in the state. Thus in reality the entire positive law, so far as it has to do with the civil law and its procedure in lawsuits, is straightway transformed into natural law. It logically becomes suprahistorical or prehistorical and in itself is unalterable."[36]

In this frame of reference, public officials enact positive law for one purpose only, in order that the natural law may be observed. Thus, for Pufendorf, every law became natural law as opposed to the older philosophy which conceded to very few basic norms and principles the dignity and force of natural law.

His theory of international law puts into focus several of the consequences of his basic position. Princes and states live in the status naturalis, since, as Rommen put it, "no status adventicius, no civitas maxima, as yet exists. Hence international law consists merely

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of natural law. There is no positive international law because there is no sovereign authority. Measured by the contributions of Grotius and the Late Scholastics, this view makes a great stride backward along the path which Hobbes had taken.[37]

Whereas Grotius shifted the accent in natural law theory from a theistic base to a secular one, a shift furthered by Pufendorf, Thomas Hobbes (1588-1679) moved still farther away from the current of the tradition to a position that A. P. d'Entreves labels "...the extreme outcome of rationalism and individualism as it were the reductio ad absurdum of both."[38] The same author comments that these accent shifts offered nothing new to the development of the theory except the extremes to which they went. There was nothing new in the assertion that man was a rational being. The Stoics proposed this, the Fathers of the Church taught it, and the Scholastics of the early and late periods went to considerable lengths to expound and clarify the meaning of man's rationality.[39] The same is true of the proposition that man is born free and equal to all other men.

What the Schoolmen had been at great pains to reconcile, the "city of God and the city of man," the foremost writers of the seventeenth and eighteenth centuries sharply divided. This was true of Pufendorf in his De Jure Naturae et Gentium (1672), of Burlamaqui in his Principes du Droit Naturel (1747), and of Vattel's Droit des Gens ou Principes de la Loi Naturelle (1758), all of which writings were well known to the leaders of the American Revolution. Natural law for these writers was a purely rational construction, although, as d'Entreves notes, they did not altogether refuse to pay homage to some remote notion of God. Of this period,

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C. Becker remarked that God was increasingly withdrawn from immediate contact with men. The laws of nature were to Jefferson the Laws of Nature's God. The new value was the individual, and a new determining factor was added to the political philosophy of the American Revolution. What Jefferson called the "station" to which nations and men are entitled under "the laws of Nature and of Nature's God" had become a pattern of ideas for which it is difficult to find historical precedent, and which has left an indelible mark on Western civilization.[40]

The following treatment of Hobbes seems appropriate for several reasons: to point up the extremes to which individualism can go, to account for Hobbes' influence in American political theory, at least insofar as he came into the colonies via Blackstone[41], and to provide several signs of caution against the surrendering of rights of free speech and press to an increasingly powerful central government. A reasonably substantial argument could be built both from the history of Hobbes' influence as a factor in bringing the notion of legislative sovereignty to the stockpile of American ideas, and from the strong tendency among the American people for local autonomy, as well as individual liberty, an autonomy that would make the several state legislatures counterparts of British Parliament.[42]

Hobbes uses natural law terms, but at bottom it was he who made the definitive break with a theistically oriented natural law tradition; a break that led him in fact to a denial of natural law.

In the state of nature that Hobbes formulated as a premise, man lived in a lawless condition, in a state of chaos that was a struggle

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of all against all. In such a state there was no possibility of true liberty. Man, according to Hobbes, discovered the way out in the Social Contract. Under terms of the contract, all would surrender rights and liberties to the sovereign prince. This prince, either actual or symbolic of any center of absolute power, became the de facto source of all laws and rights. Behind traditional words it becomes clear in the meaning of Hobbes that "laws of nature" are not laws at all; "they are but qualities that dispose men to peace and obedience."[43]

That there are really critical differences between the traditional classic theory of natural law and the natural rights theory of Hobbes, Strauss notes in the preface to The Political Philosophy of Hobbes (1936).

> ...We must raise the more precise question whether there is not a difference of principle between the modern and the traditional view of natural law. Such a difference does in fact exist. Traditional natural law is primarily and mainly an objective 'rule and measure,' a binding order prior to, and independent of, the human will, while modern natural law is, or tends to be, primarily and mainly a series of 'rights,' of subjective claims, originating in the human will.[44]

Strauss points to the contrast between Hobbes' political theory and that of Plato and Aristotle, a contrast that may also be discerned without much difficulty "...if one compares the doctrines of Locke, Montesquieu, and Rousseau with those of e.g., Hooker, Suarez, and Grotius."[45] Hobbes, then, is important to an understanding of the revolutionary rights concepts in early America because many of the younger lawyers in the colonies knew him through Blackstone, as has been noted above, and also because it can not be gratuitously assumed that the political thought of Hobbes is not a component of contemporary

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Some consideration of Hobbes' political philosophy seems appropriate to the purposes of this thesis, because many of the modern objections to natural law theory are in fact not objections to the traditional theory of natural law but objections to the 'modern theory of natural law' as d'Entreves puts it, which is the same as revolutionary theory of natural rights.

The social contract, keystone of natural rights theory, was a device employed to explain the societal tendencies or needs of man once the relationship between the nature of man and the nature of God had been operatively dissolved. Given this break with the tradition of a theistically oriented theory of natural law which founded the rights of man in the law as it existed in the mind of God, some such device was necessary to explain how and why man stepped from a state of nature to a state ruled by human law.

Historically, the preoccupation of Hobbes with the individual traces back to William of Occam (d. circa 1349). Occam extolled the will as the supreme faculty, more noble than the intellect. For him, as for Hobbes at a later date, there was no inherent connection between the essence of God and the essence of man, apart from creation. (No analogy of being). Consequently, there exists no unchangeable moral order, unchangeable because it is grounded in the nature of things which is unchangeable in the sense that this will be worked out in the metaphysical analysis that follows.

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Rommen holds that for Occam, "Oughtness is without foundation in reality, just as universals are merely vocal utterances and not mental images of the necessary being of ideas of God."[46] In brief, the natural moral law is positive law, the operation of the divine will; it has no foundation in reality, in the essential nature of things.

When the human sovereign replaces God, as in Hobbes, the will of the sovereign is law, and there is no other. Oughtness does not follow from the nature or structure of things but from the mandate of God or the human sovereign.

The consequences of this voluntaristic posture, coupled with an arbitrary separation of fact and value, if generally accepted and lived in this country, would make ethical conduct in the mass media a matter of the individual conscience only (whether erroneous or not), or a matter to be determined solely by civil law with the unacceptable implication that the state is the final arbiter of the internal as well as the external affairs of men. From a purely utilitarian point of view, neither of these alternatives is satisfactory. If each must devise his own rules, without direction of any kind, the social structure would soon collapse. For the alternative, recourse to authority only rather than to reason also is seldom a digestible answer for the curious Whys of intelligent men. The evidence of experience indicates an escape route from the apparent dilema...a law that is made up of discoverable dynamic patterns of tendential beings that is at once objective, and capable of suitable interpretations by positive law.

If such a law as this were not operative and discoverable, it is extremely difficult to apprehend the possibility of any meaningful

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The confusion that Hobbes introduced into natural law thinking [47] with his state of nature construct stems in part from his fascination with the evolving methods of physical science. This led him to attempt to impose these more certain methods on the less certain data of his social and political thought.[48]

Mathematics had captured the imagination of many of the best minds of the 16th and 17th centuries. Grotius had applied a kind of mathematical method in his presentation of natural law. Descartes was a mathematician turned philosopher, and Spinosa, building on Hobbes, attempted to bring religion and ethics into harmony with mathematical science.

It was unfortunate then, and to some extent it is unfortunate today that mathematical method was not and is not limited to mathematics in its primary work, and applied to the conclusions of other sciences in its secondary function. The belief that natural law was a product of private reason led men, intrigued by mathematics, to regard natural law as a purely speculative science like mathematics, and not as a practical science that deals with actual human affairs. The traditional method of judging these affairs involved moral prudence rather than mathematical logic. St. Thomas Aquinas had noted that to make a law fit every case was impossible, and experience bears this out.[49]

Traditional natural law left considerable room for the almost infinite variations of human activity, and could thus absorb the constantly changing conditions of civil society.

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Commenting on the effects that the speculative and rationalistic philosophers of the 17th, 18th, and 19th centuries have had on Western political systems, John Wu, a student of Holmes, and an eminent twentieth century representative of traditional natural law, writes:

> The modern speculative, rationalistic philosophies of Natural Law are aberrations from the highroad of the scholastic tradition...It is most regretable that practically all of the seventeenth, eighteenth and nineteenth century philosophers of Natural Law departed from this great tradition. They proceded more geometrico; they wove whole systems of socalled Natural Law just as a spider would weave a net out of its own belly. To mention a few, Hobbes, Spinoza, Locke, Pufendorf, Christian Wolf, Thomasius, Burlamaqui, Kant, Hegel, and even Bentham with his felicific calculus, all belong to the speculative group. Many of the nineteenth century judges in America abused the name of Natural Law by identifying it with their individualistic bias.[50]

In one of the many ironies of natural law history, Hobbes established his positivism on a kind of natural law that was infallibly mathematical, rejecting the traditional natural law because it was not so. Later critics of the supposed traditional natural law of Hobbes rejected it precisely because it claimed mathematical certainty.[51]

Contrary to older and more recent estimations of scholars, John Locke (1632-1704), at least the equal of Hobbes as a speculative and rationalistic theorist, did not write his Two Treatises either as a refutation of Hobbes or as a defense of the "Revolution" of 1688.

The purposes of the present thesis do not require a detailed account of either question. Such correctives are presented here to help in constructing as nearly accurate as possible a picture of the document that had such a profound influence on the development of American political philosophy.

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Laslett notes that..."When he (Locke) wrote Two Treatises, then, Leviathan was an influence, a gravitational constant exercised by a large body though at a great distance.[52] But, "We must describe Two Treatises, then, as a deliberate and polemically effective refutation of the writings of Sir Robert Filmer...related only in the indirect way we have discussed with the work of Hobbes. It was other things as well, of course, and it is as an independent treatise on politics that it has had its influence, although its connection with Hobbes has so often been distorted and exaggerated. It was intended to affect, and it most decidedly did affect, the political and constitutional beliefs of Englishmen who created the constitution and the political habits under which we still live."[53]

Regarding the date of writing, Laslett makes an excellent case to substantiate his claim that the total work excepting a few emendations made in 1688 was written several years before the "Revolution."[54]

Of more interest to this section of the thesis is the observation that the "Essay has no room for natural law."[55] In Two Treatises, Locke uses language on the subject of natural law which seem inconsistent with his own statements about innate ideas in the Essay.[56] Laslett notes that it is always 'beside his present purpose' for Locke to demonstrate the existence and content of natural law.[57] The same author continues:

> He did not do so in his Essay, even in the second edition where the passage in the second book which Tyrrell had complained of was rewritten. He would not do so by bringing out his early Essays on the Law of Nature, which Tyrrell asked him to do in the course of their exchange. As Dr. Von Leyden has shown, these earlier essays would not have provided a doctrine of natural law capable of reconciling the theory of knowledge in Locke's Essay with the ethical doctrine of that work and of Two Treatises.[58]

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John Locke is important to this thesis as one of the great figures of English political and literary history. His lifetime spanned the reigns of Charles I and Queen Anne. He was born in the same year as Pufendorf, Spinoza, and Leibnitz. He knew and praised the work of Pufendorf, using many of the German's arguments, and reproduced his positions, although the views of the two men were in such contrast on constitutional matters.

Locke's influence on Jefferson and others of the Founding Fathers seems to have been such that Jefferson in a letter to Madison dated August 30, 1823[59] felt it necessary to mention Richard Henry Lee's charge that the Declaration was a copy from Locke's Treatise of Government. That natural law ideas were not, as incorporated in the Declaration, extravagant improvisations is attested to in letters of Timothy Pickering and John Adams. Both of these men seemed surprised, fifty years after the Declaration was adopted, to discover the acclaim and reverence accorded it. Adams to Pickering on August 6, 1822:

> As you justly observe, there is not an idea in it but what had been hackneyed in Congress for two years before. Indeed the essence of it is contained in a pamphlet voted and printed by the Town of Boston before the first Congress met, composed by James Otis.[60]

Jefferson replied to these charges in the letter to Madison, in which he added that "I did not consider it as a part of my charge to invent new ideas altogether, and to offer no sentiment which had ever been expressed before." (Italics added for treatment below of subtle but critical shifts in American formulations of natural law theory.) In a letter to Henry Lee, Jr. Jefferson stated that he had not aimed at originality of

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principle or sentiment, nor had he copied from any particular writing. The Declaration was intended to be "an expression of the American mind. All its authority rests upon the harmonizing sentiments of the day."[61]

There is much to commend the argument that Jefferson's understanding of "self-evident truths" entailed his interpretation of "an expression of the American mind," and "the harmonizing sentiments of the day." Further investigation may well reveal that there is an essential similarity, if not identity, between these ideas and the concept of the public consensus, the material with which good government works, both to discover and to mold itself into an effective structural pattern of ethical human affairs.

Rommen along with several respectable scholars asserts that Locke's theory of natural law as this was worked out in the Treatises served as "a means of vindicating the "Revolution" of 1688-89 and of laying the juridical foundations of bourgeois society." While it may be true, as Laslett indicates, that Locke made several emendations in his work that would indicate their being added during this period, the book had been substantially completed some time before the year and the events of 1688, as noted on page 44.

Although Locke held that man had an obligation not only to preserve himself but ought also "as much as he can to preserve the rest of mankind"[62], (no source indicated for quote,) he was an individualist in his social philosophy, as was Hobbes. Empiricist though he was in his epistemology, he failed to accept the two equally essential notes of the nature of man, his rationality and his sociality. Locke elected to choose

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the first and to construct a substitute for the second. Neither law nor ethics for Locke is based in an objective order of norms out of which the rights of individuals flow by intrinsic necessity. He did not believe in what Wild refers to as an "inescapable tendential nature."[63] In this, Locke was not true to his empiricist position, because it is a matter of sense observation that all things are in a state of change. And this state of change is not a change in any direction but a change that is directed according to the structure of the being that experiences change.

In Locke's philosophy, order is not a given but a product of contracts between individuals who are urged by self interest to enter into mutually profitable contractual agreements. The traditional conception of natural law thus becomes as Rommen puts it "...a rather nominalistic symbol for a catalogue or bundle of individual rights that stem from individual self-interest."[64]

Basic to Locke's position in natural law theory is his subjectivistic theory of knowledge that makes him very skeptical of man's capacity to know the real nature and the inner constitution of natural entities. In the Third Book of his Essay, he remarks that we can never know the real structure of any natural substance but only its sensible effects, and are thus in a less favorable situation than a countryman who sees only the outward figure and motions of the famous clock at Strasburg, and has no idea of the inner contrivance of that famous clock.[65]

Unaware of the consequences of his empirical epistemology and his skepticism about metaphysica as a valid base for natural law theory,

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Locke contented himself with a belief in natural law "as a dictate of common sense."[66]

This basic belief is in no way scientific. The system developed from it can not and has not stood the test of time.

Although Locke adopted the "state of nature" proposition of many 17th philosophers, he did not, with Hobbes and Spinosa, portray this state as savage and violent. It was a state of peace and good will, but one in which man could not develop fully; for this he needed the state. As a member of the state of nature, according to Locke, man is possessed of certain inalienable rights among which are the rights to life, liberty, and to estate or property. It then becomes the state to preserve and develop these rights.

At some point or other man elects to emerge from the state of nature, according to the theorists mentioned above, and elects to enter society. When he does so, man gives up several of his natural powers as Locke indicates in the following:

> The first Power, viz, of doing whatever he thought fit for the Preservation of himself, and the rest of Mankind, he gives up to be regulated by Laws made by the Society, so far forth as the preservation of himself, and the rest of that Society shall require; which laws of the Society in many things confine the liberty he had by the Law of nature.[67]

In the following section of the same Treatise, Locke holds that man, in entering society, also gives up the power of punishing which he converts into an engagement of his natural force to assist the executive power of society.

Among the many problems and inconsistencies in Locke is his treatment of the concept of law. In his view, natural law in the traditional classic sense of norms based on the essential needs of man is not law at all. Locke uses the term law to apply only to arbitrary decrees of a ruling power which are supported by arbitrary sanctions.

> It would be in vain for one intelligent being to set a rule to the actions of another, if he had it not in his power to reward the compliance with, and punish deviation from his rule, by some good and evil, that is not the natural product and consequence of the action itself. For that, being a natural convenience or inconvenience, would operate of itself, with a law. This, if I mistake not, is the true nature of all law, properly so called.[68]

As Wild notes, what Locke calls "a natural convenience or inconvenience" is what has been called the natural sanction of natural law. For Locke, natural law then is not law at all. Any spontaneous action implies liberty, and any law, by its nature, restricts liberty. Thus, in Locke, are law and liberty opposed. It may be true that law may put restraints on passing interests or pleasures, but it can be no more than vicious or mistaken law, if it opposes the essential needs and spontaneity of man.

> It is of some interest to note with regard to Locke, his writings and his influence, that although religious freedom, and freedom of expression were fundamental to his thinking as evidenced in his writings on economics, toleration, and education, he said nothing of either in the Two Treatises. He seems, then, to have helped to bring about freedom of the press without ever considering it within the context of political rights.[69]

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Stanlis in his work, Edmund Burke and the Natural Law, comments on the effects of the 'contributions' of Hobbes and Locke to natural law theory.

> In retrospect and summary there emerge certain basic facts concerning the fate of the Natural Law in eighteenth century England. The fundamental change in the meaning of appeals to 'nature' is most evident in the revolutionary character of the new doctrine of 'natural rights.' Under the influence of physical science, the conscious attacks of Hobbes and the inept compromises of Locke, traditional Natural Law as a system of normative ethics centered in God's being and man's 'right reason' was replaced by or confounded with a purely materialist view of the universe and a hedonistic conception of individual 'natural rights.' ...By employing the traditional language of 'nature' in popularizing Hobbes' egocentric philosophy, Locke left standing the shell of traditional Natural Law principles, with their religious imperatives and idealistic connotations, but he unwittingly destroyed the meaning which Natural Law had carried for almost twenty centuries.[70]

Locke's empiricism, as Rommen notes (p. 111) contained in seminal form the forces that would "destroy" the hold exercised by natural law on the minds of men. Locke's distrust in the ability of human reason was only somewhat neutralized by his confidence in practical common sense.

One of the most devasting attacks on the classical concept of natural law in modern times was mounted by David Hume, (1711-1776), the philosophical skeptics and agnostics, Jeremy Benthan (1748-1832), the utilitarians, and the antirationalists who followed the philosophy of traditionalism as expounded by DeMaistre and DeBonald[71]. All of these had one point in common, a definite distrust of the ability of human reason in individual men. It is more than likely that this was caused in part by the over-emphasis on reason that was characterized by the Ethics of Baruch Spinoza (1632-1677). As indicated above, the rationalists conceived law as a

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The reaction to this rigid and logical process as applied to practical human affairs was to conceive law as the effects of habits, the product of the experienced utility of conventional behavior for individualistic self-interest.[72] Hume, for example, very frequently points out that reason is and ought to be the servant of the passions; that man is ruled by passions, that reason does not control the passions. In a similar vein the historical school of jurisprudence insists that law, made up of time-honored customs of the people, grows out of the soul of the people, is a creation of the Volksgeist, and is not and cannot be deliberately fashioned by reason. Law, then, is not made by men, it must grows in the fashion of Topsy. As a consequence, 'nature' is not a perceptible structured reality but a collection of passions, propensities and perceptions without content or directive of reason.

Because Hume rejects a basic conception of St. Thomas that being, truth, and goodness are intrinsically linked together, he holds that what confronts the theoretical reason as true, cannot present itself to practical reason as the good to be realized, as the objective norm of human behavior. This was the gratuitous denial of the ability of human reason to grasp the reality from which it could receive directives that some actions are to be performed and others are to be avoided. A basic, verifiable of human nature is thus denied, i.e., that in all men everywhere there is a recognition that good must be done and evil avoided. This, not purely a matter of subjective inclination, but rather a conformity

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The effects of this onslaught were not as pronounced as might be expected, in the Anglo-Saxon world. This resistance to the agnosticism and skepticism of the philosophers was due in large part to the tenacity with which the English common law hung on to the conceptions of natural law and equity that it had assimilated in the Catholic Middle ages. Henry de Bracton (d. 1268) and Sir John Fortescue (d. cir. 1476) retained the posture of common law judges, in the tradition of the Roman praetors, in allowing equity to control the stiff formalities of the original common law.

In spite of the danger that grew out of the English religious revolt of the 16th century that caesaropapism might take root in British soil as a kind of Anglo-Byzantine absolutism, the traditional elements of natural law remained vital enough in the English judges. Sir Edward Coke, through whom many of the American Founding Fathers contacted the tradition of natural law, spoke in Bonham's Case (1610) for the principle that statutes are void if they do not conform to the natural law. Wright cites Coke among the English lawyers who emphasized "natural rights" as well as natural law in the form of a set of positive standards or criteria for legal judgements.[73]

Coke's thinking, which became a vehicle of natural law thinking as this was passed on to the founders of the American constitutional system, developed out of his struggles with the early Stuarts who attempted to appropriate to themselves powers which former monarchs had exercised in association with Parliament. During the period of his two chief justiceships Coke repeatedly asserted that the royal prerogative was a common-law

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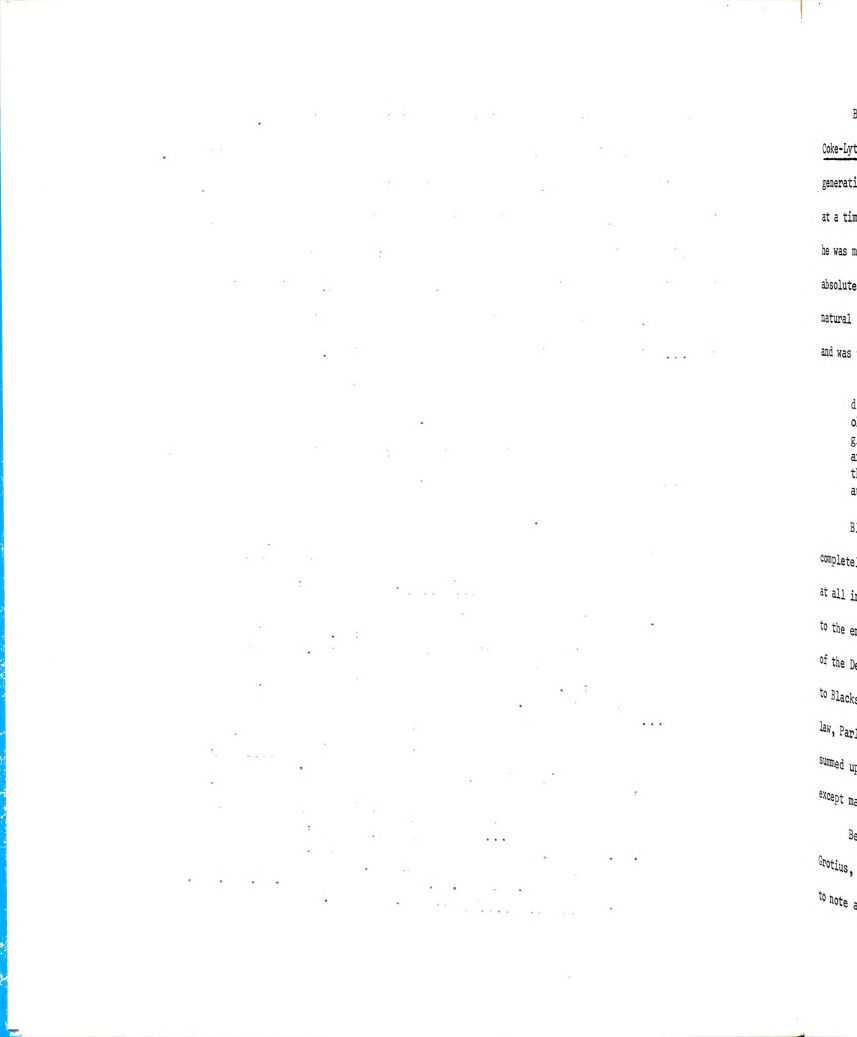
concept and as such was subject to judicial delimitation.[74] In the Bonham Case, cited above he turned the same argument upon Parliament. Regarding this latter, he remarked "And it appears in our books, that in many cases, the common law will controul acts of parliament, and sometimes adjudge them to be utterly void: for when an act of parliament is against common right and reason, or repugnant, or impossible to be performed, the common law will controul it and adjudge such act to be void...iniquum est aliquem suae rei esse judicem."[75]

Coke then is seen here to be a foundation upon which Locke would later build safeguards against power.

For the purposes of this thesis it may be interesting to note here the several statements of Coke and his point of view as it reflected his natural law philosophy.

He and his associates in the same year as Bonham's Case presented a summary of arguments in Calvin's Case, as follows:

> 1. That ligeance or obedience of the subject to the Sovereign is due by the law of nature: 2. That this law of nature is part of the laws of England; 3. That the law of nature was before any judicial or municipal law in the world: 4. That the law of nature is immutable, and cannot be changed."
> ...The law of nature is that which God at the time of creation of the nature of man infused into his heart, for his preservation and direction; and this is lex aeterna, the moral law, called also the law of nature. And by this law, written with the finger of God in the heart of man, were the people of God a long time governed before the law was written by Moses, who was the first reporter or writer of law in the world...And Aristotle, nature's Secretary Lib. 5. Aethic. saith that jus naturale est, quod apud omnes homines eandem habet potentiam. And herewith doth agree Bracton lib. I, cap. 6. and Fortescue cap. 8. 12. 13. and 16. Doctor and Student, cap. 2 and 4.[76]



Blackstone, whose (1765-1769) Commentaries began to replace Coke-Lyttleton as the law book of the American colonies for the generation of lawyers following Jefferson, was widely read in the colonies at a time when natural law thinking was gaining in popularity. Although he was much less consistent than Coke, and could as easily uphold the absolute power of Parliament, he wrote the following description of natural law which happened to suit the needs of Americans at that time and was thus taken over by them:

> This law of nature being coeval with mankind, and dictated by God himself, is of course superior in obligation to any other. It is binding over all the globe, in all countries and at all times: no human laws are of any validity, if contrary to this; and such of them as are valid derive all their force and all their authority, mediately or immediately, from this original.[77]

Blackstone, according to Corwin, (p. 53) was eloquent, suave, and completely undismayed by palpable self-contradiction. He was not bothered at all in his use of phraseology taken from Locke and Coke which he turned to the entirely opposed position of Hobbes and Mansfield, whose defense of the Declaratory Act of 1766 was admittedly based on Hobbes. According to Blackstone, with due disregard for his previous statements on natural law, Parliament is possessed of absolute power. This doctrine was later summed up by DeLolme in the following aphorism: "Parliament can do anything except make a man a woman or a woman a man."[78]

Before proceeding to specific indications of the influence of Grotius, Pufendorf, Burlamaqui on the Founding Fathers, it may be helpful to note at this point by way of summary that several widely differing

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theories of natural law found their way into the thinking of the late 18th century Americans. Although there were strong currents of classical natural law, introduced by Coke, Blackstone, Grotius among others, there can be little doubt that the Declaration of Independence and the Constitution of the United States rest upon a concept of "natural right" that in turn rests upon an historically untenable hypothesis, a "state of nature" that supposedly existed before the social compact to unite politically was agreed upon.[79]

It does seem from a review of the evidence, a sampling of which is presented in the preceding pages, that the political theorists of the seventeenth and eighteen centuries did not take as their point of departure the Aristotelean position that man, by his very nature, known from experience and reflection, was a political being, one who was meant by his structure and not by his intention alone, to live in human society.

With the exception of Hugo Grotius, the men most often referred to and quoted by the formulators of American political theory built a system of natural rights or natural law on the assumption that man at one time lived in an original state of nature that existed before political society. And if, as Davitt notes (p. 163), the Declaration and the Constitution rest upon theoretical foundations that have long since been disproven as political theories, it would seem to follow that both documents and the system that has been constructed upon them are as antiquated as the notions they embrace. If the case for such a natural law basis of American political theory were as clear as the above might

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suppose, it would be understandable why some and perhaps many today would say that "Locke's principles '...were embalmed in the Constitution of the United States which survives like an ancient family ghost haunting a modern skyscraper.'"[80]

Thus, it would seem, natural law has once again been dismissed from the scene of intelligent, meaningful discussion. Yet, this kind of disagreement and impatience with a constantly reappearing 'ghost' exposes itself to the charge that the argument has been arbitrarily concluded in the face of evidence and issues that refuse to yield or to be long ignored.

With the hope of clarifying both the issues and the argument a number of observations pertinent to the question may profitably be made at this point.

Some authors have suggested that the 'state of nature' concept of the 17th and 18th century philosophers had theological connotations, that this state was related to the condition of mankind as portrayed in Genesis before the Fall. Given the radical contrasts between Hobbes and Locke, for example, as these men viewed the original state of nature, this does not appear to be what the philosophers were talking about. Nor is there any intrinsic evidence that the philosophers were concerned with the theological account of man's creation, life before the Fall, the 'test,' the Fall itself and the condition of man as fallen, yet redeemed. It is always possible that the religious struggles of that period had some influence on them, but it seems safe to assume that the philosophers were primarily intent on giving an account from reason alone for the tension that existed between individual rights and state authority.

It has already been indicated above that while the thought and even in some cases, as with Locke's words and phrases were adopted by Jefferson, Otis, Hamilton, Adams and others of the American Revolution, there were important changes that made for a unique formulation of natural law theory on the American continent. Geographical, cultural and temporal differences would seem to demand modifications. What might be acceptable to Englishmen in the "Revolution" of 1988 would not necessarily meet the needs of Americans in the Revolution of 1776.

The unique American formulation of natural law theory, based on the political philosophy of the seventeenth and eighteenth centuries, may now be considered archaic, and in a sense it has to be. This would seem to be a necessary conclusion, since there has been another change in time and change in modes of thought as a result of new experiences and considerable advances in man's knowledge of the world in which he lives. This last does not necessarily follow solely from an advance of time and an increase of experience, for it is possible for mankind to forget, to fail to learn from experience, and to regress from civility to barbarity. This has been the case with cultures that have become extinct, and with peoples who have been grossly misled by barbaric leadership as happened in Nazi Germany. However, this thesis presupposes that with the passing of time, the intellectual and moral efforts of mankind in general do produce a better understanding of the world, and can result in more sophisticated standards of morality that make it possible for man to live better lives, morally and ethically.

The natural law philosophy of the Founding Fathers may now be

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outmoded in the How it attempted a solution to the problems of 1776; it is not outmoded in the What it attempted in resolving for that time the continuing problem of liberty against government.

Thus is spelled out one of the several reasons why natural law theory, here taken to identify the two thousand year old tradition of philosophical realism, has alternately won and lost the respect of educated men. Even when it has not been confused with natural rights theory and the currently untenable foundations of that particular mode, the proponents of the theory have too frequently insisted upon a total grafting of the theory from one time and culture to other times and other cultures without taking into account cultural variations and the valid conclusions of the physical sciences.

More than two thousand years of human intellectual effort cannot reasonably be brushed aside. On the other hand, the discoveries and formulations of the past must, if they are to be relevant to contemporality, be constantly reexamined and reevaluated.

Whether or not man's intellectual history is known by any given man at any given time, whether he has been influenced in his thinking by currents of thought contemporaneous with him, it seems neither unusual nor remarkable that an independent thinker in any period may be discovered as representative of a centuries long tradition. Such would seem to be the case with Thomas Paine (1737-1809).

Paine lived in an America whose revolutionary leaders drew freely upon the 'state of nature' concept of the English philosophers. Yet,

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as Wild notes, "Paine agrees emphatically with a central thesis of authentic natural law philosophy that man is a social being not by contract but by nature, and originally endowed with tendencies that fit him for social life."[81] Citing Paine, Wild continues, "As nature created him for social life, she fitted him for the station she intended."[82] Consequent to this position, Paine does not begin from a 'state of nature' and 'social contract' to an explanation of 'natural rights,' but rather argues to this from the fact of man's existence and his nature. "Natural rights are those which appertain to man in right of his existance. Of this kind are all the intellectual rights or rights of the mind."[83] Paine argues close to the line of Aristotle that man is rational by nature and as such has by the fact of his existence a natural right to education for example that he may develop his intellectual faculties. Man is also animal, with physical needs which are so much a part of his nature that if not satisfied he cannot continue to live. Thus, it is that man has a natural right to property and security.[84]

Paine makes a telling argument in support of his position that man is by his nature social when he observes that "social cooperation is not founded merely on certain special tendencies. It is required by every dynamic phase of his being. No human want can be adequately realized without the support of others."[85] Thus, Wild's summary in preparation for the statement of Paine: "In all cases she (nature) made his natural wants greater than his individual powers. No one man is capable without the aid of society of supplying his own wants; and those wants acting

upon every individual impel the whole of them into society, as naturally as gravitation acts to a center."[86]

Given the influence that Hobbes and Locke seem to have had in the formulation of American political philosophy, it is interesting to note that Paine disagrees radically with Hobbes who opposes natural law to civil law. He also contends with Locke insofar as the latter holds that some at least of man's natural rights are surrendered when civil government comes into being.[87] Opposing this position of Locke's, Paine remarks that "Man enters society not to have fewer rights but to have original rights better secured."[88]

As against the division of Hobbes, Paine claims that civil law when properly construed will always be founded in natural law. "Every civil right grows out of a natural right."[89]

The insight of Paine is that human obligation and duty, if these are to be seen as objective and meaningful, will be known from an analysis and a reflection upon the common needs of man. When these common needs of man are realized, individual reason becomes capable of discovering how these needs may be met, through cooperative action. This is easily enough understood if it is kept in mind that this social activity is a dynamic action engaged in by individuals all of whom strive toward a realization of their tendencies. The result of this human ability to relate needs to means of satisfying those needs joined with the general human awareness of the tendencies or drives of human nature is what has been called 'the sense of obligation.' To approach the same topic from a slightly different point of view, when a man becomes aware of certain rights that are rooted

in his needs, intellectual or physical, he can then conclude that others who share his nature, share his needs and also his rights. These rights in others he then reacts to with a "sense of obligation."

Whether the above always works out this way in the human situation is another question. If all men were of equal intelligence and if all were determined in their actions as guided by this intelligence, there would be a considerably closer similarity between the argument for the relation between right and obligation and the observable data of human experience. But, all men are not of equal intelligence, and all men are not totally determined in all of their acts, as personal awareness, the presupposits of law and the record of history will testify.

Thomas Paine, then, an influential figure of the American Revolution, seems clearly to represent a natural law position quite different from those political philosophers who were so often quoted and referred to by the majority of the American leaders.

In the following section an attempt will be made to demonstrate the relationship between Jefferson, Wilson, Hamilton, Madison, Otis, Washington, Sam Adams, and John Adams and the sources which apparently influenced their political thought.

It may be helpful to recall here that the historical study in progress and the empirical investigation to follow have as their purpose in this thesis the reasonable ground for the explicit development of an ethic for the mass media of communication that is proper to the unique American political philosophy rooted as this is in natural law theory.

This historical study must take into account not only the multiplicity of sources of natural law thinking that came into the American colonies but must attempt to account for the modifications in these sources as they were adapted to the particular times and circumstances of the American revolutionaries. Finally, it can reasonably be assumed that these theories, adapted as they were, did not become matter for mere repetition. It would be closer to the fact to hold that they (the theories of natural law) were vehicles of thought, stimuli for the individual thought processes of intelligent men, and perhaps as often apologia for their revolutionary acts.

In this regard, it seems important to keep in mind that not only do most men not follow the thought of others in a slavish manner, all the time and everywhere, but it is likely that even the 'originator' of the thought or theory is never so conditioned by his own thought and theory to the extent that he becomes one with it, and inescapably determined by it. Experience indicates that each new moment and each new experience presents new possibilities of choice which result in an evolution, radical modification of or complete conversion from the previously held theory. Here, then, enters the necessity for an understanding of the concept of process in all things, in human affairs, and in particular, toward the development of an ethics of mass communication that derives its flexibility not from personal whim but from the equivilation and proportion that exists between reality and man's attempt to adjust to it through the formulation of behavioral patterns and structures.

The word is not the thing signified. The image in the mind is not the same as its external cause. The ethical demands of man are the conclusions of insight and experience. They do not exist as such in the structure of reality.

In the preceeding pages, an attempt was made to trace the several currents of natural law thinking that influenced the Founding Fathers of this Republic. It now remains in the concluding pages of this historical section to discover evidence of natural law thinking in these men, to indicate, when possible, either intrinsic or extrinsic evidence of derivation, and finally, to show from their own writings the kind of natural law theory that was the unique product of the American policy.

George Washington, during his "Farewell Address"[90] said:

> I dwell on this prospect with every satisfaction which an ardent love for my country can inspire, since there is no truth more thoroughly established than that there exists in the economy and course of nature an indissoluble union between virtue and happiness, between duty and advantage, between the genuine maxims of an honest and magnanimous policy and the solid rewards of public prosperity and felicity; since we ought to be no less persuaded that the propitius smiles of Heaven can never be expected on a nation that disregards the eternal rules of order and right which Heaven itself has ordained.

Writing again of a law higher than the state that governed the actions of man which were beyond the province of the state, Washington address himself to the United Baptist Churches in Virginia in May, 1780[91]:

> If I could now conceive that the general Government might ever be so administered as to render the liberty of conscience insecure, I beg you will be persuaded that no one would be more zealous than myself to establish effectual barriers against the horrors of spiritual tyranny and every species of religious persecution. I have often expressed

> my sentiments that every man conducting himself as a good citizen, and being accountable to God alone for his religious opinion, ought to be protected in worshipping the Deity according to the dictates of his own conscience.

Thomas Jefferson has frequently been accused in history of copying his ideas (in the Declaration) from a pamphlet of James Otis, of merely representing the common sentiment of the day on the question of natural rights, of pirating the Second Treatise of John Locke, of being a Deist. His letters to political contemporaries cast some reasonable doubt on the validity of these charges, many of which have little meaning and less support. His sentiments expressed outside of the ring of political argument would seem to express his concern for matters of religion, the relationship that existed in his mind between church and state, and the implication of his acceptance of a law higher than that of the government. Writing to the Ursuline Sisters in New Orleans on May 15, 1804, Jefferson answered:[92]

> ...The principles of the Government and Constitution of the United States are a sure guarantee to you that it will be preserved to you sacred and inviolate, and that your institution will be permitted to govern itself according to its own voluntary rules, without interference from the civil authorities. Whatever diversity of shade may appear in the religious opinions of our fellow-citizens, the charitable objects of your institution cannot be indifferent to any; and its furtherance of the wholesale purposes of society by training up its young members in the way they should go, cannot fail to insure it the patronage of the Government it is under. Be assured it will meet with all the protection my office can give it.
> I salute you Holy Sisters, with friendship and respect.
> (Signed) Thomas Jefferson, President.

Again, writing to the General Assembly of North Carolina, in 1808, disapproving of a third term Jefferson noted:[93]

> The wrongs our country has suffered, fellow citizens, by violations of those moral rules which the Author of our being has implanted in man as the law of his nature to govern him in his associated, as well as individual character, have been such as justly to excite the sensibilities you express, and a deep abhorence at indications threatening a substitution of power for rights in the intercourse between nations.

Quoting from No. 20 of The Federalist, Cornelia Le Boutillier[94] attempts to establish Alexander Hamilton's early interest in natural law as a bit of whimsy. "The final paragraph of No. 20 begins with these words: 'I make no apology for having dwelt so long on the contemplation of these federal precedents. Experience is the oracle of truth; and where its responses are unequivocal, they ought to be conclusive and sacred.'" Boutillier continues: "Here Hamilton expressly repudiates an earlier dalliance with rationalism and with the transcendental natural law. A man who says, 'Experience is the oracle of truth,' is a man who will place no final faith in 'the ignis fatuus of a priori speculations of closet philosophers.' By the time Hamilton addressed himself to the challenge of writing The Federalist with James Madison and John Jay, he had put away casuistry."[95]

This kind of comment would hardly deserve response except for the fact that it represents an attitude toward natural law theory that has still many adherents among the ill-informed. As has been shown above, and as will be developed in the following section, experience is not only a vital component of natural law thinking, but is, in fact, its point of

departure. The faith, of which LeBoutillier speaks is neither faith at all, nor any kind of worship for speculations, a priori or otherwise that hang in the air like so many Japanese lanterns. Finally, there is neither an implicit nor explicit denial of his earlier philosophical posture in these and other statements of the older Hamilton.

In the citation following, Wright seems to sympathize with LeBoutillier but offers no evidence to support Hamilton's 'deviation.' Aside from the fact that this would be quite difficult to substantiate, the proving of the fact would not add much to the argument pro or con natural law theory. Assuming that Hamilton did change radically in this regard as he grew older, he could have done so for any number of reasons. It could have been that he no longer saw it necessary to belabor the obvious. It could have been that his increased knowledge of political affairs left him impatient with the formulations of his youth. It could, finally, have been that what he saw more clearly in youth escaped him in his later years. There is no guarantee that natural law theory once accepted will always be accepted by the same man. There is likewise no guarantee that once a man ascribes to natural law theory he will not err either at that time or at a later time. In brief, a mistake in arithmetic is no argument against arithmetic.

Wright in noting the contribution of Hamilton to the natural law thinking of revolutionary America says that:

> Probably the most influential pamphlets of this period which were produced in the colony of New York were those written by Alexander Hamilton. Although he was but seventeen years of age when the first appeared, and but eighteen when he wrote the second, they are by no means juvenile performances. And although later writings of Hamilton indicate that he soon ceased to have much sympathy with the doctrine of natural rights, these pamphlets are second to none in their reliance upon this concept. In the first of them he argues that the proper solution of the present discontents can be secured only by a study of the principles of 'natural justice' and the 'fundamental principles of the English Constitution.'

Wright proposes that Hamilton's opponent, the 'Westchester Farmer' seems to have been familiar with Hobbes and to have agreed with Hobbes that rights come from society and not from nature. To which Hamilton replied, "Good and wise men, in all ages have embraced a very dissimilar theory."[96]

> They have believed that the Deity 'has constituted an eternal and immutable law, which is indispensably obligatory upon all mankind, prior to any human institution whatever. This is what is called the law of nature.'[97]

In line with his natural law preoccupations of this period, Hamilton refers to Blackstone in support of his position that all human laws, if they are valid, derive what authority they possess from the law of nature and that any law that contradicts the law of nature is by that fact invalid and of no account.

> Upon this law depend the natural rights of mankind; the Supreme Being gave existence to man, together with the means of preserving and beautifying that existence. He endowed him with rational faculties, by the help of which to discern and pursue such things as were consistent with his duty and interest; and invested him with an inviolable right to personal liberty and personal safety.[98]

Commenting on the inherent right of the colonists to exercise a legislative power, Hamilton placed a plea beyond the civil law, for no charter existed in New York at that time:

> There is no need, however, of this plea. The Sacred Rights of Mankind are not to be rummaged for among old parchments or musty records. They are written, as with a sunbeam, in the whole volume of human nature, by the hand of divinity itself, and can never be erased or obscured by mortal power.[99]

From the foregoing and supported by the following citations from Wilson, John Adams, James Otis, and Samuel Adams, it seems reasonable to assume that natural law philosophy was ingrained in the thinking of the Founding Fathers. Documents cited and the curriculum of studies in colonial institutions of higher learning in that period substantiate both the inclination and the fact.[100]

James Wilson, one of the principle authors of the Federal Constitution and a member of the first Supreme Court was a Philadelphia attorney of Scotish birth. It is likely in the estimate of those competent to judge such matters that Wilson had no equal in the colonies in his control of British constitutional history, with the exception of John Adams. The introductory pages of his pamphlet, "Considerations on the Nature and Extent of the Legislative Authority of the British Parliament," written in 1770 and published in 1774 indicate his natural law position as he attempts to establish basic principles for his legal and constitutional argument.

> Those who allege that Parliament has power to legislate for the colonies, he writes, argue that there must be in every state a final, absolute authority, and that this authority in Great Britain is Parliament. (Works [Bird Edition], III, 205). This principle, he

> continues, is of great importance, but that importance is derived from its tendency to promote the ultimate end of government. If, in any particular instance, its application would destroy instead of promoting that end, it should be rejected.[101]

The following rather lengthy citation is included below not only to show the natural law thought of Wilson at work, but also to indicate his use of Burlamaqui's Principles of Natural and Politic Law. There is also evidence of his use of Blackstone whom he sometimes quotes to refute.

> All men are, by nature, equal and free: no one has a right to any authority over another without his consent: all lawful government is founded on the consent of those who are subject to it: such consent was given with a view to ensure and to increase the happiness of the governed, above what they could enjoy in an independent and unconnected state of nature. The consequence is, that the happiness of the society is the first law of every government.
>
> This rule is founded on the law of nature; it must control every political maxim: it must regulate the legislature itself. The people have a right to insist that this rule be observed; and are entitled to demand a moral security that the legislature will observe it. If they have not the first, they are slaves; if they have not the second, they are, every moment, exposed to slavery. For "civil liberty is nothing else but natural liberty, devested of that part which constituted the independence of individuals, by the authority, which it confers on sovereigns, attended with a right of insisting upon their making a good use of their authority, and with a moral security that this right will have its effect."[102]

As Wright notes "Perhaps the longest, and almost certainly the heaviest of the pamphlets written in defense of the stand taken by the Continental Congress is the well-known Novanglus of John Adams." (The series of letters which make up this tract were written by Adams in answer to the letters of 'Massachusettensis' (Daniel Leonard), and

were published in the Boston Gazette between November, 1774 and April, 1775)[103]

> ...I would ask, by what law the parliament has authority over America? By the law of God in the Old and New Testament, it has none; by the law of nature and nations, it has none; by the common law of England, it has none, for the common law and the authority of parliament founded on it, never extended beyond the four seas; by statute law it has none, for no statute was made before the settlement of the colonies for the purpose; and the declaratory, act made in 1766, was made, without our consent, by a parliament which had no authority beyond the four seas. What religious, moral, or political obligations then are we under to submit to parliament as a supreme legislative? None at all.[104]

Adams seems to have been early taken with the doctrine of natural law and expounded upon it throughout his very long career of political writing.

Among the earliest of his political pamphlets is the Dissertation on Canon and Feudal Law.[105] He maintains here that in spite of the repeated attempts of authority to "wrest from the populace, as they are contemptuously called, the Knowledge of their rights and wrongs," the people continue to hold those rights antecedent to all earthly governments... "Rights, that cannot be repealed or restrained by human laws - Rights, derived from the great Legislator of the universe." (Works III, 449) His method for examining the spirit of liberty is significant:

> Let them all become attentive to the grounds and principles of government, ecclesiastical and civil. Let us study the law of nature; search into the spirit of the British Constitution; read the histories of ancient ages; contemplate the great example of Greece and Rome; set before us the conduct of our own British ancestors, who have defended for us the inherent rights of mankind...Let it be known that British liberties are not grants of princes or parliaments, but original rights,

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[13]) [14]

> conditions of original contracts, coequal with prerogative, and coeval with government; that many of our rights are inherent and essential, agreed on as maxims, and established as preliminaries, even before a parliament existed. Let them search for the foundations of British laws and government in the frame of human nature, in the constitution of the intellectual and moral world.[106]

In a letter to Richard H. Lee which was later published as a pamphlet, Adams speaks of principles that are justified by 'nature and experience.' He suggests nature and experience as the basis for a science of politics. In this vein he writes that the works of the great political philosophers must be studied, and he adds that those of Locke, Milton, Sidney, and Harrington "will convince any candid mind, that there is no good government but what is republican. He continues that "a good government is an empire of laws," and the first step in making those laws is "to depute power from the many to a few of the most wise and good."[107]

Samuel Adams, cousin of John, was not nearly as learned in the law, nor had he read as widely...in the literature of political thought. He wrote neither books nor pamphlets, but he did produce hundreds of private letters and state papers reflecting the most advanced ideas of his time. What is most important to the purposes of this thesis is that Samuel Adams was one of the most prolific journalists of his time,[108] and the principal tool for the propagation of his revolutionary ideas was the colonial newspaper. Although not a many talented man, Samuel Adams was a genius in one field. He knew how to interpret the aspirations

of the common man to the general public.[109] For this reason, he is in the estimate of many historians a leading candidate for the title "Father of the American Revolution."

A sample of the thought of Sam Adams is found in the following set of resolutions that he prepared which were adopted by the House of Representative of Massachusetts on October 29, 1765.

> 1. Resolved, That there are certain essential rights of the British Constitution of government, which are founded in the law of God and nature, and are the common rights of mankind; - therefore
>
> 2. Resolved, That the inhabitants of this Province are unalienably entitled to those essential rights in common with all men: and that no law of society can, consistent with the law of God and nature, divest them of those rights.
>
> 3. Resolved, That no man can justly take the property of another without his consent....[110]

According to his theory, Samuel Adams holds that the rights of man, as indicated in the resolutions noted above, are derived immediately from the British constitution, but are ultimately founded in the law of nature. This principle he repeated many times during his active political life. And, because of his industry in letter writing and in journalism, his thoughts became widely known in the colonies. Perhaps the best known of his statements on natural rights is contained in the Massachusetts Circular Letter of February 11, 1768:

> ...it is an essential, unalterable right, in nature, engrafted into the British constitution, as a fundamental law, and even held sacred and irrevocable by the subjects within the realm, that what a man has honestly acquired is absolutely his own, which he may freely give, but cannot be taken from him without his consent; that the American subjects may, therefore, exclusive of any charter rights, with a decent firmness, adapted to the character of free men

[illegible]

> and subjects, assert this natural and constitutional right.[111]

As had John and Samuel Adams, James Otis graduated from Harvard and went on to practice law in Boston. He has in history the reputation of having been a 'spellbinder,' one of the great orators of the day.

Otis does not frequently seem to have used the terms natural or natural law in a way that would clearly indicate that he was, in fact, speaking from a natural law or natural rights position. He may not have used the words but he was dealing with a 'higher law' when he referred to the Writs of Assistance in his defense of Paxton as "destructive of English Liberty and the fundamental principles of law." In the same trial he contends that:

> ...reason and the constitution are both against this writ... had this writ been in any book whatever, it would have been illegal. All precedents are under the control of principles of law... No Acts of Parliament can establish such a writ; though it should be made in the very words of the petition, it would be void.

In the year following the trial, Otis published a pamphlet under the title "A Vindication of the Conduct of the House of Representatives of the Province of the Massachusetts-Bay," in the course of which there can be no question as to his use of natural law theory. Defending the position of the House that it had the right to originate taxes, Otis comments:

> 1. God made all men naturally equal. 2. The ideas of earthly superiority, preheminence, grandeur are educational, at least acquired, not innate. 3. Kings were (and plantation Governors should be) made for the good of the people, and not the people for them. 4. No government has a right to make hobby horses, asses and slaves of the subject, nature having made sufficient of the two former, for all the lawful purposes of man, from the harmless peasant in the field, to the most refined politician in the cabinet; but none of the last, which infallibly proves they are unnecessary. 5. Tho' most govern-

> ments are de facto arbitrary, and consequently the curse and scandal of human nature; yet none are de jure arbitrary...[112]

Near the end of this pamphlet, Otis treats the rights to which the colonists are entitled by 'common law, by their several charters, by the law of nature and nations, and by the law of God.[113]

As authority for the statements he calls 'data' Otis refers to Locke's Discourse on Government, as he calls it. Wright notes that John Adams exaggerated when he declared that 'this little fugitive pamphlet' contained the 'solid substance' of the Declaration of the Continental Congress in 1774, of the Declaration of Independence, of the writings of Price and Priestly and Tom Paine, and of the French Revolution. It was however, according to Wright "...in point of time, first of the many pamphlets which were to be of major importance in importing, modifying, and popularizing the doctrines which were to culminate in the Declaration of Independence.

Tom Paine, considered at some length previously, a recently arrived Englishman, seems to have been the first of the revolutionary leaders to use the theory of national rights in favor of the colonies without reference to or dependence upon England's laws or customs.

In his famous Common Sense, published in Philadelphia on January 9, 1776, he set forth his political belief. For him government should be a kind of public utility, to be operated at the least expense for the interests of the general population. The most important function that a government can have is its full recognition of the rights of man. Arguing for independence, he declared that, "...a government of our own is our natural right."[114]

Thomas Jefferson read Paine's book Rights of Man, with approval in a later 'Second American Revolution' and used it as a tool to mold public opinion in his struggle against those who would make the new republic an aristocracy of wealth and station.

Thus concludes the historical study that has attempted to trace the several currents of natural law theory that influenced the formulation of American political theory. That natural law or 'higher law' thinking is intimate to the very being of the American 'way' has seldom been seriously questioned. Natural law thinking has not been repudiated as an essential component of American political philosophy. It has, however, been largely ignored for more than one hundred years. It has as often been misunderstood and poorly used by those who would wish to do away with it, and sometimes by those who choose to defend it.

However complex the confusions and disagreements about natural law theory, this thesis proposes that neither American political philosophy nor an ethic of communication that stems from it can be evaluated or usefully employed toward a resolution of socio-ethical problems in the United States unless the existence and influence of natural law is properly accounted for.

Professor Jay W. Jensen, head of the Department of Journalism in the University of Illinois, speaking on "Freedom of the Press: A Concept in Search of a Philosophy," as the 1962 Nieman Chair lecturer at Marquette University, addressed himself to a number of questions that are central to this thesis.

He speaks of the concept of press freedom as a product cast in the mold of seventeenth and eighteenth century liberalism. And he sees this concept under lethal attack by the forces of neo-liberal thought. Before proceeding to a discussion of Jensen's arguments and premises, several observations might be made to place the discussion in the framework of the thesis, to single out issues critical to this thesis, and to reiterate a posture or attitude stated above in this study.

About the attitude indicated, this thesis presupposes that the concept of freedom of the press as formulated in this country at the time of the Declaration and Constitution was a product both of history and of the unique times and circumstances of its adoption. As has been noted in the historical study of the natural rights thinking of the Founding Fathers there were many and varied philosophical, social, economic, and political currents of influence that render at least a partial account of the concept of press freedom and the meaning and understanding of it, when it was so formulated. A contemporary appreciation of both the uniqueness of the situation and of the concept which was a component of the situation should avoid several possible extremes.

It should not arbitrarily be assumed that because the concept of freedom of the press was formulated in the middle of the eighteenth century it has no meaning, value, or relevance to the twentieth century and its needs. Nor ought it be assumed under the rubric of reverence for the traditions of the past that the concept must be taken strictly, literally, and entire to be forced into the mold of modern social and political structures. The first assumption rests upon a dangerous premise

that there is no significant relationship between the past and the present, that all things must be discovered anew in each moment of time, that the past has no meaning in the present. The second assumption rests upon an equally dangerous premise that the time continuum linking past and present is a rigid and determined line that admits of no dynamism, no process, no evolution or progress in human experience and knowledge.

The insights of the Founding Fathers were necessarily limited and to some extent determined by the knowledge of the world that they possessed at that time. These insights were valid and remain valid insofar as they gave an accurate account of reality as they experienced it. This validity is based on two premises of this thesis: that man is intelligent and that reality is intelligible. Given the existence of such constants, a number of variables must also be acknowledged in the face of verifiable evidence. In this instance the variables include the kinds and qualities of the experience of reality shared by the Founding Fathers, the particular needs of the times as they understood them, the prejudices that were built into their sources of political theory, and their own natural limitations in gathering and evaluating the many kinds of data that consciously and unconsciously went into the formulation of the concept of freedom of the press.

The concept today looks at different data; the variables of time and circumstances will differ from the variables of the mid-eighteenth century, and, although the constants of human nature and its potentialities, together with the content of the concept will remain substantially unchanged, there remains the demand of dynamic process in human events that the concept be constantly re-examined and modified as fresh insights into new

experience may direct.

To summarize briefly, a denial that the truth of the past is relevant to the truth and the search for truth in the present is an implicit denial of the value and relevance of truth in any period. Such a denial neglects the evidence of the dynamism, process, and tendency of things and thoughts to grow and develop from what they are to what they can and ought to be. The world which such thinking represents is static and atomisically complete, a world in which there is no motion, no change, and no truth other than what is in any given moment possessed.

On the other hand, the truths of the past need to be accommodated to the needs of the present for the same reasons, i.e., the dynamism, process, and tendency of things and thoughts to grow and develop from what they are to what they can and ought to be.

Jensen's concern may now be studied in the light of the observations made above.

Professor Jensen looks first at the rise and incipient decline of what he refers to as "a powerful social myth, the individualistic Weltanschauung of Classical Liberalism." Noting that this philosophy grew gradually during a period of four centuries, from the time of Thomas Aquinas to John Locke, Jensen observes the coincidence of this growth with the development of capitalism, science, and the secular state. This would seem to be his appreciation of the several shifts from an "other-oriented world" to a "self-oriented" world discussed at some length in these pages treating Grotius, Pufendorf, Hobbes, and Locke.[115]

The new philosophy, out of which grew the American concept of freedom of the press, was typified by an image that was "...a rational, moral, and autonomous self having reality and meaning in relation to an objective order of reason and moral law and limited in the exercise of its will only by 'right reason' and individual conscience."[116] As the foregoing pages have indicated and the following pages will further substantiate, this is something of an oversimplification of individualism representing as it does only the classic Graeco-Roman-Medieval theory of natural law, and excluding largely the impact of Pufendorf, Hobbes, and Locke with their considerably different natural rights theories.

What Jensen does not see or at least does not put into proper focus is that the very forces that gave birth to the liberalism and individualism of the seventeenth and eighteenth centuries also contained the seeds of its destruction. Once the superiority of the intellect over the will is denied, once the ability of the reason of man is seriously questioned, once the value of metaphysics is impatiently brushed aside, empiricism, positivism and materialism must result. Jensen seems to hold that these collectiveisms are a consequent of "new modes of thought and the development of new social forms,"[117] without noting that Classical Liberalism with its key concept of an atomistic autonomous Self and neo-Liberalism with its central concept of "cultural" Self might both be extreme positions resulting from overemphases on particular aspects of the data of human experience. And further, these 'isms' are not really new modes of thought. There roots and manifestations have a history at least as long as the philosophy of moderate realism that Jensen seems to hold as attacked or

subverted by positivism.

Continuing his discussion, Jensen remarks:

> So far as it has progressed to date the mutation of the traditional concept of freedom of the press may easily be perceived in at least two dimensions. The first dimension is manifested in the subversion of the basic premises of Classical Liberalism, in the growth of Positivism since David Hume, in the "flight from reason" in psychology and the social sciences, and in the increasing collectivization of contemporary perspectives and institutions.[118]

Although there appears some little confusion in what Jensen attempts to propose as the cause and effects of the shift from Classical to neo-Liberalism, he comes to the point of his concern about press freedom in the following:

> What was in Classical Liberal theory regarded as a natural right (that is, the freedom of the press) is taken in neo-Liberal theory to be a permissive, conditional, and social right. As Dean Theodore Peterson reminds us in his analysis of social responsibility theory, when the framers of the Constitution appended an amendment for the protection of the liberty of the press, "they had no intention of binding the publisher to certain responsibilities in exchange for his freedom."

Aside from the observation that it is frequently hazardous to presume the nature of the intentions of both contemporary and, a fortiori, of historical figures Jensen and Peterson seem to prescind from the social aspects of rights as these were incorporated in the thinking and in the sources of the Founding Fathers.

Few of the Classical-Liberals conceived of rights in general and the right to freedom of the press as absolute. John Milton, one of the most eloquent spokesmen for press freedom would deny this freedom to Roman Catholics and to the ephemeral journalists of his day. As Siebert notes, "Milton recognized that the right of free discussion might be

limited but he avoided any general principles on which these limitations might be based."[119] It was in his Areopagitica that Milton made the statement so well known to students of press freedom:

> ...though all the winds of doctrine were let loose to play upon the earth, so truth be in the field, we do injuriously by licensing and prohibiting to misdoubt her strength. Let her (truth) and falsehood grapple; who ever knew truth put to the worse, in a free and open encounter?

Emery comments that Milton's glory is somewhat dimmed by the fact that he himself was serving as licenser and censor only seven years after making this statement. (The Mercurius Politicus, an official organ published during the reign of Cromwell).

John Locke, on rights in general, could not have viewed them as absolute, if one or several could be given up to the State.[120]

Later in his paper, Jensen returns to his theme adding this time a reference to the natural law framework of the right:

> As an autonomous self, the individual was limited in the exercise of his will and interest only by an order of values transcending social existence, objectified in natural law and natural rights, and to which he was ontologically linked by reason and conscience.[121]

The above statement is very much in agreement with the realistic theory of natural law as proposed by Aquinas, Suarez, and to a great extent by Grotius, but once again, in the light of the preceding historical study of the problem, it is difficult to reconcile Jensen's assessment with the natural rights thinking of the Founding Fathers.

Jensen then speaks of the Classical Liberal notion of "a natural opposition between the individual and society, a dichotomy which assumed that individuals have discrete and independent existence apart from the

society in which they live..."[122] The present thesis tries to show that this tension between the individual and society has existed as a puzzling problem for many centuries perhaps from the beginning of time, and not from the Renaissance as Jensen supposes. There may well have been a preoccupation with the concept of Self dating from this period, but the tension would seem to be built into the very nature of man, as individual and social. He (man) cannot be what he is and what the evidence of history shows him to be without both of these dimensions. And, it may well be that not only can there not be a resolution of this tension, but it may be that this tension between man as individual and as social is at the very source of the dynamism that makes progress possible for mankind.

Jensen seems to feel that the shift from the individual-oriented philosophy that was in vogue at the time of the formulation of the First Amendment in its structure of Libertarianism as a theory of the press, to the so-called Social Responsibility theory as discussed by the Hutchins Commission is a sign that man as individual is being gobbled up by the culture in which he moves. There is little doubt that the note of responsibility has received more attention in recent years than it had formerly in philosophies of the press in England and the United States. And there may be a danger in this shift that the autonomous Self could be assimilated by collectivism. However, the note of responsibility as a concommitant of press freedom does not demand such a surrender.

As will be discussed in more detail in the final section of this thesis, rights, including freedom of the press, have no meaning unless

they refer to other persons possessing the same rights by virtue of a shared human nature.

Rommen clarifies the issue in the following statement:

> As the person is a self-sufficient autonomous being, but directed to communal life, so, too, these natural rights cannot be understood as isolated and wholly independent. They are by far more coincident with the order among the socially connected persons. No right has a meaning if it is not a right positively to act with other persons, or negatively to be free from interference by other persons. Consequently the rights receive their intended meaning from the social order in which the persons live and they are necessarily counterbalanced by duties.[123]

Professor Jensen concludes his paper with a call for the rehabilitation of the concept of freedom of the press.

> Hence, what is most urgently required for the rehabilitation of the concept of freedom of the press is a new metaphysics - a metaphysics that will restore what Positivism, Romanticism, Collectivism, and other derivative isms have lately destroyed: an image of the Self as ontologically independent of Culture and existentially related to an objective order of values. For only thus can the concept of freedom of the press, like that of human freedom in general, be grounded in a structure of philosophic categories capable of ensuring the freedom of the self, of public communication, and of public opinion.[124]

Again there is much agreement between what Jensen has said and what this thesis proposes. But, there is a difference in attitude. If dissatisfaction with present trends toward an engulfment of the Self may be taken as a starting point, it seems logical enough to investigate the record of history, as this thesis has attempted to do, to attempt the clarification of issues necessary for an understanding of the dissatisfaction. An interest in and an impatience with metaphysics are

nothing new. These opposing attitudes are as old as recorded philosophy. Hence it is not a new metaphysics that is needed but a deeper understanding of the place of metaphysics in the structure of the problem of human rights and freedom of the press. Then, the investigator is ready to measure what has been discovered in the past against the new experiences and circumstances of the present. The result will not be a final solution to the problem of press freedom but a formulation, accounting for advances in knowledge that will be seen as relevant to the needs of the present time. This is, of its nature, a continuing labor requiring constant observation, correction, adaptation, because man is in motion, is free, is capable of truth, and is susceptible to error.

Jensen wants a rehabilitation of the concept of freedom of the press, a rehabilitation that he sees as possible only as a consequent of a new metaphysics. This kind of thing is not, or does not appear to be, a popular preoccupation among those who struggle to meet the issues involved in the concept of freedom of the press. There are signs, and they have increased in number during the past forty years in the United States, that natural law thinking is once again moving toward a position of respectability in both the world of the academy and the world of practical affairs. Philip Selznick points the way to its value in the social sciences. The Natural Law Institute at the University of Notre Dame brought together a wide variety of scholars and political leaders from many parts of the world to discuss natural law issues. The Center For the Study of Democratic Institutions has published a series of six

papers devoted to natural law. Among the participants was Robert Gordis who remarked:

> Today signs are multiplying that there is a growing interest in natural law and its possible rehabilitation for modern use. Circles which have long looked askance at it- philosophers, lawyers, sociologists-are manifesting a desire to find the viable elements in the concept of natural law.[125]

Allied documents of World War II were underlaid with the conviction of mankind that totalitarianism was literally inhuman. As LeBuffe and Hayes put it:

> To make the state all powerful, to derive all rights from the state and thus give the state a free hand to do what it liked and when it liked, was seen, in its effects, to be a horrible thing. Men were thrown back to principles of morality and to "inherent," "fundamental," "human" rights as they have rarely been thrown back before. The "absolute state" had the mask of respectability torn from its face and its lewd, leering visage shocked mankind.[126]

These same basic human rights founded in a natural law of moral realism appeared in the Declaration of the United Nations, the Berlin-Potsdam Conference, the Charter of United Nations, the post-war treaties, the Nuremberg Tribunal, the French Constitution, and in numerous other national and international agreements, among which that of Dutch-Indonesia is typical.

> The Dutch-Indonesian Agreement, November 1946, Article X states that the forthcoming Statutes of the Netherlands-Indonesian Union shall contain provisions safeguarding in both parts of the union "the fundamental human rights and liberties referred to in the Charter of the United Nations' Organization."[127]

It would be the burden of an altogether different kind of investigation to establish with a respectable degree of rigor that these returns to natural law are either an attempt to escape from reality or a desire to penetrate reality with an urgency proper to the tensions and crises of the present era. Whatever the motives ample evidence of a return to natural law thinking is abroad.

A good case might be made, in consequence of this renewed interest, for a return to perennial natural law theory rather than to the outmoded formulations of periodically stamped variations and alterations of the traditional theory proposed by the philosophers of moral realism.

In one guise or another, either of dissatisfaction with alternative attempts to resolve the issues that press for answers in the social sciences, or of a natural curiosity to place the question beyond the question of disciplinary premises, metaphysics may once again be making a plea for general acceptance.

Rommen, among others, comments:

> Yet one point history does make clear. The idea of natural law obtains general acceptance only in the periods when metaphysics, queen of the sciences, is dominant. It recedes or suffers eclipse, on the other hand, when being (not taken here in Kelsen's sense of mere existentiality or factuality) and oughtness, morality and law, are separated, when the essence of things and their ontological order are viewed as unknowable.[128]

The same author observes that natural law depends on the science of being which is metaphysics. And this brings the argument again back to Jensen's plea for a new metaphysics required for a rehabilitation of the concept of freedom of the press. It seems clear enough that the

object of the study of metaphysics, the data which it examines and structures, is not the study itself. What might have been satisfactory to the scope of man's knowledge in the past will very probably not be sufficient for the needs of the present. On the other hand, it would be more than presumptuous to conclude that the formulations of the past have nothing to offer toward attempts to solve current problems. Since, then, the reality that is the object of metaphysics is constant, and the knowledge of this reality is a variable dependent upon man's abilities and opportunities, what seems to be needed is not, strictly speaking, a new metaphysics, but new metaphysical formulations based upon fresh insights into the data of reality as this data is opened up for investigation by modern science. Philip Selznick supports this view in his statement of the need of natural law philosophy:

> I also believe that natural law philosophy would benefit from a greater effort to increase the scientific component of its discourse. A vigorous research program, devoted to the formulation and testing of natural law principles, might do much to advance both the cause of justice and sociological truth.

Jacques Leclercq also seems to be in agreement with the attitude of this thesis and with the statement of Selznick:

> The conclusion I reach is that natural law is permanent; that it does not change, but that our knowledge changes; and that to develop our knowledge it is necessary to study. To elaborate theories and reasoning, to argue and oppose different mental attitudes without positive foundations, is of little use, if any use at all. The example given of the introduction of divorce into France shows how these questions have been investigated and why there has been no advance. As I reach the end of my career, I can only hope that more young men will approach the problems of natural law in the only way which seems to me able to lead toward a progress of thought.[130]

Speaking to problems of legal theories closely related to the several ethical questions of this thesis, Anton Donoso remarks:

> Contemporary legal theories can be divided, as they have been throughout the past century, into varieties of legal positivism and natural or "higher" law theories. A survey of the writings in jurisprudence since the war's end, especially in the United States, reveals that legal philosophers are a bit wary of those legal positions that can be characterized, at best, as more "positivistic," i,e., maintaining that basically law is what is said to be (posited as) law and has the force behind it to be considered such. The current trend is clearly toward what can be characterized, at best, as more "naturalistic," i.e., that positive law is to be guided in its formulations and judged as to its validity by "ideas" founded on the "condition" and operation of the human person.[131]

In a footnote to the above Donoso remarks that, "The most striking fact about current national developments is the rise of natural law philosophies almost everywhere. England, Sweden, and Denmark (as well as Russia) are among the few countries which do not participate in this world movement..."[132]

Earlier in this thesis, Wild's five basic doctrines were enumerated as the criteria of moral realism which will now be examined under the rubric of the premise that moral realism is the pervading attitude of traditional natural-law philosophy rooted in a metaphysics of basically empirically verifiable data.

Wild takes the position that the moral realist must hold:

> (1) that the world is a nexus of interdependent tendential systems; (2) that each recurrent tendency is determined by a specific structure or form; (3) that the structure of substantial entities, like living things, determines essential tendencies shared by every member of the species; (4) that such tendencies must be activated according to a certain normal pattern or law; if (5) the good of that entity, its realization or completion, is to be achieved.[133]

From these ontological principles Wild moves to their application to human nature in the development of three specifically ethical theses.

(1) the universality of moral or natural laws;
(2) the existence of norms founded on nature; and
(3) the good for man as the realization of human nature.[134]

This in outline is the structure of the argument to be pursued in the following pages toward an attempt to find firm ontological foundations for ethics in general, and an ethics of the mass media of communication in particular.

Footnotes

[1]Wild, p. 64.

[2]The American Philosophy of Law, LeBuffe and Hayes, p. 41.

[3]Ibid., p. 42.

[4]Stanlis, p. 4.

[5]"The Scope and Purpose of Sociological Jurisprudence," Harvard Law Review, XXV (Nov., 1911), 162, Charles G. Haines' The Revival of Natural Law Concepts, 1930; and Otto Gierke's Natural Law and the Theory of Society, 1934.

[6]Gordis, p. 249.

[7]Plato's Modern Enemies and the Theory of Natural Law, p. 104.

[8]Ernest Barker, in Natural Law and the Theory of Society: 1500-1800, ed. Otto Gierke, Cambridge, England: At the University Press, 1934, I, xlvi.

[9]Stanlis, p. 11.

[10]Ibid., p. 135.

[11]The Rights of Man and Natural Law, p. 61.

[12]S. T. I-II, q. 91, a. 2.

[13]Wild, p. 64.

[14]Wild, p. 73.

[15]The Revival of Natural Law Concepts, p. 311.

[16]Wild, pp. 132-133.

[17]Wright, p. 16.

[18]T. Hutchinson, History of the Colony of Massachusetts - Bay, I, 496-497, as quoted by Wright, p. 16.

[19]Massachusetts Historical Collections, as cited by Wright, pp. 20-21.

[20]History of New England as cited by Wright pg. 28-29.

[21]See pages 6 and 7 these notes.

[22]De Jure Belli, I, i, 10, 1.

[23]Wright, p. 8.

[24]Wright, pp. 89-90.

[25]Wright, p. 8.

[26]Corwin, p. 53.

[27]Rommen, p. 71.

[28]Rommen, p. 71.

[29]C. Becker, The Declaration of Independence, pp. 256, 257.

[30]Haines, The Revival of Natural Law Concepts, p. 65.

[31]Wild, p. 118.

[32]De Jure Belli Ac Pacis, Bk. I, p. 12.

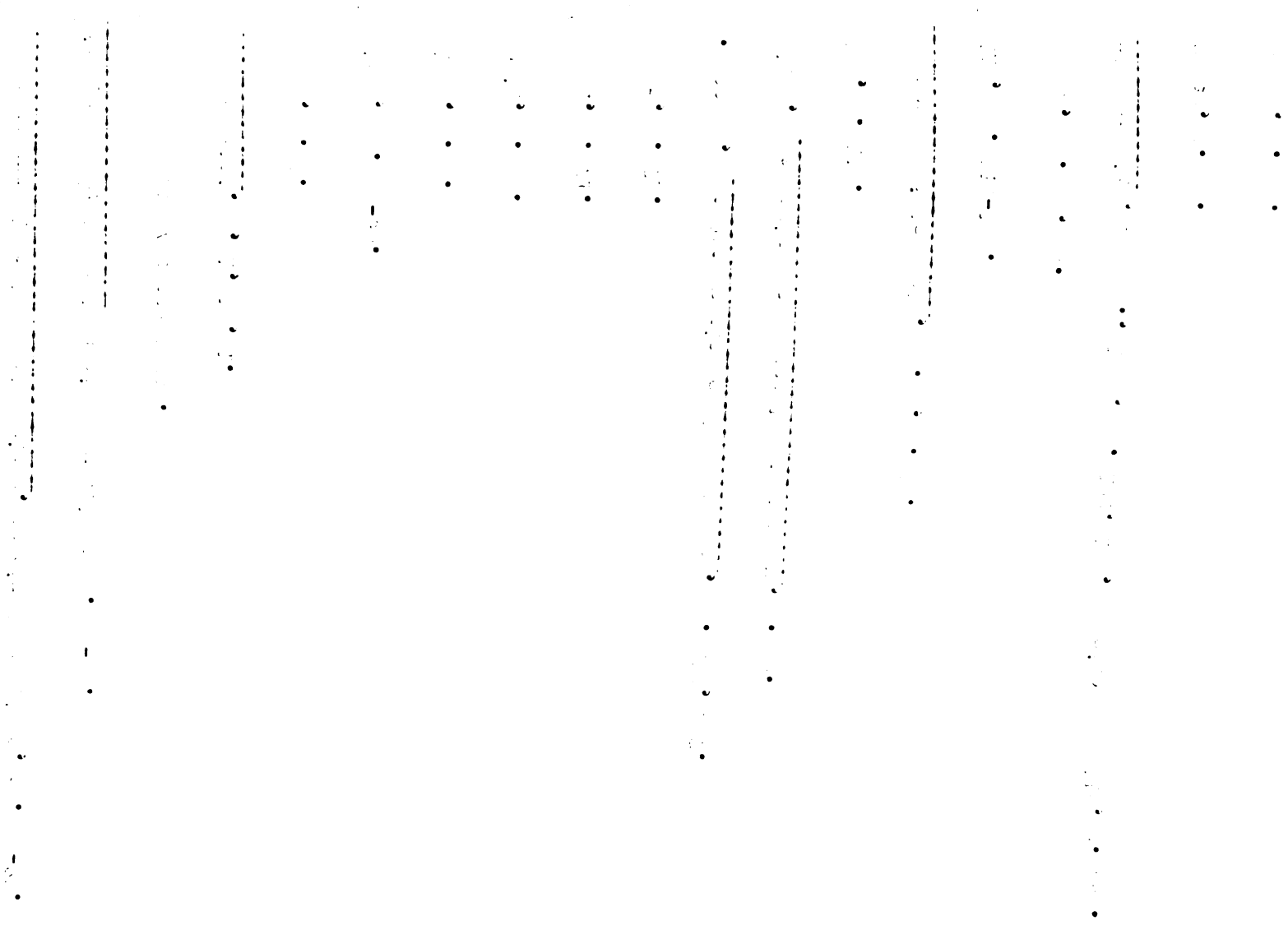
[33]Wild, pp. 119-120.

[34]Rommen, pp. 93, 94.

[35]Eris Scandica, 2nd ed., 1743, pp. 102, 103, as cited by Wild, p. 135.

[36]Rommen, p. 95.

[37]Rommen, p. 96.



[38]Natural Law, p. 56.

[39]Suarez, De Legibus, bk II, chapt. V.

[40]d'Entreves, pp. 54-55.

[41]Wright, p. 11; Corwin, p. 56.

[42]Corwin, p. 57.

[43]Corwin, pp. 52-53; Leviathan, Chpts. 13, 17, 18.

[44]Strauss, p. xi.

[45]Strauss, p. xii.

[46]Rommen, Natural Law, p. 58.

[47]Strauss, p. 104.

[48]Stanlis, p. 17.

[49]Stanlis, p. 24.

[50]John C. H. Wu, "Natural Law and Our Common Law," Fordham Law Review, XXIII (March, 1954), pp. 20-22.

[51]Stanlis, p. 25.

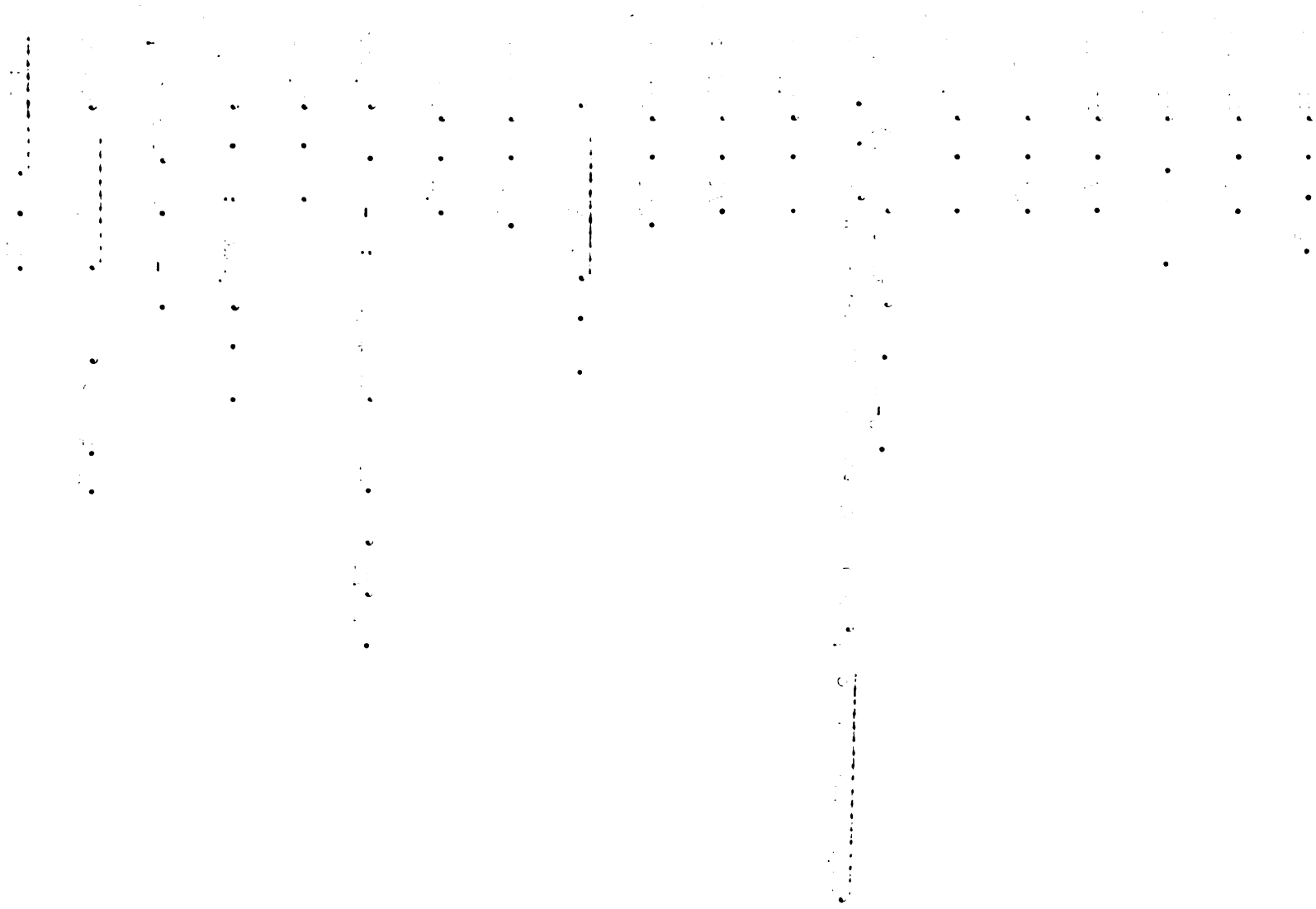
[52]Laslett, p. 74.

[53]Laslett, p. 75.

[54]Laslett, pp. 45 ff.

[55]Laslett, p. 81.

[56]Laslett, n. p. 81.



[57] Laslett, p. 81; Locke in Treatise II, 12.

[58] Laslett, p. 81.

[59] Nat. Law Inst. Proceedings, 1947, p. 17.

[60] N. L. Proceedings, p. 17.

[61] Writings, V, p. 343, as cited in Natural Law Institute Proceedings, Vol. I, pg. 19.

[62] Wild, 128.

[63] Wild, p. 129.

[64] Rommen, p. 89.

[65] Essay, Bk III, chapt. vi, sec. 9, p. 64, A. C. Fraser edition.

[66] Rommen, p. 90.

[67] 2nd Treatise, sec. 129.

[68] Essay, Bk II, chapt. xxviii, sec. 6.

[69] Laslett, n., p. 85.

[70] Stanlis, p. 27.

[71] Rommen, p. 110.

[72] Rommen, p. 110.

[73] Wright, p. 9.

[74] Corwin, p. 34.

[75] 8 Co. 118a (1610) as cited by Corwin, pp. 34-35.

[76] 7 Co. 1 4b

[77] Commentari

[78] Corwin, p.

[79] Davitt, E

[80] Broad, Jo
Davitt,

[81] Wild, p.

[82] The Works
356, as

[83] Ibid., I,

[84] Ibid., I,

[85] Wild, pp.

[86] Ibid., I,

[87] See pages

[88] Ibid., I,

[89] Ibid., p.

[90] Commager,
p. 83.

[91] The Writ
and Ha
Associ

[92] The Ursu
Hayes,

[93] N. Y. Ti

[76] 7 Co. 1 4b, 12a-12b (1610) as cited by Corwin, p. 36.

[77] Commentaries (12th ed., 1793), I, 40 as cited by Wright, p. 11.

[78] Corwin, p. 56.

[79] Davitt, Elements of Law, p. 163.

[80] Broad, John Locke, 31 Hibbert Journal 249, 256 (1933) as quoted by Davitt, p. 165.

[81] Wild, p. 121.

[82] The Works of Tom Paine, ed. Faner (New York: Citadel Press, 1945), I, 356, as cited by Wild, p. 121.

[83] Ibid., I, 275, as cited by Wild, p. 121.

[84] Ibid., I, 342, as cited by Wild, pg. 121.

[85] Wild, pp. 121-122.

[86] Ibid., I, 356, as cited by Wild, p. 122.

[87] See pages above.

[88] Ibid., I, 275, as cited by Wild, p. 122.

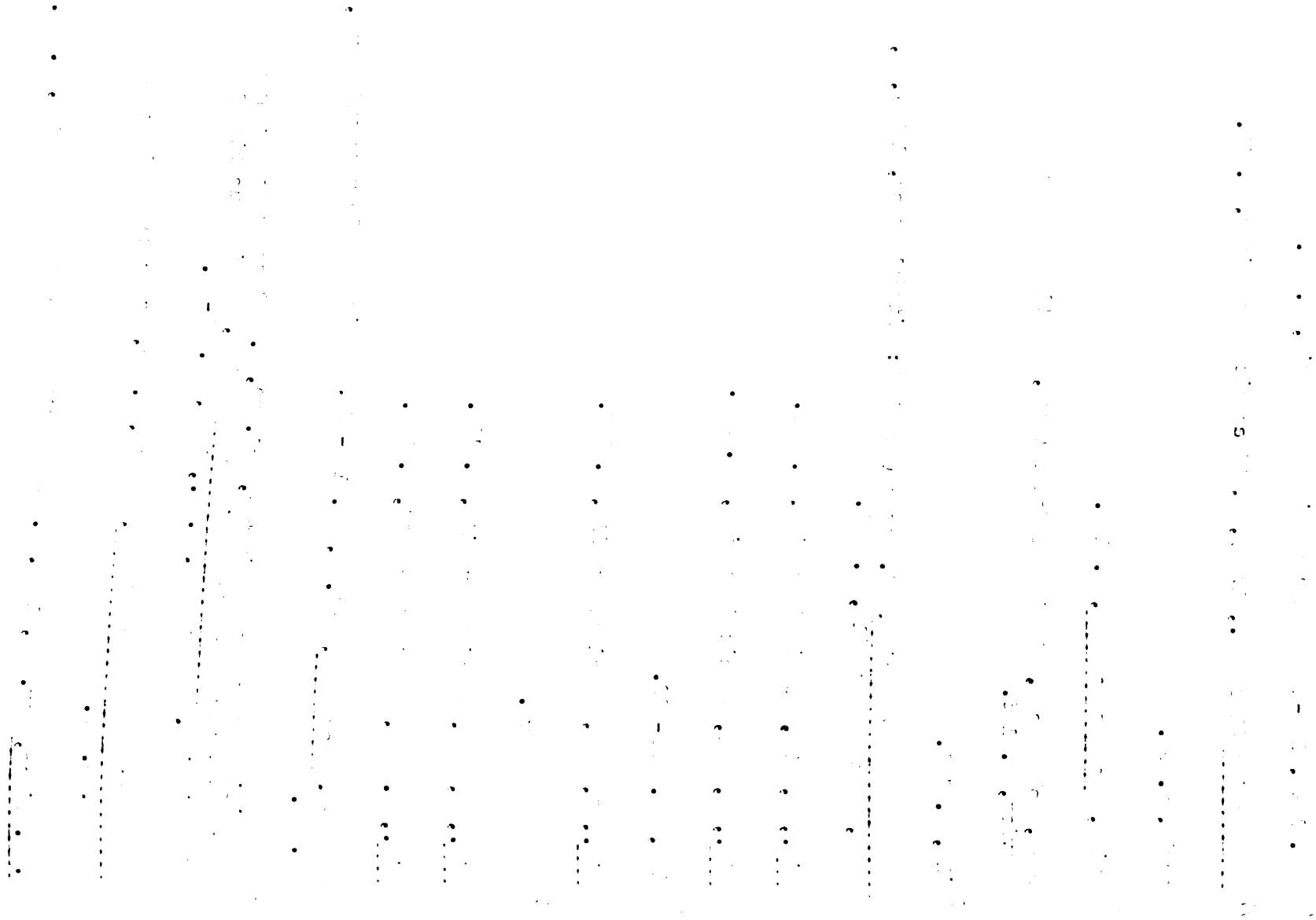
[89] Ibid., p. 276, as cited by Wild, p. 122.

[90] Commager, Documents, Vol. I, pp. 169-175, as cited by LeBuffe and Hayes, p. 83.

[91] The Writing of George Washington, Vol. 30, p. 321 as quoted by LeBuffe and Hayes in The American Philosophy of Law, Jesuit Educational Association, New York 10, N. Y., 1953, pp. 94-95.

[92] The Ursuliness of New Orleans, Semple, p. 60, as quoted by LeBuffe and Hayes, p. 95.

[93] N. Y. Times, Nov. 23, 1939, p. 32 as quoted by LeBuffe and Hayes, p. 96.



[94] American Democracy and Natural Law, Columbia University Press, New York: 1950, p. 112.

[95] Ibid., p. 113.

[96] Wright, p. 90.

[97] The Farmer Refuted (1775), Works I, 59, cited by Wright, p. 90.

[98] Wright, p. 90 seems to be a citation from The Farmer but Wright doesn't indicate where it may be found.

[99] Ibid., p. 108; Wright, p. 90.

[100] For documents, see "Declarations and Resolves of the First Continental Congress," Oct. 14, 1774 Documents Illustrative, etc. p. 1-4; Declaration of the Causes and Necessity of Taking Up Arms, ibid., p. 10; "Virginia Convention", ibid., p. 19; "Articles of Confederation," ibid., p. 27; "Northwest Ordinance", Hill, Liberty Documents, pp. 227-243. Very ample collections are The People Shall Judge; and Commanger, Documents of American History. For the natural law educational background of the Founding Fathers, see Walsh, The Education of the Founding Fathers of the Republic. Also Obering, The Philosophy of Law of James Wilson.

[101] Wright, p. 85.

[102] Wright, p. 85.

[103] Wright, p. 88.

[104] Works, IV, 37, Wright, p. 88.

[105] Works, II, 148ff. W. 74.

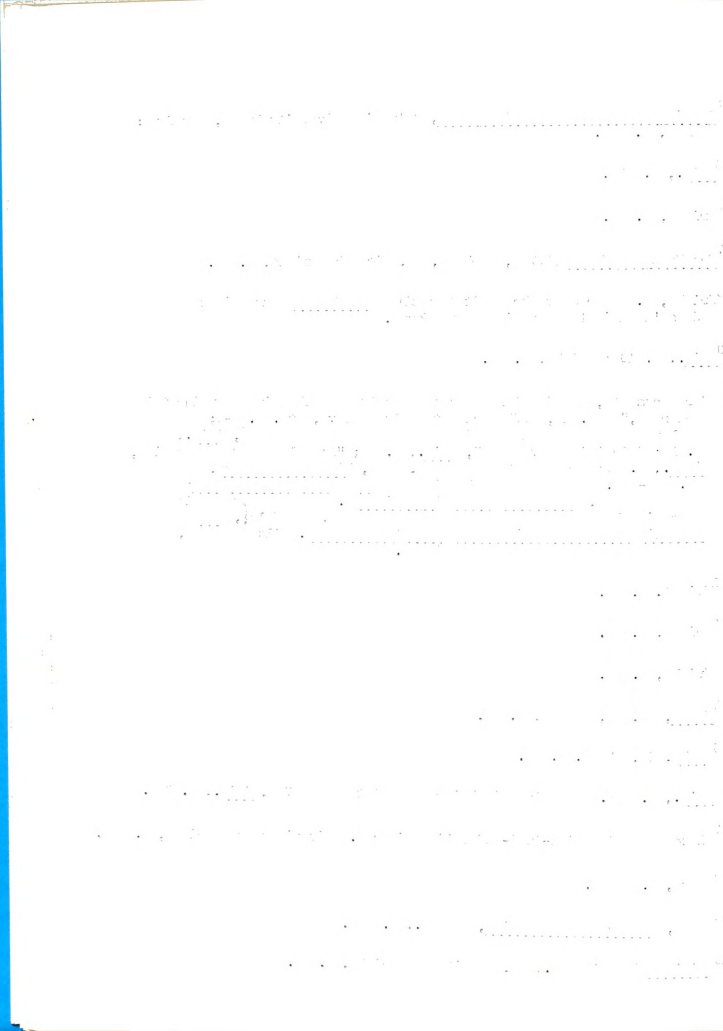
[106] Ibid., p. 462. See also his "Clarendon" letter of 1766, Ibid., p. 480.

[107] Plato and Federalist-Anti-Federalist dispute. Citations from Wright, p. 103.

[108] Emery, p. 98 ff.

[109] Emery, The Press and America, 2nd ed., p. 100.

[110] Writings (Cushing ed.,) I, 23 cited by Wright, p. 72.



[111] Ibid., I

[112] Vindicat

[113] Vindicat

[114] Writings

[115] "Freedor
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[116] Jensen,

[117] Jensen,

[118] Jensen,

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[120] See p.

[121] Jensen,

[122] Jensen,

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[124] Jensen,

[125] Natural

[126] LeBuffe

[127] LeBuffe

[128] Rommen,

[129] Natural

[111] Ibid., I, 184.

[112] Vindication, pp. 17-21; Wright, p. 65.

[113] Vindication, p. 52.

[114] Writings (1798 ed.) I, 44, as cited by Wright, p. 94.

[115] "Freedom of the Press: A Concept in Search of a Philisophy," Social Responsibility of the Newspress, Milwaukee: Marquette University Press, 1962, p. 45 ff.

[116] Jensen, p. 76.

[117] Jensen, p. 77.

[118] Jensen, p. 78.

[119] Four Theories, p. 45.

[120] See p. 49 these notes.

[121] Jensen, p. 77.

[122] Jensen, p. 77.

[123] The State In Catholic Thought, St. Louis: B. Herder Book Co., 1945, p. 192.

[124] Jensen, p. 88.

[125] Natural Law and Modern Society, p. 241.

[126] LeBuffe and Hayes, p. 110.

[127] LeBuffe and Hayes, pp. 122-123.

[128] Rommen, Natural Law, p. 161.

[129] Natural Law and Modern Society, p. 193.

[130]"Natural Law The Unknown," Natural Law Forum, 1962, p. 15.

[131]U. of D. Law Journal, Oct. 1963, p. 60.

[132]Ibid., p. 60.

[133]Plato's Modern Enemies and the Theory of Natural Law, p. 134.

[134]Ibid., p. 134.

CHAPTER III

METAPHYSICAL ANALYSIS

With Wild this thesis will agree that the recognition of metaphysics as the basic empirical discipline was characteristic of the founders of natural law ethics as well as of the major representatives of this philosophy. "No revival of authentic realistic philosophy is possible without a revival of metaphysics," Wild states[1], and then asks whether such a revival is possible.

> Metaphysics is commonly regarded as a chaos of abstract speculations quite remote from the immediate data of concrete experience. Hence, the most influential objection raised against it is that its concepts and theorems, having no empirical reference, are unverifiable and therefore meaningless. As a matter of fact, it provides us with the only possible instruments by which we may hope to grasp the immediate data of experience in their full concreteness. Of all the philosophical disciplines, it is the most eminently empirical and closest to the brute facts as they are actually given. Not only do its basic concepts and theorems refer to evident data of experience - not only are they directly verifiable and meaningful - but without unambiguous reference to these foundational meanings, the basic concepts and theorems of all other disciplines lapse into vagueness, unintelligibility, and meaninglessness.[2]

The data of which Wild speaks, with emphasis on the brute datum of science has at least three definable characteristics.

> (1) It must be thrust before the cognitive faculties with an external constraint which rules out subjective inference and interpretation. (2) To have any confirming power it must be structuralized; no intelligible theory can be verified by an ineffable datum; if there is any such thing. (3) It must be accessible to different observers at different times working under somewhat divergent conditions.[3]

The data of metaphysics enjoys these three definable characteristics to this extent that the existence of anything before the observer demands an assent on the part of the observer that the 'thing' in question 'is' even though in the moment of observation it may not be clear to the observer precisely what the 'thing' is. The data of this science also reveal a structure, i.e., plurality in both the time and space dimension. Active tendency and dependency in many cases are also given by the data to the observer with a high degree of clarity. Metaphysical data, finally, is so accessible to any human observer that without it there would be no human experience at all.[4]

In the above fashion, metaphysics may properly be defined as a science in terms of the data with which it works. How, then, does it differ from the restricted or particular sciences under the data rubric? In the first instance, the data of metaphysics are pervasive, non-quantitative, and extremely rich in scope. The data of the physical and social sciences, on the other hand, are likely to be quite restricted, primarily quantitative, and most often abstract in the construction of premises.

Scholars not philosophically oriented sometimes manifest impatience with a disciplines that calls itself a science and yet uses no special instruments or machines for measurement and analysis. The reason for this is simple and perhaps frustrating enough. The data of metaphysics is not only in the laboratory but on the way home and in the home itself. As Wild notes, measuring techniques are all but useless here because the primordial data of metaphysics includes much more than the note of quantity.

Among the many objections that have been raised against the science of metaphysics is this that the data of common everyday experience is by definition crude and inexact. This generally is intended to mean that the data are qualitative and relational, rather than quantitative, and thus not subject to exact measurement. While this must be admitted as quite true, it must also be noted that because one science does not yield to the method of another science, it is not by that fact meaningless. While the data of metaphysics may not be measured, it may perhaps be accurately described and analyzed. On this point Wild comments that "Different kinds of data are apprehended in different ways, and each discipline must develop its own standard of exactitude."[5]

Another objection to the data of metaphysics is offered by Wild:

> ...it is said that these data are confused and vague. I have heard positivistic philosophers sometimes use the word "sloppy" in this connection when speaking of everyday experience. What they mean is that the world of everyday experience is filled with a very rich and variegated content, and that it also fades away into obscure lacunae and dim horizons where, without patient examination and analysis, nothing can be clearly grasped, and sometimes not even then. These facts also must be admitted. But they hardly justify the proposed inference that this vast field of data should be neglected and the structures underlying them dismissed as insignificant. It is certainly true that the range of a concept such as existence is so broad that it cannot be covered by any univocal definition. In this sense, it must be vague and confused. But this does not mean that it cannot be grasped at all, as for example analogy, and that we must abandon the attempt to understand the basic structure of experience.[6]

Another objection to the claims of metaphysics as a respectable discipline whose findings can be meaningful to all other scientific disciplines is the fact that the field continues to be a chaos of conflicting opinions, theories, and positions. In contrast, the other

sciences seem to lead a more orderly life subject to controls and in more or less constant progress. One reason for this seemingly disadvantageous comparison is that philosophical data, being all pervasive and concrete, are available to all, and to all a concern, to some degree at least. All men, however well trained, or not trained at all, will form attitudes and opinions that they must have in order to live. These men explicitly or implicitly adhere to positions on knowledge and the confidence that may be placed in it; on truth or falsehood; on fact and value; on good and bad; on norms of human conduct, objective and/or subjective. Life cannot be lived without this sort of thing that is the data of metaphysics.

On the other hand nuclear physics, for example, is not necessary for human life. Its data are most abstract and remote to the untrained. Its language is unintelligible to those who have not been schooled in its meaning. If the data of nuclear physics were accessible to all, and if the language were more or less intelligible to all, there would be many in the field beside the specialist. A confusion similar to that in philosophy would result. This confusion would not substantially alter the nature of the science. The task of the nuclear physicist would be more complicated than it is at present, but confusion would not prove that his subject was trivial or meaningless.

Another of the several difficulties approached by Wild is that raised by the so-called "empiricists."

> ...who complain that these ubiquitous and inescapable data are apt to turn out to be very odd. This also is quite true, and constitutes the final paradox. How strange to hear this from the lips of so many positivistic thinkers who pride themselves on their

> ruthless empiricism, which of course, in this connection means precisely the opposite, a bigoted dogmatism which knows what the data must be without even examining them, and is ready to condemn anything not fitting their a priori theories as impossible or odd.[7]

If the peculiar and all-pervasive data of metaphysics cannot be investigated in any quantitative manner, how, then, can they be investigated? Wild suggests that the only possible way to examine these data is through the method of phenomenological description. "We must," he states, "Return to concrete experience itself, examine it carefully, separate what is incidental and transitory from the pervasive ontological data, and then use our reason to describe these data as they are given, refraining from all inference and interpretation."[8]

Wild further claims that this is the only method that can be used to gain what he calls structuralized evidence capable of verifying our explanatory theories.

> Only then will a philosophical discipline be possible. Phenomenology and metaphysics go together. When men lose interest in the primordial data of everyday experience, metaphysics dies. Philosophy disintegrates into a chaos of partial abstractions and finally into linguistic analysis.[9]

It is possible for a man to fly a small airplane without much knowledge of aeronautics, and with little or no knowledge of aerodynamics. If, however, he plans to fly often and successfully in larger and more sophisticated aircraft, he will of necessity have to learn these sciences at least to the extent that he is able to follow their rules. He may, in fact, be able to do this quite well without a deep understanding of the theories involved. But someone must know the theories, and the work of neither the theorist nor the practitioner is ever complete. Both must

continually struggle with current problems of efficiency, economy, and safety and constantly cope with changing and increasingly complex situations moving from the future into the present.

Just as this man may occasionally fly a small plane safely with a minimum of the most elemental instruction, and fly well or poorly under these conditions depending on his natural talents and his ability to grasp essentials quickly, so it is in the field of communication ethics. A person quite unfamiliar with the theory and functions of the media of mass communication might occasionally apply his natural talents and ability to grasp essentials to the satisfactory solution of a simple ethical problem. However, should this man attempt to solve such problems on a regular basis without much practical experience and the consequent formal or informal education in ethics that this implies, he could not reasonably anticipate more success than the man who would fly under similar conditions. And, as the problems increased in frequency and intensified in complexity, his situation and the effects of his decisions would predictably be harmful both for himself and for others.

It is assumed for the present that there is an ethical dimension in communications, that communications involves human beings, that these human beings make decisions and have decisions made for them, and that these decisions are good or bad for them as human beings.

Unless a study of the ethics of communication is to be an endlessly frustrating and impossible task both the theorist and the practitioner must, as occasion demands, concentrate on the ethical issues of this

particular area. And yet this necessity for concentration or specialty of focus must not be allowed to overlook the fact that the area of attention is an integral, dynamic segment or component of the total human reality. This is to say that an ethical action in communications will always be based on an ethical principle that would be equally valid as principle for any human being under any circumstances. The principle is derived from circumstances and experience, but is by definition an abstraction from concrete reality, and is not caught up in the process dynamics of time and space.

As there have been and are conflicting theories of aerodynamics and aeronautics, so there are conflicting ethical theories in both general ethics and in applied or special ethics, within which latter category communication ethics falls. And, for reasons given above in attempting to account for the greater number of conflicting positions in the philosophical as opposed to the physical sciences, it seems advisable in the interest of intelligible, hopefully fruitful discourse to point out what would seem to be the critical and most basic difference between the ethical foundation of this thesis and opposing ethical positions.

It has been noted above and will be repeated here that the basic issue between those who defend natural law and those who oppose it is not that of theism or nontheism. This, as Wild claims, is a peripheral metaphysical issue. Natural law studies can and have been done outside of a religious context. Belief or non-belief in God is another question entirely. The study of natural law as such has nothing to do with Catholicism, with Protestantism, with Judaism, with paganism, agnosticism,

atheism or any other ism. Natural law and the basic issue of the problem now under consideration concerns the nature of moral norms.

> Are they grounded in something which exists independently of human interest and opinion, or are they man-made? The philosophers of natural law are moral realists. They hold that certain moral norms are grounded on nature, not merely on human decree. It is this thesis that binds together the various strands into a single tradition and which radically separates all of them from the subjectivistic schools of modern thought.[10]

It is held with equal vigor in this thesis that the question of the objectivity of moral norms as such has nothing to do with either political or social systems. This does not mean nor is it intended to mean that natural law and moral norms have no relevance to religious, social, economic, or political systems or structures. On the contrary, the reality and the theories that attempt to interpret reality would have no practical value or use unless applied to concrete structures and circumstances. This again is the question of principle in the abstract and practice or application in the concrete.

For the purposes of this thesis it seems necessary to clarify this matter above because ethical problems in the communications media confront not only each individual religion, social, economic and political group, but they likewise face these groups in such pluralistic societies as the United States, and they become increasingly more pressing on the international scene as the facilities and need for international communication make great demands for the practical working out of complex ethical problems in communications. The technical means for audio and visual communications between and among all the peoples on the planet

are now available and will very likely become more readily available to more people for more purposes in the future. Technology has marched perhaps dangerously ahead of ethics and law. And, perhaps this must always be the case if ethics and law are to be realistically founded in experience. Yet, should the gap continue to expand, and should the use of existing facilities long continue without an understanding and reasonable governance of the process, use, and effects of communication, there can be little hope that order in the human affair will long be maintained.

Assuming, then, for the moment that the moral law is discovered and not invented by men, that it is not merely a human construct but rooted in reality and structured on the basis of ontological categories, the mind is now led to the exploration of the most basic data of experience in the expectation of meeting the questions of moral ontology. Such a quest will prepare the way for an examination of the ethical doctrines held by moral realists.

Wild's treatment of the meaning of the term nature will serve well as a point of departure for this investigation.

> The basic conception is the realistic thesis that there are norms grounded on the inescapable pattern of existence itself. This pattern is an order in which many diverse factors are brought together into a relational unity. From the time of its first origin in ancient Greece, realistic philosophy has employed the term nature (φύσις), meaning growth or change, to refer to this normative order which is manifested in the acts of changing things. This order has many distinguishable aspects adapted to one another by the peculiar normative relation of fitness. The good is always ontologically proper or fitting, what is owed to a thing in virtue of its tendential structure.[11]

As Wild explains it, it was necessary to discover a unifying word for a concept that could be used to represent not only the "general relation but also the more important relata. The word nature was chosen to exercise this unifying function, holding together in a single concept several distinct but related meanings."[12]

This word or concept in its richest meaning stands for a definite structure of a finite entity which determines both the basic tendencies of the structure and the kind of activity which will fittingly complete those tendencies.

Nature, then, is seen to say structure, the tendencies of the structure, and the activity involved in the tendencies of the structure. This is the dynamic order of activity in time and in space.

It seems appropriate now to proceed to a consideration of the three elemental ontological categories of essence, of existence, and of tendency.

Essence may be conceived as the principle in a thing which determines it to be what it is and marks it off from everything else that it is not.

Existence is that which separates a thing from nothing. It answers the question Is it? whereas essence answers the question What is it?

Under the aspect of essence all things are united. This at root is the solution of history to the fundamental problem of the one and the many.

The third category, tendency, is well explained by Wild in the following:

> Wherever being is found, it is determinate. There is present a factor (essence) which marks it off from other entities and kinds. There is also present another factor (existence) which separates it from nothing and brings it into act. But in addition to these, there is a third factor which results necessarily from the union of the two. This is an active tendency which arises primarily from the act of existence but which is determined to proceed in a certain direction by the limiting essence. All being is vectorial and tendential, on the way towards further existence not yet possessed.[13]

Wild continues this explanation with a caution that these three ontological phases are not to be understood as separate things or substances loosely associated together. "They are not 'things' at all but relational structures, each of which is only be virtue of the others."[14]

This kind of philosophical orientation needs attention today when essentialist ontology seems to predominate in the face of so much contradictory evidence. The physical world is not frozen in space but includes space and proceeds in time. Natural substance is not something palpable and rigidly contained somehow within geometrical bounds. Reality is not an enormous collection of billiard balls to be set in motion. The whole notion of reality and the physical world must be dynamized if it is to conform to reality as this is known by the physical sciences. This reality as known by the physical sciences would require that it no longer be statically conceived but rather that it be viewed as dynamic, as fields of force and energy.

Aristotle, very much a philosopher of change and dynamics, saw all the data of human experience, including man himself, as a continuing process of transformation. A natural entity for him is one which tends or moves toward something. "As he states specifically in the Physics,

'all the beings of nature seem to have in themselves a source of movement or rest.'[15]

This source of movement and rest is in itself a complex of several sources. Change, then, is a composite having a composite cause.

> One of these (sources) is something incomplete, for change is never finished, but always on the way towards something beyond. Aristotle calls this factor potency (*dúnamis*). But it is never absolutely indeterminate. It is moving in one way rather than in another, toward some determinate goal. What is responsible for this definite factor of change? Aristotle gives his answer while discussing the different meanings of the term nature in Book V of the Metaphysics (The so-called Book of Definitions).
>
> 'The source of change,' he says, 'in all natural entities is essence (or form.) In the case of substantial change, the most radical kind of transformation, the form is present only potentially. But in the case of accidental changes of a single substance, this form is actually present, determining the tendency to proceed in a certain direction towards further fulfillment.'[16]

Empirical observations do not extend very far into the vast complex of the universe with its numberless units or entities constantly changing within themselves and as often changing in their relationship to other entities. And yet this vast realm of continuing change, growth, and decline is not a random chaos. Though there are now and again examples, sometimes striking, of exceptions to the order in the universe at least, as man perceives that order, order rather than chaos is the datum of experience and the presupposition of any scientific investigation.

> ...'nature does nothing in vain, nor does it omit anything really necessary.' Working always in orderly ways, 'nature ever tends towards the best of what is possible.' If we examine these changes from a long-range point of view, we discover anti-chance and orderly procedure 'in all the works of nature.' The forms of human art are not merely arbitrary inventions. 'The resulting end of the generations and combinations of nature is the basic form of the beautiful.' and the highest manifestations of human art are modeled after these.[17]

And Wild continues with Aristotle on nature:

> 'The nature of the whole universe' is compared to an army made up of independent individuals whose activities are nevertheless 'ordered together somehow for a common end.' They are like the members of a single household each of whom contributes something towards the good of all. The subordinate participants in this ordered life, animals and children, like the natural elements, make a necessary contribution in a largely unconscious way by random coming and going. But the more mature members, understanding what is required of them, are bound by the moral law,[18] (Meta 1075a 19)

If, then, the universe as it is known to man through the data of experience, and by reflection upon this data of experience is in fact a vast and dynamic complex of interdependent tendential entities, generally ordered rather than chaotic, man, a component of this complex, may safely be assumed to be subject to the same laws at least insofar as they are operative in him as a rational, intellective entity.

The conception of moral law as treated in its elements above has played a vitally important role in the intellectual, political, and social history of the West. The Stoics popularized this theory of moral law which was later to be taken up by the Roman jurists. In the Middle Ages, it joined similar conceptions known to all men, independently, as far as can be determined, in Judaic, Christian, and pagan cultures. In this setting it was to develop as the basis on which scholastic ethics would be founded.

> The early thinkers of the Reformation were led to ignore it, or even to deny it, by their anti-intellectualism and moral pessimism, but it was kept alive by Suarez, Hooker, and others, who used it to criticise authoritarianism and political tyranny. Later on, thinkers like Locke and Paine used it in formulating those political principles which played an important role in the American and French revolutions. In the comparatively peaceful period of the

> nineteenth century, it was again almost completely eclipsed by historicism and moral relativism. But now once again, in a time of troubles and unrest, it is being revived, as it always must be revived when men are led to think with radical seriousness about the foundations of human life and culture. The most noteworthy expression of this recent revival is the United Nations Universal Declaration of Human Rights which, in addition to the political rights recognized by the eighteenth century formularies, also recognizes social, cultural, and economic rights - and duties as well.[19]

This brings the present discourse to particular problems arising from the dichotomies imposed upon the conceptual couplets of ought-value, goodness-existence, fact-value, and goodness-obligation.

As noted above, "there is an odd reluctance on the part of social scientists, "according to Selznick, "to deal with normative systems." Several reasons for this reluctance have been indicated in the preceding pages. Perhaps the social sciences want the same kind of rigor in their method as the physical sciences demand in theirs. Perhaps the data of normative systems do not lend themselves to the precise molds of physical data. Whatever the case may be, normative systems cannot arbitrarily be dismissed as meaningless and somehow unworthy of the dignity of scientific study simply because they do not lend themselves to the investigations and research tools of quantitative systems. The fact of the matter is that values are facts of some kind, and cannot safely be ignored, if any sense and order is to be made of the human enterprise which is largely if not entirely motivated by value.

What is true of the human enterprise in general is valid for the communications dimension of the enterprise. If no attention is paid to such questions as good and bad, right and wrong in communication problems,

not only is there then given a rather arbitrary denial of history and of culture and its meaning and influences, but it becomes more than a little difficult to understand how communication questions can be attacked at all, if, in fact, they can even be recognized as problems, if either problem, or communications have any meaning at all. Such a denial of value, then, may be seen to lead to a dogmatic, doctrinaire, and arbitrarily constructed dichotomy between the world of the mind and the world of experience.

Wild notes that:

> It is also significant that many thinkers of divergent schools agree that basic moral categories such as goodness, so far as they can be defined at all, must be identified with fixed, determinate qualities or properties of some kind. But this metaphysical assumption seems to lead only to reductionism, eclectic pluralism, or the dubious doctrine of indefinability. Can it be that a more basic existential category is being forgotten or ignored?[20]

The same author then focuses his attention on the problems that arise in modern ethical theories when attention is addressed to two pairs of related concepts, the ought and the good, and existence and value. None of the more recent theories have been able to bring into focus the relationships that exist between these and other conceptual pairs. Either one, taking value-existence as an example, is reduced to the other, or they have been so separated by a yawning chasm that some rather strange and paradoxical conclusions result, often in contradiction of the examined data.

> Either reductionism or disintegration. This is the price we pay for a neglect of the concrete data and those ontological concepts by which alone they may be coherently understood.[21]

If an attempt is made to reduce oughtness to what is good, here conceived as an hedonic quality, the investigator is confronted with the difficulties that arise concerning the essential goodness of virtuous acts, i.e., what makes these acts virtuous, Why are they conceived to be good? If the good and the ought are one and the same, how explain the binding power which the good exerts on the individual agent? This needs some explanation.

The good that a man ought to do, if good is taken to be reduced to ought, says nothing. If, however, the good is understood, in scholastic or Aristotelean categories, to be the final cause of the agent, and the ought is conceived in some way as related to efficient cause, then the two causes, efficient and final may be said to coincide with the determining formal cause of a structured nature. Coincidence is not sameness, and the coincidence seen in the above is given only in subrational entities.[22]

> Each thing tends to act in accordance with its structure (μορφή). The world is through and through tendential. When such an essential tendency is realized, the act is said to be according to a nature.[23]

This is the meaning of the Second Book of the Physics which defines nature as an intrinsic cause of motion or rest.[24]

In the above it was noted that there is a coincidence among formal, final, and efficient causalities in subrational entities. By implication, this coincidence is not given in rational creatures except for those who would hold that man is completely determined in his acts as man, i.e., rational acts, and thus has nothing more than an apparent freedom of

choice. While it is doubtless true that man is largely conditioned by heredity and environment, it is far from conclusive that he is wholly so determined. Not only does this latter position need considerably more proof and evidence to be convincing, but it stands against the burden of history in every culture studied by contemporary scholars, makes a mockery of all systems of crime and punishment, disembowels the meaning of law, and must lead either to a universal state of anarchy or, in the imaginations of some, to a return to some abstract and idyllic state of nature.

To return to the main lines of the argument which address the problems arising from the reduction of ought to good or vice versa, and the opposite attempt to separate the two, very real difficulties are discovered regarding the disintegration of the two concepts. If ought is separated from factual value and they are conceived to be two insular essences totally divorced from each other,

> ...we are forced to say that what we ought to do is not good, and the good is not what we ought to do. If they have nothing in common, how, then, can we weigh them against one another and compare them, as we must do in any serious process of deliberation? Moral law is then left with no factual foundation whatsoever, and moral justification seems meaningless.[25]

Value can be more deeply understood and seen to be distinct from yet related to ought only when the significance of the three basic ontological categories of essence, existence and tendency is appreciated. Then it will quite easily be understood that no determinate structure can be in existence without at the same time possessing active and

determining tendencies.

> When such a tendency is fulfilled in accordance with natural law, the entity is said to be in a stable, healthy, or sound condition - adjectives of value. When it is obstructed or distorted, the entity is said to be in an unstable, diseased, or unsound condition - adjectives of disvalue. Goodness and badness in their widest ontological sense are not phases of abstract structure but rather modes of existence, ways in which the existential tendencies determined by such structures are either fulfilled or barely sustained in a deprived, distorted state.[26]

A dilemma similar to that confronted in an analysis of the value-ought couplet meets the enquirer of the goodness-existence combination. If goodness is reduced to existence conceived of as a finished fact, then what exists is right and good and ethics and morality simply disappear. On the other horn of the dilemma, if Kant and his followers are to be taken seriously in their separation of existence and good, then value or good is left without any basis and crumbles into a mere human construction, or to put it more starkly, into nonbeing, or nothing.

> We may seek a refuge in the notion of indefinability or ineffability. But granted that this notion can be freed from difficulties, it offers no refuge for anyone who still conceives of ethics as an intelligible discipline. A supposed discipline whose basic concepts are ineffable and uncharacterizable cannot be anything but vague and ambiguous. It will be a house built in rotten foundations.
>
> If metaphysics is not judged a priori to be impossible, there may be an escape from these problems and dilemmas. A neglect of the metaphysics of ethics is common to the modern schools. Nowhere is moral analysis brought into any disciplined relation with a critical analysis of being.[27]

Now to the fact and value combination that Selznick claims creates such a problem for contemporary social science. Can the one, value, be deduced somehow from a study of fact? "If by deduction we mean the tautology of modern logic, the answer is of course no."[28] The

realization or fulfillment of a tendency is not identical with the incipient stages of that tendency. There is a synthetic connection between the two, fact and value. "But if we mean by synthetic two separate items which merely succeed each other in time with no real bond between them, the answer to this again is no."[29] There can be no apprehension of incipient tendency with any degree of clarity without some understanding of the Gestalt which determines the tendency and its fitting fulfillment.

> The tendency is not an atomic essence which we first understand by itself alone and from which we 'infer' the completion as another separate entity. It is rather a relational activity which is either grasped all together with some degree of clarity or not at all. In apprehending a relation, we must apprehend something of its term; so in apprehending a tendency, we must grasp something of what it is tending towards. Thus, values are rightly said to be founded on facts.[30]

The fourth and final combination under consideration namely that of goodness and obligation is in its components commonly fragmented by contemporary schools of ethics. For example, goodness is often thought to be an object of the power of cognition having no binding power in any objective sense. Oughtness or obligation is a subjectively felt thing of some kind which is considered to be a compulsive tendency to act. In this way, the two are divorced one from the other as though they were fixed essences like blackness and whiteness, as though goodness ought not be realized, and as though doing what ought to be done were not good. This does not seem to make much sense. It would then seem that some relationship must be given between goodness and obligation.

> The essential needs or tendencies of human nature may be objectively understood, together with the fitting values or realizations founded upon them. From these values certain modes of required action may then be strictly deduced and stated in the moral law of nature. In a given situation, I may see that such an act is possible for me. I will then experience that peculiar union of rational insight into the tendential nature of man and the law founded on this nature, together with subjectively felt tendency (for I myself am human) which constitutes what we call an obligation. If I have ever paid any attention to the factual tendency of human nature, I must feel something of this sort. If I do not feel it in a given instance, either my analysis of the tendency is wrong or I do not understand myself.[31]

To sum up what has preceded in this section on four apparent dichotomies, and to attempt to clarify some of the difficulties that social science would seem to have with the fact-value problem, it may be helpful to indicate that fact, as experience seems to reveal, is not something finished and complete. Nor is value something that enjoys some mystical kind of existence quite apart from the existence of fact. In short, a fact is not something fixed and finished and value quite separate and altogether different from fact.

> Value is what ought to be. And the ought implies a certain futurity and tension which cannot belong to a finished fact. Hence, value is thought of as a peculiar kind of quality or property dwelling in its own realm apart from actual existence. But if value is really separated from existence completely, how can it be anything at all? Surely, there is some relation between the two. What is it?
>
> Our analysis suggests a reasonable answer to this fundamental question. Existence as we have seen is tendential. Value is the fulfillment of existential tendency. It is true that it cannot be identified with any finished fact in so far as this includes fulfillment. But in the concrete no facts are finished. They are incomplete and tendential. Hence the sense of futurity and tension that attaches to the concept of <u>ought</u>.[32]

Given the foregoing analysis of the three basic ontological categories, essence, existence and tendency which are derived from experience, the student of problems in communication ethics is not forced to reduce oughtness to goodness, goodness to oughtness, or goodness to existence. Neither is he forced to restrict these categories to isolated atomic compartments. They may be put together as existential categories into a meaningful structure that has some correspondence with the data of moral experience. This, however, according to Wild, will require the abandonment of essentialist prejudices very dear to the modern mind.

> The first of these is the doctrine that value, if it is anything at all, must be a peculiar quality or property. Such a view must lead either to a reductionist ethics like hedonism and utilitarianism, a chaotic view like moral pluralism so-called, or a flight to ineffability like that of G. E. Moore and the so-called intuitionists. These are striking examples of the terrible price that must be paid for the neglect of first philosophy. Basic concepts like goodness and rightness can be clarified only by ontological analysis. Unless they are so illumined they will either be reduced and distorted or fade into unintelligibility.[33]

Wild comments in the concluding pages of his excellent study on natural law that the great social and political struggles of the present era have forced upon the attention of men's minds the necessity for a widespread and intensive reflection on the nature of law and its foundations. What is true of law, ethics, and morality in general is likewise true of the law, ethics and morality of communications, which function of society plays so vital a role in the human enterprise. And, just as reflections on the nature of law have led to a serious questioning of that

positivistic legal theory which denies any natural foundations for prescriptive principles and reduces all law to the level of subjective human decree, so too such reflections would seriously question the position that freedom of speech and of the press in the United States have meaning only insofar as they are stated, interpreted, and practiced by law, positive law without any relation to the foundations of law or to the history of the development of these freedoms in the Anglo-American tradition.

> This interest is now shared by all those who have any living hope for the establishment of a world community without the use of military force. The realistic doctrine of natural law has received its most recent, and in certain ways its most adequate, political formulation in the United Nations Declaration of Human Rights. A convenant for the legal enforcement of these rights is now under consideration. Such a covenant would revolutionize international law and also modify the internal law of many countries, including our own.[34]

Wild's observations and concerns might be paraphrased to suit the specific occupations of this thesis. The widespread concern with natural law will very probably have widespread effects not only on international communication but upon the laws and codes governing communication in this country.

Before progressing to the second section of the empirical investigation, i.e., an examination of relevant laws, codes, custom and practices, on the assumption that the ethic is in the industry, and can be discovered and explicated, something should be said first about human reason and its relevance to natural law theory.

According to Rader[35], reason is not exclusively man's attribute as Aristotle would contend. Apparently accepting without question the authority of psychologist Wolfgang Kohler that chimpanzees also have the capacity of reason because "they can figure out ways of piling and mounting boxes, for example, so as to reach bananas hanging high from the ceiling of their cage," Rader attempts to save the situation of inconclusive evidence and endless argument by distinguishing man from brute not under the rubric of reason but according to the criterion of cultural development.

Reason, to follow this line of argument, is found in brute animals inchoatively, yet it is not manifested, as in humans in the same way, if not to the same degree of development. Granting that there may well be some similarities between the manifestations of human reason and the manifestations of some animal capacity, it seems rather difficult to account for the absence of any real evidence of progress in the lower forms of "intellectual" life. Why, for example, have the animals no culture, a natural product of reason?

> Man is unique: he is the only living species that has a culture. By culture we mean an extrasomatic, temporal continuum of things and events dependent upon symboling. Specifically and concretely, culture consists of tools, implements, utensils, clothing, ornaments, customs, institutions, beliefs, rituals, games, works of art, language, etc. All peoples in all times and places have possessed culture; no other species has or has had culture. In the course of the evolution of primates man appeared when the ability to symbol had been developed and become capable of expression. We thus define man in terms of the ability to symbol and the consequent ability to produce culture.[36]

So speaks White and the overwhelming majority of anthropologists on the issue of reason, man vs. animal. Until more convincing evidence has been accumulated and evaluated, it will be assumed in the following

consideration of reason that this is a capacity belonging exclusively to man.

The present controversy over the morality of contraceptive practices in Catholic circles has opened up the larger question of the nature of morality and has brought into dispute the very idea of natural law.

According to Robert O. Johann,[37] "It is not a question of simply holding on to the concept of natural law or of abandoning it altogether. More profoundly, at least within Catholic circles, the discussion centers on the precise meaning to be assigned to it."

Johann seemingly would be in agreement with Leclerq, as cited in the preceeding pages, when the American remarks that the notion or theory or natural law needs careful interpretation if it is not to be misleading. In support of his contention, Johann quotes from the French Moral Theologian, Pere de Finance in the section of his Essai sur l'agir humain that treats of the essence of moral value:

> It is not because reason is natural that we should follow reason; on the contrary, it is only because our nature shares in reason that it is good to act in accord with nature.[38]

The remark according to Johann is critical because it is not nature itself but reason and reason alone that has moral relevance. "The morally good is not simply what is in accord with nature, but what presents itself as reasonable in the particular circumstances. The eminent dignity of human nature, Pere de Finance continues, springs from its aptitude to follow reason, to determine itself reasonably; only in terms of this capacity does it have moral value."[39]

The implications of the Johann and de Finance remarks and the conclusions that would seem to follow from them appear at first glance to damage the argument structure of this thesis. There may or may not be a basic disagreement here. However, this can not be known with any certainty until there is available more extensive treatments of the subject by one or the other of these men. Until such a study and comparison is possible, it will be assumed here that this is not a radical or substantial change in the traditional interpretation of natural law theory, but rather a shift in emphasis that in itself is not entirely new.

As Johann himself notes:

> Criticism, then, of conventional natural law arguments does not necessarily spring from a subjectivistic bias, personalist, or otherwise, or from some sort of anti-rational and relativistic confusion. Its origin is not a desire to extol personal freedom over nature but a refusal, on the contrary, to exalt brute, natural facticity over man's capacity to cope with it rationally. Instead of ousting reason, many critics of the "natural law" are seeking simply to restore it to its central and creative role.
>
> They recall that for Aquinas himself the nature that is morality's norm is not a complex of impersonal structures, but precisely recta ratio - reason rectified by love. And they think it might not be a bad idea to get back to this liberating and refreshing view.[40]

Before commenting on the several perhaps overly optimistic notes of the above citation, it seems good here to suggest that the many and complex problems in natural law theory and its applications to communication ethics may never be satisfactorily structured and properly attacked unless the total nature of man and the world in which he lives are included in the establishment of methods, investigatory techniques, and approach to the ethical data of communication studies. To repeat from the introductory

pages of the present thesis, it is a premise of the present investigation that the phenomenon of information cannot be properly construed apart from the basis of its meaningfulness which is total man. And, total man is taken here to mean man in the all that he is, his dimensions of individuality and sociality, his reason and its operation, and the tendential characteristic of man, all his actions, and the tendential characteristic of the physical world and the human society within which man moves.

As has been noted throughout the metaphysical section of this study, there are and have been many critics of natural law who are not "seeking simply to restore it to its central and creative role." There are at least several modern ethical theories that completely ignore natural law. Others of the Kantian variety considerably overemphasize its rational dimension. Still others, reacting against the rationalism of Kant, deny, ignore, or radically modify the rational dimension. Finally, in the light of the historical section of this thesis, it would seem somewhat hazardous to hold that "Criticism, then, of conventional natural law arguments does not necessarily spring from a subjective bias, personalist, or otherwise, or from some sort of anti-rational and relativistic confusion." A perusal of the contributions of G. E. Moore, Ayer, Stevenson and Perry will indicate that the modern scene is not likely to be transformed into a beneficient universal acceptance of natural law, at least in the academy. The same sort of realistic and tempered pessimism seems appropriate in the light of the writings of Pufendorf, Hobbes, Locke, Hume, Spinosa and others mentioned in preceding pages.

It may fondly be anticipated that current and future attempts to interpret traditional natural law will not so much seek solutions in the extremes of individuality or sociality, in the extremes of rationality or tendential structures but in and from a posture of approach that attempts to discover and interpret balance of dimensions and characteristics that will be found only in total man.

No treatment of natural law written or attempted in the manner of tradition would wisely neglect the contribution of Thomas Aquinas. The Treatise on Law, then, will be mentioned here, and reason will be given before-hand for its not receiving as much consideration as the De Legibus of Francis Suarez that will immediately follow.

According to Mortimer Adler[41]

> The false issues and confused controversies of modern jurisprudence must be shocking to the Thomist who finds the Treatise on Law in the Summa Theologica an almost perfect expression of wisdom about the nature, sources, and kinds of law. Anyone who, having commenced with typically modern discussion of these matters, comes subsequently to a study of the Treatise on Law is equally perplexed by the contrast. St. Thomas appears to know the answers to problems which, since his day, have been raised again and again, each time with less clarity in the problem itself and consequently less definiteness in the answer. This is equally true in the case of natural law - whether it is, what it is, and how it is related to positive law. And the consideration of natural law has generated the central issues of modern jurisprudence - whether law is discovered or made, whether law is a work of reason or of will.[42]

While there can be no reasonable questioning of the contributions to the history of human intellectual progress made by Aquinas, it helps little in the advance of the argument about natural law to be historical about every human thinker except St. Thomas. As Adler notes, "Though historical evidence plainly suggests that every human thinker suffers

from the limitations of his cultural location, and has defects peculiar to the time and circumstances of his work, these historicans often seem to extricate St. Thomas from the impurities of history, while at the same time accounting for the failure of later ages to understand St. Thomas' teaching in terms of causes which must somehow apply to St. Thomas himself and which, if applied, would lead us to look for error and inadequacies in Thomistic doctrine - defects appropriate to the historical circumstances of its development."[43]

Adler then proceeds to suggest that if Thomas is approached in this manner, he may be brought more effectively into contemporary discussion. There is little possibility of bringing his wisdom to bear on modern problems unless he be examined, and corrected as necessary after the manner of Adler's suggestion. If, as Adler notes, the misinterpretations of natural law are not entirely of modern origin and if the doctrine as expounded by Thomas were as clear as it is in some circles thought to be, it is difficult to understand how the doctrine has come to be so greatly misunderstood, not only in the present day, but also in the period between the present and the time of St. Thomas.

While there may well be several other explanations for this misinterpretation and ignorance of natural law, Adler suggests two defects in the Treatise on Law which account in his estimation for the difficulties about natural law.

> In the first place, considering it as a part of the Summa Theologica, it is, as it should be, primarily theological. It is not primarily concerned with human positive law, or even with natural law, but with Divine positive law, and with natural law as a human participation of Eternal Law. In contrast, human law, as positively instituted and as naturally founded, is the primary concern of the

> Philosopher of law...In the second place, in the Treatise on Law, there are ambiguities in the use of some of the principal words, such as "common good" and "law" itself...Now these ambiguities, fundamental though they are, do not affect or mar the Treatise on Law in so far as it is primarily a theological work dealing with Divine positive law, with the Old and the New. That may be one reason why St. Thomas did not make the effort to increase the precision of his language.[44]

Adler comments that the distinctions for Thomas need not have been made more explicit because he himself saw them so clearly that it never occurred to him that he would be misinterpreted. Basic to the kind of misinterpretation referred to is that which has confused the meaning and use of the concept "law" in the Treatise. Whatever Thomas intended or understood, the fact remains that several of the misunderstandings about natural law arise out of the false presupposition that the law of natural law and the law of positive law are one and the same thing, that the term is univocal. If this difficulty were attended to, perhaps a beginning, at least, could be made towards introducing the Thomistic doctrine into contemporary discourse.

What is more to the point here, however, is the first defect that Adler sees in the Treatise, i.e., that human law as the primary concern of the philosopher of law was not the preoccupation of Thomas Aquinas. This charge will be accepted as substantially true here, and for this reason the De Legibus of Suarez, certainly more philosophical than theological, will be used rather than the Treatise on Law in the following section on the role of reason in natural law theory.

Footnotes

[1]Wild, p. 181.

[2]Ibid., p. 181.

[3]Ibid., pp. 186-187.

[4]Wild, p. 186.

[5]Wild, p. 187.

[6]Ibid., p. 187.

[7]Ibid., p. 189

[8]Ibid., pp. 189-190.

[9]Ibid., p. 190.

[10]Wild, p. 105.

[11]Wild, p. 107.

[12]Wild, p. 108.

[13]Wild, p. 199.

[14]Wild, p. 199.

[15]Wild, p. 160.

[16]Wild, p. 161.

[17]Wild, p. 159.

[18]Wild, p. 159.

[19]Wild, p. 175.

[20]Wild, p. 183.

[21]Wild, pp. 183-184.

[22]Phys. 198a, 25, Meta 1044 a 36, Pol 1252b 30 as cited by Wild, p. 169

[23]Wild, p. 170.

[24]Phys 192 b 22.

25Wild, p. 184.

[26]Wild, p. 206.

[27]Wild, p. 184.

[28]Wild, p. 231.

[29]Wild, p. 231.

[30]Wild, p. 231.

[31]Wild, p. 232.

[32]Wild, p. 230.

[33]Wild, pp. 232, 233

[34]Wild, p. 234.

[35]Ethics and the Human Community, p. 63.

[36]Leslie A. White, The Evolution of Culture, p. 3.

[37]America, April 10, 1965, p. 487.

[38]America, p. 487.

[39]America, p. 487.

[40]Ibid., p. 487.

[41]"A Question About Law, " Essays In Thomism, Robert E. Brennan, O.P. ed., New York: Sheed & Ward, 1942, p. 207 ff.

[42]A Question About Law, p. 207

[43]Ibid., p. 208

[44]Ibid., pp. 208, 209.

CHAPTER IV

DEFINITION AND LOCATION OF NATURAL LAW

In the early pages of this thesis, several authors, i.e., Maritain, Aquinas, and Wild, were cited for their definitions of natural law. An exhaustive litany of definitions from the time of Sophocles, Plato, and Aristotle to the present time is possible but would serve no other purpose than to establish the continuity of thought and belief that has existed in Western civilization for more than five thousand years. For the student interested in pursuing the subject an adequate beginning will be found in Rommen and Gierke both of whom have been referred to in earlier sections of this study.

For the purposes of the present treatment of the subject, it will be sufficient to follow the sources used by Suarez preliminary to his investigation of the meaning, location, and operation of natural law.

In the proper sense of the term, according to Suarez, natural law which pertains to moral doctrine and to theology is "that form of law which dwells within the human mind, in order that the righteous may be distinguished from the evil, in accordance with the passage of Psalsms (iv [vv.y,7]): 'Who Sheweth us good things? The light of Thy countenance, O Lord, is signed upon us.' Such is the explanation of St. Thomas in the passage (I-II, qu. 91, art. 2) wherein he concludes that the natural law is, 'a participation in the eternal law on the part of the rational creature.'"[1]

In another passage[2], St. Thomas says: "Because man (alone) among living beings is cognizant of the essential nature of his end and of the comparative relationship between the work and the end, the natural power of comprehension implanted in him, which is directed toward befitting action, is therefore spoken of as the lex naturalis, or ius naturale (natural law), while in the case of other animals, it is called naturalis aestimatio."

Suraez adds that this is plainly the opinion of Cicero[3] as indicated in the following: "Wherefore that law which the gods have given to the human race has been justly praised; since it is the reason and mind of a wise being, suited to commanding and to restraining."

Thus it is that the law, or that aspect of law under consideration, is called natural, not only, as Suarez puts it, in so far as the natural is distinguished from the supernatural, but also in that what is natural is distinguished from what is a matter of free choice. This is the case, he continues, not because the execution of that law is natural, or the result of necessity, as is true of the natural executive of the inclinations of other animals or inanimate objects, but because the law in question is a kind of characteristic of nature, and because God himself has annexed that law to nature.

Moreover, according to Suarez, the natural law is also divine, in that it is decreed directly by God himself.

> Such was the opinion of St. Thomas as expressed in the above mentioned passage (Q. 91 and qu. 94, art. 6), where he cited the words of St. Augustine (Confessions, Bk. II, Chap. iv), spoken to God, 'Thy law is written in the hearts of men', words which had reference to natural law; where-

> fore Augustine has said, in another work (On the Sermon of Our Lord on the Mount, Bk. II, chap. ix), that there is no soul, 'in whose conscience God does not speak. For who save God writes the natural law in the hearts of men?'[4]

In addition to the general criteria which may be used to classify those modes of natural law theory that belong to the Graeco-Roman-Medieval tradition, as these criteria were set down by Wild[5], and the definitions selected in the pages immediately preceding, an understanding of what the natural law is requires an inquiry into the nature of that law. In this manner, it may be hoped that the meaning of natural law will become more evident, and the fact of its existence more certain.

Many writers in the classical tradition have asserted that natural law is none other than rational human nature itself. Because this concept may be advanced with at least two meanings it needs some clarification.

In the first instance, or meaning, as Suarez notes, the assertion that natural law is rational nature itself may be understood to refer to nature itself, strictly speaking, and in so far as, by reason of its essential character, certain actions are by nature appropriate to it, and contrary actions inappropriate, "According to the other interpretation, the statement in question is to be understood as referring to nature on the basis of the power of (vis) rational judgment which is inherent in it, and with respect to which it has the character of law."[6]

Concerning the first opinion, that rational nature, strictly speaking, is natural law itself, in the sense that rational nature involves no inconsistency and is the basis in human actions, either of all their righteousness (through their accord with the said rational nature),

or else, on the contrary, of their turpitude (through their disaccord with that nature), it will be seen through a study of the arguments advanced in favor of this position that it is unacceptable.

The basis of this opinion held by Vazquez[7] and others as cited by Suarez[8], is that certain actions are so intrinsically bad of their very nature, that their wickedness in no way depends upon external prohibition, nor upon the exercise of judgment, nor upon the divine will; and similarly, other actions are so essentially good and upright that their possession of these qualities is in no sense dependent upon any external cause. Suarez assumes that this is the common opinion of theologians as he cites Sentences, Bk II, dist. xxxvii, the words of St. Thomas I-II, qu. 100, art. 8, ad 3, and from the Relectio X (De Homicidio, nos. 1 et seq. of Victoria).

To avoid confusion, before proceeding with the argument, it should be kept in mind that what is supported above and confirmed by Suarez is a doctrine that regards the intrinsic goodness or evil of human actions. This is an objective order, as opposed to the subjective order which is man's determination of the objective goodness or evil of his actions. This subjective order may or may not, culpably or not culpably coincide with the objective order of things.

Basic to the position that human acts are good or bad by their very nature is the view that such moral actions have their own intrinsic character and unchangeable essence. Further, according to this view, these actions depend in no way upon any external cause or will, any more than do the essences of other things.

As an illustration of the foregoing, Suarez offers the following:

> ...lying, for example, is not evil because it is adjudged by reason to be evil; rather, the converse is true, that lying is adjudged evil because it is essentially evil; therefore, it is not judgment that measures the evil of this action, and consequently, it is not a prohibitory law on the subject. Wherefore, other conclusions may be proved by the converse reasoning, as follows: the action in question is evil for this reason, namely, that in its very essence it is out of harmony with rational nature; hence, that nature itself is the standard by which this action is measured, and, consequently, that nature is the natural law.[9]

A second argument that may be advanced to support this opinion is that precepts of natural law are either principles that are self-evident from an analysis of their terms or they are obvious conclusions that are necessarily derived from self-evident principles. According to this view the principles and conclusions which are the body or content of natural law are prior to every judgment framed by reason.

This would seem to be the case not only for judgments of the created intellect but also for the judgments of the divine intellect as well.

> For just as the essence of things, in so far as it does not involve a contradiction, is in each case of a given nature, by virtue of the fact that it is such inherently and prior to any causality on the part of God and (as it were) independently of Him; even so, the righteousness of truth and the evil of falsehood, are such of themselves and by virtue of eternal truth. Hence, with respect to such actions and precepts, a judgment cannot have the nature of law, seeing that prior to every (possible) judgment they possess their good or evil character, and are prescribed or forbidden accordingly; and therefore, with regard to these same actions and precepts, there can be nothing endowed with the character of natural law, save rational nature itself.[10]

After exposing the first interpretation of rational nature as natural law, Suarez rejects the position and lists several reasons for its unacceptability, the first of which as he claims is foreign to the teaching of all theologians and philosophers.

Because rational nature itself, strictly viewed in its essential aspect, does not give commands, nor does it make evident the rectitude or turpitude of anything, Suarez holds that it cannot be law in any sense. He confirms this in adding that rational nature does not direct or illuminate or produce any of the other proper effects of law.

> Therefore, it cannot be spoken of as law, unless we choose to use that term in an entirely equivocal and metaphorical sense, a use which would render the entire discussion futile. For, we assume, in accordance with the common opinion found not only in the words of the Doctors, but also in the canon and the civil law, that the body of natural law (ius) is a true body of law, and that particular natural law (lex) is true law.[11]

Proposing a third argument for his contention that rational nature is not natural law, Suarez comments that not everything which forms the basis of the goodness or rectitude of an act prescribed by law, and not everything which is the basis of turpitude of an act forbidden by law may in themselves be called law. While it is true that although rational nature is the foundation of the objective goodness of the moral actions of human beings, it may not on that account be called law.

As Suarez claims, nature may be spoken of as a standard, "yet it is not correct to conclude on that ground that it is law, for 'standard' is a term of wider application than is 'law.'[12] In support of his position, Suarez cites the example of almsgiving. The need of a poor man and the ability of the one giving the alms are the basis of the

goodness or the obligation in the giving of alms. Nevertheless, no one holds that neither the need of the poor man nor the ability of the giver, is the law that imposes almsgiving.

> The words of St. Thomas (II.-II, qu. 141, art. 6), concerning temperance, furnish a similar example when he says that the need of the body is the rule of temperance; yet no one will say that this need is the law (of temperance); on the contrary, it is the foundation of the law. In that same passage (ad I), indeed, St. Thomas says that happiness is the rule of human actions in so far as they are morally good; and yet happiness is not law.[13]

After offering as supporting evidence of his position, several absurdities that follow from the position which holds that rational nature is the same as natural law, he concludes his attack and prepares to set forth his argument in support of the position that holds natural law to be rational nature regarded on the basis of its power to judge, by the light of natural reason, concerning those things which are in accord or discord with it.

It is natural reason and not rational nature that is natural law. And natural reason is then seen to be the very precept (lex) of nature which lays commands or prohibitions upon the human will regarding what must be done (or left undone), as a matter of natural law (jus).

> This appears to be the opinion of theologians, as one gathers from St. Thomas (I.-II, qu. 94, arts. 1 and 2 and on the Sentences, Bk. IV, dist. xxxiii, qu. 1, art. I), and from Alexander of Hales (Summa Universae Theologiae, Pt. III, qu. xxvii, memb. 2, art. I). Moreover, the same view is held by Abulensis (Tostado) (on Matthew, xix, qu. 30), Soto (De Iustitia et Iure, Bk. I, qu. iv, art. I), Viguerius (Institutiones Theologicae, Chap. xv, I), in many instances by other theologians; by the jurists on Digest, I. i; and by Albert of Bologna (Tract. De Lege, Iure et Aequitate, Nos. (Chaps.) xxv and xxvi), who especially may be consulted, in a passage wherein he refers to other authorities. The philosophers, too, frequently

speak in this vein, as we have previously noted (Bk. I, chap. iii).[14]

Noting St. Paul (Romans, Chap. II, vv 14-15), Suarez continues:

> ...who, after saying: 'For when the Gentiles who have not the law, do by nature those things that are of the law, these having not the law, are a law to themselves', adds, as if to indicate the way in which the Gentiles are a law unto themselves and the nature of that law: 'Who show the work of the law written in their hearts, their conscience bearing witness to them.' For conscience is an exercise of the reason, as is evident; and conscience bears witness to and reveals the work of the law written in the hearts of men, since it testifies that a man does ill or well, when he resists or obeys the natural dictates of right reason, revealing also, in consequence, the fact that such dictates have the force of law over man, even though they may not be externally clothed in the form of written law. Therefore, these dictates constitute natural law; and, accordingly, the man who is guided by them is said to be a law unto himself, since he bears law written within himself through the medium of the dictates of natural reason.[15]

This position is also supported in the long Christian history of natural law tradition by Basil, John Damascene, Jerome, Maximum of Turin, Augustine, Ambrose, Isidore and Lactantius among many others. Suarez cites all of those listed before he sets out to confirm his position by reason.

> The opinion above set forth may be briefly supported by reasoning, in accordance with what has been said. First, (we may argue) by means of an adequate discrimination: for natural law resides in man, since it does not reside in God, being temporal and created, nor is it external to man, since it is written not upon tablets but in the heart; neither does it dwell immediately within human nature itself, since we have proved that it does not do so; nor is it in the will, since it does not depend upon the will of man, but, on the contrary, binds and (as it were) coerces his will; hence, this natural law must necessarily reside in the reason.[16]

After proposing a second argument on the basis of the legal effects of natural law, Suarez notes that the exercise of dominion and the function of ruling are characteristic of law; and in man, these functions he attributes to right reason, that man may be rightly governed in accordance with nature. Thus, he concludes that the natural law must be constituted in the reason of man as in the immediate and intrinsic rule of human actions.

The question now arises as to whether natural law consists in an act of judgment or in a habit of the mind. Suarez holds here that natural law, in the strictest sense, is in the actual judgment of the mind. However, he adds that the natural light of the intellect, the habit of the mind, may also be called the natural law, since men retain that law in their hearts, although they may be engaged in no (specific) act of reflection or judgment.

> ...Therefore, just as human law, in so far as it is external to the legislator, implies on the part of the subject not only active knowledge thereof, or an act of judgment, but also a permanent sign of its existence, contained in some written form which is always able to awaken knowledge of that law; even so, in the case of natural law, which exists in the lawgiver as none other than the eternal law, there is, in the subjects, not only an active judgment, or command, but also the (mental) illumination itself in which that law is (as it were) permanently written, and which the law is always capable of incorporating.[17]

At this point it seems necessary to dismiss one final point before moving on to the next section which will attempt to explain why the reason of man may be sometimes correct and sometimes in error.

Natural law and the conscience of the individual are sometimes compared. Although these two powers or forces are thought by some to be

identical, it can be shown, that strictly speaking, this is not the case.

The term 'law' as it is understood in this thesis, is taken to mean a rule in general terms regarding those things which should be done and those things which should be avoided. 'Conscience' on the other hand is taken here to mean, and it is so accepted generally, a practical dictate in a particular case. Thus conscience is seen to be the application of the law in a particular case rather than the law itself.

> From these facts, it also follows that 'conscience' is a broader term than 'natural law', since it puts into application, not only the law of nature, but also every other law, whether human or divine. Indeed, conscience is wont to apply not merely true law, but even reputed law, in which sense it sometimes occurs that conscience is in error. (True) law, on the other hand, can never be in error, for, by the very fact that it was erroneous, it would fail to be law, an assertion which is especially true with respect to the natural law, of which God is the Author.[18]

A final difference between natural law and conscience, as noted by Suarez, lies in this that law is properly concerned with acts that are to be performed, whereas conscience deals also with acts that have already been done. Thus, conscience is endowed not only with the attribute of imposing obligations, but also with the attributes of accusing, bearing witness, and defending as may be gathered from St. Thomas.[19] On this point, Alexander of Hales and Bonaventure may be consulted in the loci cited by Suarez.[20]

This thesis on the natural law foundations of freedom of expression in American political philosophy defends the capability of human reason to discover truth, and the capability of the human will to act according to reason. Not to defend the second of these propositions, at least in

practice, would make law, reward, and punishment meaningless or worse. Not to defend the first would constitute at least an implicit denial of the purpose of all human search for knowledge. This is not to say that all theoretical questions involved in either case have been conclusively resolved. Man and the complexity of his relationships to society, to events, and to the physical world in which he lives will never cease to be an all but limitless field of exploration for theologians, philosophers, and scientists of every dimension, physical as well as social.

In the face of the mass of evidence to the contrary, a denial of man's ability to know, and to act according to reason assumes the responsibility for proof in the testimony of evidence, that there never has nor can be such a human enterprise.

To clarify the position held by this thesis, it is held here that men, all men, know the natural law with greater or less difficulty. To a large extent, men's knowledge of this law will be determined by the stage of development of their powers of observation, reason, and moral consciousness. This natural law that all men know is at root a matter of principles in which no process of reasoning is involved, since principles, by definition, are indemonstrable, and ultimate in nature. As such, there can be no specification to particular circumstances. Among such principles would be the prologue to natural law, "Do good and avoid evil." Also included in this category would be the three propositions proposed by Ulpian in the third century: "Do good to others," "Avoid injuring others," "Render to each his own."

There is little or no possibility of a process of deduction either from these principles or from the following precepts that will eventuate in a minutely detailed code of law and human conduct. Natural law and the common law of nations do not work out in this fashion. And, it is on the basis of such claims as this that natural law philosophy has in the past fallen into disreputa.

Understanding principles, then, as the first level of law, the way is clear for an inclusion of precepts that are immediately and necessarily drawn from the principles of law. These are summed up in the Decalogue. The propositions of the precepts underlie the laws and customs of all societies, and they do so because they are necessarily deduced from the principles of law.

In recent times, most if not all of the precepts of the Decalogue have been verified by modern methods of investigation. The noted anthropologist, Clyde Kluckholm, held a position on cultural values, based on long and thorough study, that establishes beyond any reasonable doubt that there are in the midst of many cultural value variances a number of cultural values that are universal. Among these he names the following: that no culture has made of human suffering an end of and for itself; nowhere is murder, nor indiscriminate lying and cheating allowed within the group. He further states that cultural relativism does not justify the conclusion that cultures are in all respects utterly disparate monads and hence strictly non-comparable entities.[21]

Both the principles and the precepts are inadequate by themselves to govern ethical action, but for different reasons. In the case of the principles the inadequacy arises because the principles specify only the end, the finality of human action, and say nothing about the means of attaining that end. In the case of the precepts of law, the means are specified, but only in a general way, without reference to the contingent circumstances that are always involved in action and in the governance of action.

Before proceeding to a consideration of the place of positive law in this brief analysis of legal structure, some mention should be made of the jus gentium, the law of nations, to place it within the structure of law, to distinguish it from natural law, strictly speaking, and to indicate its relevance to formulations of international codes of communication ethics.

Grotius who has been treated at some length earlier made a considerable contribution to the question of the law of nations; yet as will be seen he paved the way for the confusion of Pufendorf who eradicated the distinctions between natural law and the law of nations.

To the undying merit of Grotius, as Rommen puts it, he systematized international law and placed it upon the solid foundations provided by natural law. In the midst of an era of fierce wars, including the Thirty Years' War (1618-1648), when the civitas christiana was being rent with enormous cruelty and radical disregard for legal norms, Grotius powerfully and impressively upheld the idea of rule by law even in time of war. In so doing he brought back to life the intellectual unity of the West, after

its religious unity had been destroyed during the time of the Reformation. Thus he substituted an intellectual solidarity founded on reason for a solidarity that had once been grounded on a common faith.

It was, however, because of his heavy emphasis on reason that Grotius tended toward a kind of rationalism which led him to obscure the clear separation between natural law content and the positive content of the jus gentium as this was deftly exposed by Suarez and the Late Scholastics. The path was then open, as has been noted, for the Pufendorf equation of ius naturale and ius gentium.

The great accomplishment of Suarez and de Vittoria in particular was to clear up the ambiguous distinctions of Roman law that had infiltrated natural law thinking.

> Ius gentium in the proper sense is not ius naturale, although the precepts of the latter are evidently valid for the ordering of the community of peoples. Thus differentiated, ius gentium is the quasi-positive law of the international community: it is founded upon custom as well as upon treaty agreements. The basic norm of this positive ius gentium is, besides the material principles of the natural law, especially the axiom, pacta sunt servanda. To positive international law belong the doctrines of war, truce and peace, international trade and commercial treaties, and the law concerning envoys. But the requirements that a war must be just, and that the community of peoples must establish and foster friendly intercourse, pertain to the natural law.[22]

The Scholastics distinguished further the ius gentium as a basis for international affairs from international private law.

> The latter contains norms regarding legal institutions that are common to nearly all peoples, and hence are closely related to the natural law. Such are the general formal legal institutions touching purchases, leases, promissory notes, contracts, ownership, the family and

> inheritance. For, despite regulations that differ in detail, all these legal institutions have, among almost all peoples, many things in common over and above their natural-law foundation.[23]

Thus it is seen that the natural law may well be operative beneath all law as a kind of substratum, but neither positive law nor the jus gentium may either be equated with or logically deduced from natural law. An understanding of these distinctions may help to clear the air for ethical discussions that are often frustrated in the face of false and pretentious natural law claims. When, for example, ius gentium, is so distinguished from natural law and seen to include customs and treaties, as well as natural law, the way is open for empirical procedures that may effectively be employed in the establishment of a code of ethics for communication that will be valid for a given country, and with appropriate allowance for cultural variations, for the community of nations.

In the search for a code of communication ethics upon which a system of laws may be built that will be founded on reason rather than arbitrary will, whether this search is made to establish a code for one nation or for the international community, a return will perhaps be made to the original discovery of the ius gentium.

> The Roman world empire, with its toleration of the legal institutions of subject peoples, placed in the hands of the jurists still another important source of knowledge. This was the unwritten ius gentium, which arose out of actual practice and was substantially "found" by the jurists and magistrates.[24]

Historically, what has been said of the ius gentium is rooted in Stoic thought with implications for an age of communications that are unmistakeable. To issues current and pressing today within this nation and

among the family of nations the following might appropriately be addressed:

> All that you behold, that which comprises both god and man, is one-we are the parts of one great body. Nature produced us related to one another since she created us from the same source and to the same end. She engendered in us mutual affection, and made us prone to friendships. She established fairness and justice. [25]

It seems quite critical in the face of the real technological possibilities of the common use of television signals transmitted via satellite systems that serious study be made of the ius gentium, its history, defects of interpretation, its methods, its discoverable content, and its application to ethical and legal problems that will grow out of increasingly more closely knit inter-cultural relationships. The positive laws of one nation or of many nations cannot be relied upon in themselves to solve the difficulties. Positive law, as will be seen below, performs a function in society quite different from that of the common law of nations.

The United Nations seems a likely organization to develop such studies in spite of its failures and procrastinations of the past in the communications area.

At the third level of law, the necessity and objective "oughtness" of principles and precepts gives way to contingency, uncertainty, and the tentative. The reason for this lies in the circumstance that rules attempt to meet facts. Because, however, rules involve facts, and because facts are practically infinite in number, and subject to change, at least in relation to one another, the rules will consequently be defective insofar as they fail to provide for the unknown or unusual

cases; and, on the other hand, since facts change in their relationships, the rules must change, if they are to account for the change in relationship and maintain a reasonable harmony with the facts. This is the level of positive law.

The role or function of positive law in the pattern structured above is something quite different from that of natural law or the common law of nations. Positive law has a job to do which natural law and the common law of nations cannot do. Positive law is not, strictly speaking, a deductive result from one or the other or both. Rather, positive law is a determination of both to the facts of the circumstances about which the positive law attempts to speak. These determinations are made by the lawmakers of the community. To these lawmakers, insofar as they are deeply concerned with justice in the personal, business, social, and political relationships of the community, belongs one of the most arduous tasks assigned to man. Thomas Aquinas was so impressed with the difficulty of this task that he wrote: "Suitably to introduce justice into business and personal relations is more laborious and difficult to understand than the remedies in which consist the whole art of medicine."[26]

To meet all of the objections that have been raised and will be raised against the existence or validity of natural law, and in its meaningfulness as a basis for an ethics of communications proper to the American political philosophy is patently impossible, and, for the most part, largely irrelevant to the purposes of this thesis. Since most of the objections fall under the general heading of man's susceptibility to error, an answer to such objections will be attempted here.

To some extent both the development of man's moral consciousness and the fallibility of human reason have led more than a few to discredit natural law. If, as is now known, man once was victimized by myth and superstition, how can there be any certainty that further advances in human knowledge will not reveal a continuing and increasing number of misconceptions, judgments and conclusions about man and the world in which he lives? On the same grounds, these objectors could discredit arithmetic because some people do not know how to add, and others make mistakes in addition.

A noted authority on the problem of Church and State, John Courtney Murray, S.J., had this to say about the fallible reason of man:

> In making human nature rational, God made it subject to the laws of rational nature; and one of these laws is the general law that all laws of human nature must reach man, and be imposed upon him, by reason and its practical judgments. There is no other way, in keeping with the dignity of man, whereby his obedience to the laws of his nature may be secured, save by these practical dictates of reason which procure obedience, and a rational obedience...Reason may, indeed, perform its function badly; it may mistake for law what is not law, and it may be blind to the law that really is law. But, even when performing its function badly, reason cannot destroy its own function...[27]

For reasons given in the immediately preceding pages, supported explicitly in the sections on Suarez and Wild, and implied throughout the thesis, the posture of the thesis is that man does have the capacity to discover truth, and that man does have the capacity to act according to the dictates of his reason. Man, however, as experience clearly indicates, does make mistakes, does make bad ethical decisions. Some account has

already been given of the reasons for this, in that the reason of man is capable of development, does, in fact, grow and evolve not only in his growth from childhood to manhood but in his growth from more primitive to more civilized societal life. Experience also indicates that man, under the influence of passion, i.e., anger, lust, envy, greed, will make mistakes that he is capable of seeing himself when not so influenced.

To put the phenomenon of human error in another way, man as a social animal spontaneously moves slowly out of himself into a world that exists apart from his knowing or not knowing of it. In this moving out he gradually becomes aware that his image of reality does not always conform satisfactorily to that reality. He makes mistakes. These mistakes, or errors, may generally be ascribed to two causes; he may not really want his image of reality altered, or he may want his image to conform to reality, but, for want of sufficient evidence, or the ability to comprehend the evidence, he will, as a result, fall into error when he makes his judgment. This error he may or may not perceive as such, depending on the development of his intellective faculties and his continued exposure to evidence.

A further explanation of man's susceptivility to error may be found in the Catholic doctrine on Original Sin. Because this acoount seems to meet the two attitudes of the social responsibility theory of the press as this is presented by both Peterson and Schram, a brief survey of the doctrine will be attempted here.

The two attitudes referred to in the social responsibility theory noted above are that man has a reason and is capable of using it, but is loath to do so; and that the media have a responsibility to protect man from temptation beyond his ability to resist.[28]

According to Catholic doctrine on Original Sin, man, by his fall from grace, suffered a wounding of his nature. This wounding, however, was not a complete corruption as the Reformers and the Jansenists conceived it to be. In the condition of Original Sin, man possesses the ability of knowing natural truths, including natural religious truths, and is capable of performing natural and morally good actions. The First Vatican Council taught that man, with his natural power of knowing, can with certainty know the existence of God (D 1785, 1806). The Council of Trent taught that the free will of man was not lost or extinguished by the fall of Adam. (D 815). This is not to say, according to this doctrine that the wounding of man's nature was of little significance.

On the contrary, the teaching of the Church extending back to the time of the 2nd Council of Orange, A.D. 529, was and is that the wounding of nature extends to the body as well as the soul: "totum, i.e., secundum corpus et animam, in deterius hominem commutatum." (the whole man both in body and in soul was changed for the worse. D 174, cf. D 181, 199, 793). Together with the two wounds of the body, i.e., sensibility to suffering and mortality, theologians, including Thomas Aquinas, enumerate four wounds suffered by the soul of man as a result of Original Sin:

1) ignorance, the difficulty of knowing the truth, as opposed to prudence.
2) malice, the weakening of the power of the will, as opposed to justice.

3) weakness, the recoiling from difficulties in the struggle for the good, as opposed to fortitude, and 4) desire, the desire for sense satisfaction against the judgment of reason, as opposed to temperance. The wounds of the soul, then, are conceived to be caused by the loss of the preternatural gift of freedom from concupiscence.[29]

For purely theological reasons, the Protestant tradition has, in theory, been reluctant to place much confidence in natural law with its presupposit of a wounded yet not completely corrupt human nature. On theological grounds no confidence is to be placed in the ability of unaided (by Divine action) human reason to discover the truth, nor in unaided human will to perform good or ethically acceptable actions.

In practice, however, the Protestant tradition has assumed that man can arrive at the truth, and if this implied some supernatural assistance, there does not seem to be any real evidence, as the following citations indicate. The first is from the writings of Mr. Justice Holmes, a supposed opponent of natural law theory.

> ...But when men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundation of their own conduct that the ultimate good desired is better reached by free trade in ideas - that the best test of truth is the power to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes can be carried out. That at any rate is the theory of our Constitution.[30]

John S. Mill disputed the validity of this proposition as it was espoused by Milton in the Aereopagitica, but not necessarily because the truth could not be discovered; rather that it was doubtful that this was the way to do it infallibly. Professor Hocking expressed similar doubts,

again without any denial that the truth could not be discovered, in the following excerpt from his book, Freedom of the Press, (p. 93): "I fear it is simply not the case that in the profuse and unordered public expression of today the best views tend to prevail."

Now having completed, as far as the purposes of this thesis require, an historical study of the problem of natural law, an analysis of the three basic ontological categories of essence, existence and tendency, a study of the function of reason in natural law theory, and an explanation for man's capacity for truth and susceptibility to error, an examination will now be made of selected laws, codes, customs, and practices. The assumption that such an examination will attempt to support is that the ethic is in the industry, i.e., the media of mass communication, and that this ethic can be discovered and explicated in the light of the preceding study of natural law.

It should be mentioned here that it is not the purpose of this thesis to propose answers to particular ethical problems in communications, but rather to establish the validity of a natural law framework within which such problems may be studied and worked out. And this framework for investigation will have been seen not to be the result of an arbitrary selection but one that is consonant with the American political philosophy rooted as this is in natural law theory. Secondarily, such a framework, established both on an historical as well as on a metaphysical foundation, may serve to correct such departures from the American philosophy as have occurred and will very likely continue to occur in formulations of ethical practice for the mass communications media in this country.

Footnotes

[1]De Legibus, Francis Suarez, Lib. I, caput III, trans. The Classics of International Law, ed. James Brown Scott, Oxford: At the Clarendon Press, 1944, p. 42.

[2]Sentences, BK. IV, dist. xxxiii, art. 1.

[3]On Laws, Bk. II, chap. iv, no. 8.

[4]Ibid., p. 42.

[5]Supra, p. 33.

[6]Ibid., p. 178.

[7]Vazquez I.-II, disp. 150, chap. iii.

[8]Suarez, p. 178.

[9]Suarez, p. 179.

[10]Suarez, p. 180.

[11]Suarez, p. 181.

[12]Suarez, p. 181.

[13]Suarez, p. 181.

[14]Suarez, p. 183.

[15]Suarez, p. 184.

[16]Suarez, p. 185.

[17]Suarez, p. 187.

[18]Suarez, p. 187.

[19]St. Thomas, Pt. I, qu. 79, art. 13, and I-II, qu. 19, art. 6.

[20]Alexander and Bonaventure, cited by Suarez, p. 187.

[21]"Culture and Behavior," Handbook of Social Psychology, C. Kluckholm. p. 954.

[22]Rommen, pp. 68-69.

[23]Rommen, p. 69.

[24]Rommen, p. 29.

[25]Epistulae morales and Lucilium, XCV, 52, trans. by R. M. Gummere, in the Loeb Classical Library as quoted by Rommen, p. 25.

[26]Ethicorum, V, 15, quoted by Rommen, p. 252.

[27]John Courtney Murray, S. J., "Freedom of Religion: I The Ethical Problem," Theological Studies, VI, 2, June, 1945, p. 250.

[28]Responsibility in Mass Communications, Schramm, pp. 93, 94.

[29]Ludwig Ott, pp. 112-113.

[30]Oliver W. Holmes, Jr., "Dissenting Opinion in Abrams v. United States," Thomas I. Emerson and David Haber, Political and Civil Rights in the United States (Buffalo: Denis & Col, Inc., 1952), p. 359.

CHAPTER V

LAWS AND CODES RELEVANT TO PROBLEM IN THE UNITED STATES

In the United States, today, in spite of the simplicity of the free speech and free press clauses in the First Amendment to the national Constitution, in spite of the equally and apparently evident natural law philosophy found in the writings of the Founding Fathers, questions concerning the exercise of these liberties continue to engross and perplex moral philosophers, political scientists, and lawyers who attempt to define these rights and their limits in a democratic, pluralistic society.

One of several examples of the scrutiny to which supposed and once-hallowed principles have been subjected is the following, taken from an article by Gerhart Niemeyer, Professor of Political Science at Oglethorpe University:

> Under freedom of speech, all ideas bearing on common affairs are considered to be equally entitled to expression, regardless of their content and intrinsic value...This principle of nonpreferment is based on certain characteristic beliefs...belief in the free quest for truth, belief in the free determination of the will of the people, and belief in the rational method of discussion as a 'common good' of the social order...Like much of political liberalism, it (free speech) turns out to be a self-defeating proposition.[1]

The argument here revolves around the proposition that the principle of free speech, born of reverence for truth, proceeds to dethrone any truth already gained, by guaranteeing that the further quest will not be affected by respect for what insight has already been won. Having established such a premise, the writer then logically concludes

that such a use of the principle of free speech must inevitably lead to relativism. He closes the article with a plea for humility rather than neutrality in this seeking of truth, basing his plea on the nature of these opposing attitudes. Neutrality, he alleges, develops out of a profession of ignorance while humility springs from a confession of imperfection.

Taking the above as one of many instances of confusion in the question of freedom of expression, an attempt will now be made to show that the issue is not altogether helpless of resolution. On the contrary, within the framework of natural law theory as this has been seen to underlie the political philosophy of this country, an outline will be sketched to indicate that the ethic is in the industry and can be discovered and explicated. This attempt will be made through an examination of relevant laws, and codes that reflect the basics of American political philosophy.

The First Amendment to the Constitution, adopted in 1791, reads as follows: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the Press; or the right of the people to assemble, and to petition the Government for a redress of grievances."

It is generally accepted on the basis of Madison's careful minutes of the convention that only casual and infrequent mention of the press was made. Aside from some discussion as to whether or not the men intended to accomplish more by this amendment than to prohibit prior restraint of the press by government, there is sufficient evidence in available documents that the entire Bill of Rights was a concession

offered by the conservatives, a price paid by the authors for the public consent that made the document of Constitution practicable.

It would seem that freedom of the press was a matter of serious concern for the authors of the national charter even though little discussion of the issue is indicated, as noted above, in Madison's minutes of the convention. Some did not think it necessary to include the provision, and, in fact, seem to have felt that such an inclusion might have the effect of limiting freedom of expression. Many of the Federalists, including Hamilton viewed the liberty of the press clause as superfluous or meaningless.

> What signifies a declaration, that "the liberty of the press shall be inviolably preserved?" What is the liberty of the press?...I hold it to be impracticable; and from this I infer, that its security, whatever fine declarations may be inserted in any constitution respecting it, must altogether depend on public opinion, and on the general spirit of the People and the Government.[2]

According to Lee, it was only after the objections of Hamilton and the Federalists had been answered by Samuel Adams and his supporters that the First Amendment took effect on December 15, 1791.

Thus there were arguments and disagreements among the delegates. In addition, public sentiment apparently operated as a strong factor in the eventual ratification.

> Delegates from Massachusetts reported it would be impossible to win ratification of the Constitution in that state without a clause concerning freedom of expression. Virginia could not muster enough votes for ratification until Governor Edmund Randolph called upon the framers to add the Bill of Rights. ...Delegates were then told to return to their respective states, and to use all influence available in mustering support for ratification of the main document on the promise that the Rights clauses would be included in the charter. It was on

> this understanding that New York finally approved the Constitution, but even so, it was not an easy victory for the Federalists.[3]

The evidence then would seem to indicate, in an issue admittedly obscured by a variety of reasons and purposes, that the press clause was forced upon the framers of the Constitution by expedience. That their intentions were somewhat ambiguous seems clear in that the same group was responsible for the Alien and Sedition Acts passed by the Congress in June and July, 1798. The first law was aimed at troublesome foreigners living in the country, and the second attempted to muzzle irritating editors.

However the freedom of expression clauses came to be included in the Federal Constitution, two points might be noted. Freedom of speech and freedom of the press are a part of the fundamental law of the land. Thus it is not the government in the United States that grants these freedoms, and any restrictions on these could ensue only after the question had been submitted to Constitutional amendment. In passing, it might be noted that this is not the case in Great Britain where the Parliament provides the protection for the rights of free expression and could presumably take them away.

As a part of the fundamental law of the land, these guarantees came about not only through the action of the political leaders, nor necessarily through an overt action of the majority of people, but rather as a result of debate, concession, public opinion, and public pressure, all of which are taken here to be mechanisms of the public consensus.

If it is true, as assumed in this thesis, that the ethic is in the communication industry or community, its meaning, method, and content will necessarily be resonant with the statement, meaning and method of the First Amendment. The content of the ethic of communication will be qualitatively the same as the Amendment, but quantitatively different, as political, social, and economic situations become increasingly more complex in national and international life.

Admittedly, it is no simple task to determine whether or not in any given instance a code statement or a law relating to freedom of expression is resonant with the First Amendment. Further, it helps very little to say that all that follows from the First Amendment, if it is consonant with the Amendment, will have been implied in the Amendment. This last, in fact, is accepted as largely true in this thesis, but this would seem to be a post factum sort of thing that would have little practical significance.

What is required as a means of evaluating the resonance of a communications ethic with the fundamental law of the land is a "basic philosophy to serve as a stabilizing influence in the interpretation of the First Amendment."[4] This stabilizing influence will be, as this thesis has attempted to show, a careful consideration and study of the natural law theory that constituted the framework, and was, in fact, the environment of the Constitution and the Amendment.

Unless it is held that this country and its political philosophy have changed radically and substantially into something other than what these were in 1791, it may, with some assurance, be presupposed that the

predominant tone and structure of the laws and codes of communication reflects the natural law philosophy upon which these structures are founded.

An important component in this structure of law affecting freedom of expression is the Fourteenth Amendment, adopted in 1868, which reads in part as follows:

"No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, with due process of law..."

By a series of United States Supreme Court decisions, it has been established that freedom of speech, freedom of the press, and freedom of assembly which are protected by the First Amendment from infringement by the Federal Government, are among the fundamental rights and liberties protected by the Fourteenth Amendment from invasion by state action.[5]

The freedoms thus established by American constitutional law are not absolute. Restrictions on freedom of speech and the press not held to be unconstitutional fall into four general categories: 1. Protection of individuals against libel and slander. 2. Protection of the community against the dissemination of obscenity. 3. Protection of the state against internal disorder. 4. Protection of the state against external aggression.

Before passing on to a brief consideration of communication codes of ethics, it seems appropriate to remark that since the ratification of the First Amendment in 1791, only five major pieces of legislation have

been passed that treat the problem of free expression: the Sedition Act of 1798, the Fourteenth Amendment (1868), the Espionage Acts of 1917 and 1918, the Alien Registration Act of 1940 (Smith Act), and finally the Atomic Energy Act passed in 1946. It might be noted in addition that the Court did not definitely declare itself on the doctrinal extension of judicial review under the "due process" clause until 1925 in Gitlow v. New York, more than half a century after the passage of the Fourteenth Amendment.

The brief and selected treatment of laws relevant to the communication media completed above and the similarly limited study of media codes in the following section are intended neither to be panoramic views of such laws and codes nor to be samplings of all appropriate laws and codes in the sense that samplings would be understood statistically. For readings and projects of this kind ample materials are already available in such works as Huddon's Freedom of Speech and Press In America, Chafee's Free Speech in the United States, and in the various collections of codes for journalism, motion pictures, and the broadcasting industries.

Selections of laws and codes are made here both as points of evidence and points of departure in an effort to determine whether or not the ethic is in the communication industry. This can be done in a meaningful manner provided it can also be shown that these laws and codes by their nature and with some kind of necessity both reflect and are resonant with the political philosophy of the nation in which the laws and codes develop. As applied to the United States whose basic philosophy is rooted

in natural law theory, as demonstrated in the historical section of the thesis, the task then will be to determine whether or not the laws and codes reflect natural law philosophy, i.e., an objective norm of human conduct.

Laws, codes, customs, and practices do not develop out of a vacuum, nor haphazardly in random fashion. They develop from the will of man regulated by reason. This should not be taken naively to mean that all laws, codes, customs, and practices are either good or reasonable. It has been assumed in theory here, and can be demonstrated in practice, through observation, made within the natural law frame of reference of this thesis that man is capable of truth and susceptible to error. In a similar manner, it may be shown that man's will, although tending by its nature towards what man perceives to be good and just, can lead to evil and objective injustice through ignorance in the intellective faculty and under the influence of disordered passions or emotions.

In much the same manner as human reason and will, in practical matters, may be made manifest by speech so they may be made manifest by deeds, since seemingly a man chooses as good that which he carries into execution.[6] Thus the laws and codes which attempt to regulate and direct the media of mass communication in a free, pluralistic society are seen to be or to reflect what their formulators have perceived to be good and just for the industry and for the community that it serves.

But the laws and codes affecting communication may be changed both for better or for worse as times and circumstances change, as man digests and interprets the growing deposit of his experience.

> But it is evident that by human speech, law can be both changed and expounded, in so far as it manifests the interior movement and thought of human reason. Wherefore, by actions also, especially if they be repeated, as to make a custom, law can be changed and expounded; and also something can be established which obtains force of law, in so far as by repeated external actions, the inward movement of the will, and concepts of reason are most effectually declared; for when a thing is done again and again, it seems to proceed from a deliberate judgment of reason. Accordingly, custom as the force of law, abolishes law, and is the interpreter of law.[7]

In the abstract, and in principle, this is seen to be a sufficiently straightforward appraisal of the mechanisms that bring laws, codes, and customs into being. It also accounts for their evolution and replacement. In concrete historical situations this operation in large part is determined or conditioned by the culture in which it functions. In short it is accepted in this analysis that neither total determinism, nor the random formulation of laws and codes renders a convincing interpretation of their genesis, evolution, and /or demise in the concrete experience of the history of American laws and codes relevant to the media of mass communication.

Understanding from what has gone before that the natural law theory underlying the political philosophy of the United States is multifaceted, and assuming that this philosophy has not undergone radical and substantial change on the level of constitutional law, it may be held mutatis mutandis that the laws and codes of communications share in differing degree the authority of the Declaration of Independence and the First Amendment which "rests then on the harmonizing sentiments of the day, whether expressed

in conversation, in letters, printed essays, or in the elementary books of public rights, as Aristotle, Cicero, Locke, Sidney, etc."[8]

In passing it may be reiterated that this thesis proposes not only that laws and codes affecting communication media be stabilized in their interpretation by placing them and the First Amendment in their proper natural law environment, but that these laws and codes cannot, in fact, successfully do what they are intended to do unless they are formulated, studied, and interpreted within the natural law framework that, in theory, is the philosophical basis for the present historical situation of the United States.

A preliminary task at this point, then, is to select statements from the code of the American Society of Newspaper Editors (adopted in April, 1923), from The Television Code of the National Association of Radio and Television Broadcasters (from the version revised to March, 1954), and from A Code to Govern the Making of Motion Pictures (adopted in 1930, with occasional revisions and amendments having been made at various times since that date). Then an attempt will be made to discover whether or not these statements correspond to the social responsibility theory of the press which presumably reflects the harmonizing sentiments of the day in this area of the human experience.

The preamble of the ASNE code reads as follows:

> The primary function of newspapers is to communicate to the human race what its members do, feel and think. Journalism, therefore, demands of its practitioners the widest range of intelligence, of knowledge, and of experience, as well as natural and trained powers of observation and reasoning. To its opportunities as a chronicle are indissolubly linked its obligation as teacher and interpreter.

> To the end of finding means of codifying sound practice and just aspirations of American journalism, these canons are set forth:[9]

The above would seem to accept Weiner's proposition that to live effectively means to live with adequate information. It can also be taken to assume that both journalists and the consumers of the mass media product are possessed of intelligence and reason in so far as these are human powers found in varying degrees of development in any human society. It also states the importance of observation; the observation of objective data, and the necessity of training the human ability or power to observe. Finally, it proposes as a prime function of the press the burden of interpretation. Thus, the journalist observes to discover facts that he then interprets or attempts to interpret. This finally may be understood as an advocacy of the existence and meaningful relation of value to fact. At very least, this statement, its implications, and underlying assumptions are capable of being interpreted as coincident with the natural theory proposed in this thesis as the basis of the political philosophy of the Founding Fathers.

MacDougall implies this coincidence when he urges aspiring young journalists to attempt to live up to this code. He offers this challenge in the light of what he perceives to be the purpose of the First Amendment.

> ...On the one hand, the founding fathers wanted to prevent any governmental interference with or censorship prior to publication of news in the public interest, as they recalled the centuries of struggle which it took in England to obtain such rights. On the other hand, freedom of the press also was intended as a positive instrument to bolster the chances of success for an

> experimental government of, by, and for the people. It really was the "right to be informed" that was being protected. If the founding fathers had thought some form of governmental regulation would best serve that purpose, undoubtedly they would have prescribed it.[10]

According to MacDougall, the Founding Fathers felt that wide-open freedom for all to publish and to speak, even though this opened up the gates for error, evil, and unfairness, would in the long run serve the public interest more satisfactorily than the alternative of government regulation. He sees freedom of the press and of speech as means to an end, and not as ends in themselves.

Echoes of Milton's Aereopagitica, and Holmes' 'market-place of ideas' concept may be detected in MacDougall. This kind of thinking seems to have been, in large part, overcorrected by the Hutchins commission. The search for truth, the task to which the mass communications media are unalterably committed, might better be characterized neither by the naive optimism of a Milton nor by the neutralistic pessimism of a Hocking, but by a kind of humility as indicated above.

On this note, it may be appropriate to refer to a comment made by Aristotle in his Metaphysics:

> The investigation of the truth is in one way hard, in another easy. An indication of this is found in the fact that no one is able to attain the truth adequately, while, on the other hand, we do not collectively fail, but every one says something true about the nature of things, and while individually we contribute little or nothing to the truth, by the union of all a considerable amount is amassed. Therefore, since the truth seems to be like the proverbial door, which no one can fail to hit, in this respect it must be easy, but the fact that we can have a whole truth and not the particular part we aim at shows the difficulty of it.[11]

The meaning of the statement that the ethic is in the industry, and can be discovered and explicated comes into focus in the course of an examination of laws and codes when these are studied within the framework that accounts for the natural law basis of American political philosophy.

How this works out becomes clear when the society of human beings living in a specific and definable historical current of time and space is seen as a dynamic, living organism, a human body built large. Just as the life of the whole body is also the life of each organ of that body, so the life of the social and political organism is the life of any one of its functions. In the terms of this thesis, the media of communicationsare functions of the American socio-political body which cannot be properly understood or interpreted apart from its philosophical basis, natural law theory. In some sense, then, natural law is the living force of the total organism of this country. Consequently, the living force of the organ that is mass communication will be identical. The ethic is in the industry and this ethic is a natural law ethic. And an essential note of this natural law ethic is that there is an objective norm according to which ethical and legal decisions may be measured. This objective norm can be known in the judgment of human reason which is made on the basis of objective evidence given to the intellect by the senses as these operate in the observation of empirical data.

The second canon of the ASNE code directs itself to issues central to the concern of the present investigation.

> Freedom of the Press. Freedom of the press is to be guarded as a vital right of mankind. It is the unquestionable right to discuss whatever is not explicitly forbidden by law, including the wisdom of any restrictive statue.

To live effectively as a rational, individual, and social animal, man needs adequate information. He needs this information in order to adjust constantly to the dynamic of process in which he moves. Man is in a state of change, always tending towards what he will be in moments along the time-space continua. And these tendencies of man are not given in a vacuum, but in his relationships to other men, and to the world about him.

To illustrate man's situation as portrayed above, the figure of man in flight may be used once again. In his life situation as total man with all his intellectual, psychological, emotional, and physical needs, man is the pilot of an aircraft flying towards a destination. Such a pilot needs to know that destination. He needs to know his ship and its characteristics. He needs to know his flight pattern, his route, and whatever elements may be or become involved in the course of the passage, such as weather conditions (cloud cover, wind velocity, visibility), and the changing relative positions of other aircraft as he approaches them along his route. He needs to know all of this, if he is to accomplish his destination effectively. To a large extent he obtains this information from others with the assistance of mechanical and electronic instruments and devices of several sorts such as altimeters, airspeed indicators, artificial horizons, radar, and other communication systems. With all of this, the

pilot himself is the essential component of a successful flight, not only in this that he must effectively interpret the data given to him, but also, he must be prepared to meet new situations arising from such unpredictable factors as human error, his own and that of others, mechanical failure, and unforeseen changes in weather conditions.

The human situation of process involves all of the informational needs and complexities of the above figure plus one critical addition. No human has ever moved into the future to return with the kinds of information that a pilot possesses as he proceeds toward his destination.

Several questions may be considered within this framework of man's need for information. One which should at least be mentioned in passing is the important, perhaps vital, role that statistics play in helping to meet man's informational needs. While it is quite true, as has been mentioned above, that no human has ever moved into the future to return with the kinds of information that a pilot possesses, it is equally valid to view process as a continuum. In this event, from informational materials gathered from the past and from present knowledge and experience, probability projections may be made with sufficient potential for increasing precision development to insure against a general and dangerous condition of "blind flying."

Probability theory tends to render more satisfactory results in the theoretical sciences than in such practical sciences as communication ethics and law. Much in human affairs is subject to some degree of predictability. However in the view of this investigation that man is

neither totally determined nor totally random or free, the tasks of probability projection need not only depend on increasingly more sophisticated models but must also account for those factors in the human equation that may, in the nature of things and events, remain always and to some degree unpredictable. There would seem to be in these observations nothing more than an acknowledgment of the inherent limitations built into the mechanisms of probability theory. All, in fact, that is added here is a caution that probability not be construed as possessing any kind of necessity, either mathematical or logical.

In the order of practical human affairs, the foregoing may now be applied to the second canon as this canon relates to its implied purpose, the formulation of a healthy public opinion.

Assuming that no single man is able to attain the truth of his situation in the process of things, events, and relationships, but that living and working with other men together they will amass a considerable "amount" of truth, it would seem that what is rendered here is verifiable proof of the social dimension of man's nature. Total man cannot meet all of his needs, physical, psychological, emotional, and intellectual, alone. Yet, living as a man with other men he is able to meet all of his natural needs.

The information that a man needs to adjust to the always changing relationships of process he gathers partially as a result of his own experience, and largely as a result of the experience of others. This latter experience and resultant knowledge reaches the individual, for the most part, either directly or indirectly through the media of mass

communication. It is, in turn, on the basis of such information, individually and collectively gained, that man makes his adjustment to the world of affairs in which he lives.

How this works out in terms of the formation of a healthy public opinion may be seen with the help of a figure borrowed from the space age.

If a rocket on its launching pad is taken to represent a state, e.g., the United States, then the contours of the rocket and its internal mechanisms will be the external dimensions and internal parts and powers of the body politic. The form and purposes of the rocket are determined by the many who put it together and direct its course. As with the rocket, so with the body politic, many of its components have demonstrated performance capabilities in previously constructed and different devices. Neither rocket nor body politic is built entirely "from scratch."

In the example, the general structure or plan of the rocket stands for the constitution which establishes the body politic. The details of rocket construction stand for the body of positive laws enacted by the state according to its constitution. The fuel that puts life and power into the constitution and the body of positive laws of the nation is the public consensus. The public consensus, as was seen in the early pages of this thesis, is in the words of Adolph A. Berle, as quoted by John Courtney Murray, "a set of ideas, widely held by the community...it is essentially a body of doctrine which has attained wide, if not general acceptance... This body of doctrine contains principles, tenets, rules, standards, and criteria of judgment on individual cases or situations...It is not a

spontaneous fact in the minds of many individuals. It is the product of a body of thought and experience...Were it codified, it would be seen as a 'systematized recording of experience and attitudes."[12]

This composite of attitudes, beliefs, and value systems, a product of man's capacity for truth and susceptibility to error, then, is the power plant that makes the body politic move with its own special identity along the continua of time and space.

As the rocket moves off the pad and into space towards its objective, e.g., the moon, it constantly adjusts to the new situations that it meets in each stage of its progress. If it meets these circumstances effectively and as predicted, it will adequately perform its task and reach its objective.

In the case of the public consensus as it operates within the body politic, this consensus, the fuel which powers the nation, must possess the capability to expand and/or contract according to need, if it is to do its job effectively. The consensus has this capacity provided the constitutional and statute laws of the nation are flexible enough to withstand the pressures of changing times and circumstances, and durable enough to maintain the substantial national identity that is the external form of the public consensus.

The question that now arises is that which concerns the cause of the expansion and contraction of the public consensus. This cause, in the construction attempted here, is the reaction of the public consensus to an event which is of concern to the body politic.

To continue with the figure of the rocket as it moves upward through its various stages, the body politic as it moves upward toward its

objective, the common good of all its citizens, meets situations like Korea, Viet Nam, and the Dominican Republic.

Very few individuals received their information directly from the scene of the above mentioned crises. And those who were on the scene observed and reported from a frame of reference that reflected the public consensus. These observations and reports, in differing form and dimension, were then given to the government of the United States and to the people of the same nation.

At this point in the argument both the first and second sections of the fourth canon come into play.

> Sincerity, Truthfulness, Accuracy. Good faith with the reader is the foundation of all journalism worthy of its name.
> 1. By every consideration of good faith a newspaper is constrained to be truthful. It is not to be excused for lack of thoroughness or accuracy within its control or failure to obtain command of these essential qualities.
> 2. Headlines should be fully warranted by the contents of the articles which they surmount.

The better informed, i.e., the more accurately and more fully informed, the public and the government is about such events as Korea and Viet Nam the more and better the opportunity for the formation of a healthy public opinion.

As information becomes available to the general public, attitudes will form, generally in support of or against a course of action already initiated by the government. Here is seen the burdensome task explicitly undertaken by the Johnson Administration, the task of government by consensus. This posture of government has been attempted with varying degrees of success by Washington, Jefferson, Monroe, and F. D. Roosevelt.[13]

The differences that constitute public opinion, even under the assumption that all the people are equally exposed to all of the data available, stem from varying degrees of intelligence, intensities of interest, and modes of bias or prejudice.

Whatever, in any specific instance, may be the cause for differences of attitude, and differences in individual reaction to a public event, public opinion is formed when the public conscience, an equivalent of public consensus, confronts an issue which involves the public. If this opinion is healthy, i.e., if it conforms to the data of the event, and has ample room for discussion with consequent opportunity for correction, the resultant public affirmation may be articulated in the Congress and become a healthy component of the public consensus. When all of these conditions are satisfactorily met, there is good reason to expect that the nation will proceed through the event on a true course towards its objective, the common good of its people.

The Commission on Freedom of the Press laid down two main conditions necessary for the preservation of healthy public opinion. Chafee refers to these essential conditions as the two-way process and the self-righting process.

In his consideration of the first, Chafee has this to say:

> Communication is a two-way process of mutual response between the members of the community. The right to speak implies a readiness to listen and give consideration to what the other man says. A community is a universe of discourse in which the members participate by speaking and listening, writing and reading. In a free community the members establish and re-establish, examine and re-examine, in response to one another, their formulations of man's ultimate ends, the standards of their behavior, and their application to concrete issues.[14]

It was the mind of the Commission that in the very course of the self-righting process such differences could build up to the point of splitting the community, and thus bring an end to the universe of discourse. John Courtney Murray places the issue in sharper focus:

> The "open society" today faces the question, How open can it afford to be, and still remain a society; how many barbarians can it tolerate, and still remain civil; how many "idiots" (in the classical Greek sense) can it include, and still have a public life; how many idioms, alien to one another, can it admit, and still allow the possibility of public conversation?[15]

Here the halt is not made with the end of public conversation, rather the question may well be that of societal or national survival.

The Johnson Administration has expressed similar sentiments regarding the rash of academic sit-ins as reactions against the government's present policy in Viet Nam.

The companion of the two-way process, the self-righting process operates on the assumption that in the long run, truth will emerge from the clash of opinions, good and bad. The Commission, as a result of its study, concluded that this process was not working at all well.

> It was unquestionably demonstrated to us that the output of the press includes an appallingly large quantity of irresponsible utterances and even deliverate lying.[16]

The same author indicates three reasons why the process is not working, or at least was not working at the time of the Commission's investigations. 1) The drift toward concentration of power, exemplified by the large number of cities with only one newspaper, the common ownership of newspapers and radio stations, and the growth of newspaper

chains. Apparently the Commission felt that these factors militated against a fundamental presupposition of the self-righting process, i.e., diversity in the effective communication of facts and opinions. 2) The present prevalence of sales talk in American life, a substantially different phenomenon from discussion that tries to uncover the facts. "If the spirit of sales talk prevails over the spirit of discussion, talk can no longer be met with talk. Freedom loses its self-regulating power." (p. 25). 3) The public reads unfavorable news and opinions about people and policies with more appetite than the favorable. Hence an unfavorable item may be insufficiently counteracted because the opposing item (a) will not be printed or (b) will not be read.[17]

Before concluding this section which has attempted to relate the canons of the ASNE to man's natural need for information, to the formulation of public opinion and the relationship of the last to public consensus, the meaning of consensus should be indicated as this may be discovered in the natural law theory proposed in this thesis.

Murray notes that St. Thomas constructed with firmness and delicacy a system of moral thought that renders "a remarkable account of the origins and structure of the public consensus..."[18]

In his account which he sets out under five headings, Murray notes the consensus in its principles and rules as "remote principles of natural law."

> They are "removed" from the primary common precepts and from the immediately derivative precepts as particular conclusions are "removed" from the generality of the premises that engender them. These remote precepts bear on situations that might best be called "historical"; that is,

> they are human situations indeed, but their creation requires a process of historical development, as original human situations do not. For instance, the situation that relates corporation stockholders to corporation management is more remote from the springs of nature than the situation that relates husband and wife. The former "got here" in time; the latter always substantially "is."[19]

In consequence of the preceding it will be seen that the principles and standards of the consensus are by no means self-evident. These presuppose a rather thoroughgoing study of the circumstances in their historical context. For this reason, among others, the elaboration of the consensus is the task of the wise and the honest, a result of careful inquiry and subtle reflection. Consequently, the consensus will be consciously formulated by the wise. The same phenomenon exists in the form of simple affirmation or diffused opinion among the people at large.

As Peterson remarks in his essay, "The Social Responsibility Theory of the Press,"[20]

> The codes of the movie industry in 1930, of the radio industry in 1937 and of the television industry in 1952 reflected the changed intellectual climate...the codes reflect a far different picture of man than the newspaper code. All three codes regard man as essentially immature and as highly susceptive to the corruption of his morals.[21]

In view of the availability of the excellent study of the four theories of the press, noted above, it is not necessary here to comment at any length on this highly relevant area of the present discussion. For the purposes of this thesis, it is sufficient to repeat that social responsibility theory is much more skeptical about the emergence of truth from the clash of opinions than was its forebear, libertarian theory. Hocking expresses his somewhat pessimistic attitude that few citizens

genuinely search for ideas which attack those they already hold.[22] Man, then, is currently admitted to be possessed of reason and capable of using it, but quite reluctant to do so. Furthermore, under social responsibility theory, the media are thought to have a responsibility to protect man from temptation beyond his ability to resist.

In all three of the codes, television, radio, and motion picture, considerable attention is paid to the area of sex morality. For example, the television code under the heading of Acceptability of Program Material, lists the following subsections: d) Respect is maintained for the sanctity of marriage and the value of the home. Divorce is not treated casually nor justified as a solution for marital problems. e) Illicit sex relations are not treated as commendable. The radio code is more general in its directives in this area because of the nature of the medium. In its creed it encourages the intelligent and sympathetic honoring of the sanctity of marriage and the home. And, under the heading of News, it states that "Good taste should prevail in the selection and handling of news. Morbid, sensational or alarming details not essential to factual reporting should be avoided. The motion picture code likewise upholds the sanctity of the institution of marriage and the home. It further states that pictures shall not infer that low forms of sex relationships are the accepted or common thing, and that adultery and illicit sex, sometimes necessary plot material, must not be explicitly treated or justified, or presented attractively. There is more of the same, but this sampling will suffice for the following discussion of fact and value in a natural law context of communication ethics.

For whatever reason these codes may have come into existence, whether as safeguards against government controls, for economic reasons, out of fear of pressure groups, or any combination of these and other similar reasons, the codes presume to reflect a reasonably accurate picture of what pluralistic America regards as its composite value system. In one important sense, because man himself and the world in which he lives are in a state of process, physically, psychologically, and morally, it would be more accurate to say that the codes of ethics of the communication industries and the laws that touch these areas of the human enterprise reflected the composite value system, insofar as this could be articulated, at the time or perhaps sometime before the codes and laws were devised.

It is precisely this concept of process that is so essential to this attempt to develop an ethic of the media of mass communications proper to American political philosophy rooted as this is in natural law theory.

Footnotes

[1]Gerhart Niemeyer, "A Reappraisal of the Doctrine of Free Speech," Thought, XXV, 97 (June, 1950), pp. 251-274.

[2]Alfred McClung Lee, The Daily Newspaper in America (New York: The Macmillan Company, 1937), p. 36...citation taken from the Federalist Papers.

[3]Edwin Emery, The Press and America, 2nd ed., Prentice-Hall, Inc. 3rd printing, June, 1964 (1954), p. 130.

[4]Huddon, p. 172.

[5]Gitlow v. New York, 268 U.S. 652 (1925); Near v. Minnesota, 283 U.S. 697 (1931); Grosjean v. American Press Co. 297 U.S. 233 (1936); Hague v. C.I.O. 307 U.S. 496 (1939).

[6]S. T. I-II, q. 97, art 4.

[7]S. T. I-II, q. 97, a. 4.

[8]The Writings of Thomas Jefferson, Memorial Edition (1904), v. 16, pp. 118, 119) as cited by Huddon, Freedom of Speech and Press in the United States, p. x.

[9]Interpretive Reporting (4th ed.), Curtis D. MacDougall, pp. 27, 28.

[10]Ibid., p. 27.

[11]Metaphysics, Bk a (II), 993^{b}, McKeon, p. 712.

[12]John Courtney Murray, "Natural Law and Public Consensus," Natural Law and Modern Society, p. 53.

[13]The New York Times Magazine, March 7, 1965, p. 26 ff.

[14]Government and Mass Communications, Chafee, Vol. I, p. 21.

[15]Natural Law and Modern Society, p. 75.

[16]Chafee, p. 24.

[17]Chafee, pp. 24, 25.

[18]Murray, op. cit., p. 75 ff.

[19]Murray, p. 76.

[20]Four Theories of the Press, Siebert, Petersen, Schramm, p. 86.

[21]Petersen, p. 86.

[22]Ibid., p. 102.

CHAPTER VI

CONCLUSION

There are facts which are susceptible to investigation that can lead to a discovery of the ethic that lies buried, as it were, within the communications industry in this country, and within the phenomenon of information that is its product. Among these facts is the presence and influence of natural law theory which underlies American political philosophy. This can be determined, as has been attempted in this study, through an historical investigation of the several currents of natural law thinking that came to the surface as the American nation emerged as a distinct political entity. As has been shown in the preceding pages, this unique political union was possible because, as Jefferson remarked, it was possessed of an authority that rested on the harmonizing sentiments of the day. These harmonizing sentiments in turn were, and presumably still are, substantially, clusters of attitudes, beliefs, and standards that constitute a particular view of the nature of man, the nature of the state, the nature of the relationship between man and the state, and certain generalized assumptions and attitudes about truth and knowledge.

The same underlying political philosophy can be traced, as it evolves in space and time through a study of what the people accept as values. These values in the communications industry are to be found in the codes and laws of the industry. In a very real sense, such codes and laws are historical specifications of the more generalized clusters

of attitudes, beliefs, and values that make up the public conscience.

One level or dimension of fact that can lead to a discovery of the communication ethic that has not been treated in this study, but which would constitute a fruitful field of investigation, is a study of the kinds of ethical decisions communication people are actually making. Unless these people are idiots, in the classical Greek sense, their ethical decisions will be found to be sympathetic, in the long run, with the conscience of the body politic.

Insofar as these ethical decisions are hardened, i.e., slavish reflections of an historically past public conscience, they are likely to be irrelevant to historically present ethical problems. Insofar as these decisions completely ignore the tradition and the public conscience, they are likely to be sloughed off as an attempted graft of skin that the body refuses to accept. These ethical decisions will be both relevant and accepted by the body politic when they truly reflect the evolution of the public conscience that process has effected.

A dimension of fact that has been treated here is that which is at the philosophical bottom of the concept of process, i.e., an attack on the very nature of fact itself through an analysis of the basic ontological categories of essence, existence, and tendency.

With Wild this thesis accepts the data of experience as revealing the reality of motion, change, and process. Essential to this structure of thought is the acceptance of facts as incomplete. All that is, the nature of everything whether it be physical, psychological, or spiritual, is tendential. This is another way of saying with Wild that no facts are ever finished. They are always incomplete and tendential. And that

toward which facts tend are values in the sense that values are the fulfillment of existential tendency. Hence it is, as Wild puts it, that "the sense of futurity and tension attaches to the concept of ought."[1]

Thus it may be seen that this thesis, at the level of first philosophy, apart from which it seems meaningless to discuss natural law, denies that facts are capsulated, complete, and totally distinct from values. On the contrary, this thesis affirms that value can be discovered through a study of fact, if this fact is seen to be in process or tending toward a fulfillment of that which is due to the nature of the fact. And that toward which an entity or incomplete fact tends essentially, which will realize its nature, is precisely what is good for it.

As applied to communication ethics, this means that a decision is either good or bad, ethical or unethical insofar as the decision takes into account what is good for the man making the decision, and what is good for the men affected by the decision. What is good and what is not good in particular circumstances is seldom easy to discover. It requires a knowledge of total man, and this man in his tradition, as well as in the present historical moment.

No one man can hope to accomplish this. He will do it, if he does it at all, in union with other men. He should have some training in ethics and the sciences related to it, such as epistemology, metaphysics, psychology, law, and the social sciences, including political science, sociology, and anthropology. The man who would hope to be proficient in ethical areas of communication should also have more than a passing

acquaintance with the history and content of religious thought. In short, no area of study that can reveal data of the human experience should be arbitrarily ignored by those who would become skilled in the science of communication ethics.

Should all of this seem far beyond the grasp of the people now forced to attempt daily decisions, some encouragement can be given in this sense that their decisions cannot and are not made in a vacuum. These men are products of a tradition, living and making decisions in a specific historical moment, guided by codes, laws, and customs that can generally be relied upon to establish adequate guidelines for present and future attempts at ethical decisions.

What is recommended and treated in this thesis is directed primarily to University faculties, and to those who have both the time and the talent to dig beneath the surface of human events for causes and meanings of the issues involved in the complex mechanisms of the roles of the mass media in modern society.

These kinds of investigations can lead to a development of the ethic that is in the industry, an ethic that is rooted in the natural law foundations of the nation, an ethic that can be continually explicated, and so lead the way to a more satisfactory solution of present and future ethical and legal problems in mass communication.

Footnotes

[1]Wild, p. 230.

BIBLIOGRAPHY

Adler, Mortimer J. "A Question About Law," Essays in Thomism. Ed. Robert E. Brennan, O.P. New York: Sheed and Ward, 1942.

Aquinas, Thomas. Summa Theologica. Trans. Fathers of the English Dominican Province, Vol. I. New York: Benziger Brothers, Inc., 1947.

Aquinatis, Thomae. Summa Theologiae. Editio Leonina. Marietti, Taurini: Romae, 1948.

_____, Politicorum seu, de Rebus Civilibus. Opera Omnia. Tomus XXI. New York: Mursurgia Publishers, 1949.

_____, De Regimine Principum. Romae: Marietti, 1924.

Aristotle. The Basic Works of Aristotle. Ed. Richard McKeon. New York: Random House, 1941.

Becker, Carl L. Freedom and Responsibility in the American Way of Life. New York: Vintage Books (Division of Random House), 1945.

_____. The Declaration of Independence. New York: Alfred A. Knopf, 1964.

Chafee, Zechariah Jr. Government and Mass Communications. Vol. I. Chicago: University of Chicago Press, 1948.

_____. Free Speech in the United States. Cambridge: Harvard University Press, 1964.

Cogley, John. Ed. Natural Law and Modern Society. Cleveland: The World Publishing Company, 1962.

Corwin, Edward S. Liberty against Government. Baton Rough: Louisiana State University Press, 1948.

Davitt, Thomas E. The Elements of Law: Boston: Little, Brown and Co., 1959.

d'Entreves, A.P. Natural Law. London: Hutchinson University Library, 1951.

Denziger, Henricus. (Schonmetzer, Adolfus, Editio XXXII) Neo-Eboraci: Herder, MCMLXIII.

Donoso, Anton. "Jurisprudence Today: Naturalism versus Positivism," University of Detroit Law Journal, 1963.

Emerson, Thomas I., and David Haber. Political and Civil Rights In The United States. Buffalo: Denis & Co., 1952.

Emery, Edwin. The Press and America, 2nd ed. Englewood Cliffs, N.J.: Prentice-Hall, Inc. 3rd printing, 1964.

Ernst, Morris L. The First Freedom. New York: Macmillan Co., 1946.

Friedrich, Carl J. Constitutional Government and Democracy. Boston: Little, Brown and Co., 1941.

Gabel, Emile. America, Aug. 10, 1963.

Gierke, Otto. Natural Law and the Theory of Society. Boston: Beacon Press, 1957.

Grotii, Hugonis. De Jure Belli Ac Pacis. Tomus Primus. Lausannae: Marci-Michaelis Bousquet, MDCCLI.

Haines, Charles G. The Revival of Natural Law Concepts. Cambridge: Harvard University Press, 1930.

Hastings, James ed. Encyclopaedia of Religion and Ethics. New York: C. Scribner's Sons, Vol ix, 1955.

Hocking, William E. Freedom of the Press, a Framework of Principle. Chicago: The University of Chicago Press, 1947.

Hook, Sidney. ed. Law and Philosophy. New York: New York University Press, 1964.

Hudon, Edward G. Freedom of Speech and Press in America. Washington, D.C.: Public Affairs Press, 1963.

Hutchins, Robert M. A Free and Responsible Press. Chicago: The University of Chicago Press, 1947.

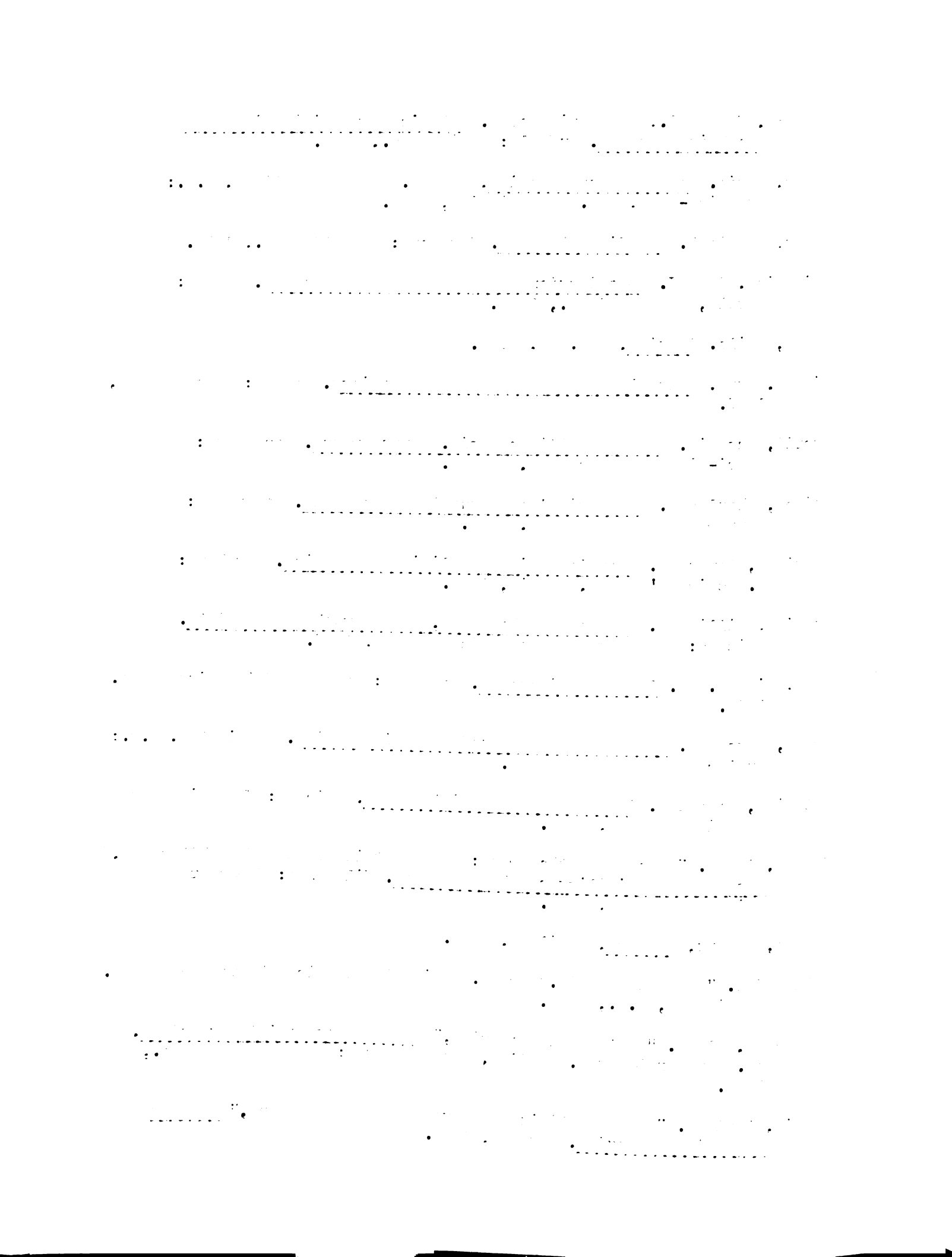
Jensen, Jay W. "Freedom of the Press: A Concept in Search of a Philosophy," Social Responsibility of the Newspress. Milwaukee: Marquette University Press, 1962.

Johann, Robert, America, April 10, 1965.

John XXIII. "Pacem In Terris." Trans. National Catholic Welfare Conference. Washington, D.C., 1963.

Kluckholm, Clyde. "Culture and Behavior," Handbook of Social Psychology, ed. Gardner Lindzey. Reading, Massachusetts; Addison Wesley Co., 1954.

Koenig, Louis W. "The Hard Limits of Government by Consensus," The New York Times Magazine, March 7, 1965.



LeBuffe, Francis P., S.J. and Hayes, James V. The American Philosophy of Law. New York: Jesuit Educational Association, 1953.

LeBoutillier, Cornelia G. American Democracy and Natural Law. New York: Columbia University Press, 1950.

Leclercq, Jacques. "Natural Law the Unknown," Natural Law Forum, Vol. 7, 1962.

Lee, Alfred M. The Daily Newspaper in America. New York: Macmillan Co., 1937.

Lippmann, Walter. The Public Philosophy. New York: Mentor Books, 1956.

_____. Public Opinion. New York: Macmillan Paperbacks, 1960.

Locke, John. Two Treatises of Government, A Critical Edition by Peter Laslett. Cambridge: The University Press, 1963.

_____. An Essay Concerning Human Understanding, A Critical Edition by Alexander C. Fraser. Oxford: The Clarendon Press, 1894.

McLaughlin, Andrew C. A Constitutional History of the United States. New York: D. Appleton-Century Co., 1936.

MacDougall, Curtis D. Interpretative Reporting. New York: The Macmillan Company, 1963.

Maritain, Jacques. Man and the State. Chicago: The University of Chicago Press, 1951.

_____. Rights of Man and the Natural Law. Trans. Doris C. Anson. New York: Scribner's, 1943.

_____. Freedom in the Modern World. Trans. Richard O'Sullivan. New York: Scribner's, 1941.

Mauer, Robert A. Cases on Constitutional Law. Rochester: The Lawyers Co-operative Publishing Co., 1941.

Milton, John. Areopagitica. ed. John W. Hales, London: Oxford University Press, 1954.

Murray, John C., S.J. "Freedom of Religion: I The Ethical Problem," Theological Studies, VI, 2, June, 1945.

Niemeyer, Gerhard. "A Reappraisal of the Doctrine of Free Speech," Thought, XXV, 1950.

Ott, Ludwig. Fundamentals of Catholic Dogma (Ed. in English by James Canon Bastible, Trans. Patrick Lynch), St. Louis: B. Herder Book Co., MCMLVII.

Pufendorf, Samuel. De Jure Naturae Et Gentium. Trans. The Classics of International Law. Ed. James Brown Scott. Oxford: The Clarendon Press, 1934.

Rader, Melvin. Ethics and the Human Community. New York: Holt, Rinehart and Winston, 1964.

Rahner, Karl. Nature and Grace. Trans. Dinah Wharton, New York: Sheed and Ward, 1963.

Rommen, Heinrich A. The Natural Law, A Study in Legal and Social History and Philosophy. St. Louis: B. Herder Book Co., 1947, Trans. Thomas R. Hanley, O.S.B.

_____. The State in Catholic Thought. St. Louis: B. Herder Book Co., 1945.

Scandon, Alfred L., and Barrett, Edward F., ed. University of Notre Dame Natural Law Institute Proceedings. Notre Dame: College of Law, Vols. I-V, 1947-1951.

Schramm, Wilbur. Responsibility in Mass Communication. New York: Harper & Brothers, 1957.

Siebert, Fred S., Peterson, Theodore, and Schramm, Wilbur. Four Theories of the Press. Urbana: University of Illinois Press, 1956.

Stanlis, Peter J. Edmund Burke and the Natural Law. Ann Arbor: The University of Michigan Press, 1958.

Strauss, Leo. The Political Philosophy of Hobbes. Trans. Elsa M. Sinclair. Chicago: The University of Chicago Press, 1952.

Suarez, Francisci. De Legibus. Opera Omnia. Tomus V. Parisiis: Vives, 1846.

_____. Selections From Three Works. Trans. Classics of International Law, Vol II. Oxford: The Clarendon Press, 1944.

White, Leslie A. The Evolution of Culture. New York: McGraw-Hill Book Company, Inc., 1959.

Wiener, Norbert. The Human Use of Human Beings. Garden City, New York: Doubleday Anchor Books, 1950, (Second Edition Revised).

Wild, John. Plato's Modern Enemies and the Theory of Natural Law. Chicago: The University of Chicago Press, 1953.

Wright, Benjamin F., Jr. American Interpretations of Natural Law. New York: Russell & Russell, Inc., 1962.