"The relation between law and morals is the crux of all natural law theory... The fundamental assumption of natural law is the close association between law and morals".

A.P. D'ENTRÈVES, *Natural Law*

I. INTRODUCTION AND PURPOSE

1. A familiar deductive paradigm has become the standard expression of thinkers who logically or conceptually relate their moral philosophy to law. These legal, or juristic, naturalists

1. I use "naturalist" to refer to natural law thinkers. I do not refer to the school of American naturalists like John DEWEY and Ralph Barton PERRY
believe this standard model justifies that legal systems logically require a moral postulate.

We can state this familiar, standard model, or naturalist paradigm, in oversimplified, abbreviated form, as a syllogism.

1. If something is to be considered lawful (legitimate, valid, etc.) then it cannot be immoral.
2. Judgment P (opinion, rule, enactment, decision, goal, etc.) is immoral.
3. Therefore P is not law (or not legitimate or valid law).

(As with all moral rules and judgments, the model assumes that moral terms and their cognates (good, etc.) presuppose "can" since moral necessity may be dependent upon moral possibility. And use of the word "law", meaning positive law, conceptually implies compliance.)

The naturalist Jean Dabin in an article, "General Theory of Law", put it this way:

Natural law... dominates positive law in the sense that, while positive law may add to natural law or even restrict it, it is prohibited from contradicting it.

This central justificatory thesis of the juristic naturalist, who tends to subscribe to the tradition of natural law, denies that anything can be valid law (or can be law at all) if it is immoral in certain serious and fundamental ways. "An unjust law is not a law", said Antigone in Sophocles' play by that name. And according to tradition, the philosopher Augustine said the same. If not being immoral is logically necessary to something's being enforceable law, then the discovery that a legal judgment is immoral is sufficient to entail its unlawfulness or illegitimacy. The right to disobey the judgment, although not always the duty to do so, follows, on this view, by the logic of the meaning of "law".

who intended by "naturalism" reference to persons' wants and interests which they construed as the empirical ground of moral value.
(The deductive syllogism does not deny that legal systems require other defining criteria as well. A law, for example, must be shown to be relevant and necessary, that is, that its ends are not attainable without enforcement. It must be prospective, general, understandable, etc.)

That legal systems cannot breach certain fundamental moral ideas while retaining their legitimacy is denied by the natural law school's main juristic opponent, legal positivism. And so the controversy continues today over the adequacy of the naturalist's model, historically enunciated more than 2000 years ago in Confucius and Greek ethical, legal and political thought, and by its Roman Stoic successors. Confucius' and Plato's solution to the morals-in-law requirement was to insist that virtue must inhere in the ruler.

Justice, security, a harmonious social order, and freedom from the oppression of a tyrant and from foreign hegemony have, by and large, been central moral principles which the juristic natural law philosophy has sought to protect from the positive will of those in power. In the late Middle Ages, the famous *Vindiciae contra tyrannos* systematized the natural law argument that there existed a legal right to resist a tyrant. Generally it is persecution of persons or perversion of government of one sort or another with which legitimacy of rule is declared inconsistent. Corruption and deception, degradation of persons, torture, massacre, and other atrocities—the kinds of horrors which Amnesty International reports—are exactly intended by naturalists' claim that if gross immoralities are sanctioned by law they are illicit. Indeed they are not law at all.

It has seemed to legal naturalists that the most effective way to secure one's personal ends and social associations against those in


3. Attributed both to Philippe du Plessis-Mornay and to Hubert Languet, about 1579. But authorship is debatable.
power who find it convenient to conceal their self-aggrandizement under law's name, is to bind the law with the logic of certain fundamental moral principles that prohibit these enormities—and to declare invalid or "not law" that law or that regime dishonoring or repudiating these moral relations. A logical bind cannot be got rid of; for one can argue from inexorable reason (defined to include imaginative empathy with that which one does not know firsthand) that the opposition is nonsense and hence has no reasonable standing for consideration. By consensus, moral reasons always take precedence over reasons of other kinds. To insist that an immoral directive is law because, say, elected officials follow an agreed-to procedure in promulgating or enforcing it and that the directive has therefore to be complied with because it is law, violates this well understood priority of moral justification4.

2. Difficulties, however, lodge in the naturalist's justificatory paradigm. The syllogism, tightly deductive, begs the question. Social morality is not a mathematical system sealed from growth and adaptation. Logic and math are not, like law and society, organic. And so the standard syllogism may appear flippant and dogmatic. Or it may suggest that philosophy of law produces tight, tidy formulas, definitions, postulates, and theorems needing only to be studied like geometry to know exactly what to think—leaving no room for reflection.

In any case, the conceptual necessity which naturalists hold obtains between law and morals resides in the guiding, or general, premise, which is taken to be analytic, and it is this guiding premise which positivists deny. One debate, then, focuses on the

4. Well understood but not uncontested. The American relativist Gilbert Harman has made a case against foundationalism by arguing that there is no hierarchy of basic principles, some resting on others for justification. "Whether... a belief is justified depends on how well it fits together with everything else one believes. If one's beliefs are coherent they are mutually supporting". "Positive VS Negative Undermining in Belief Revision", NOUS, Vol. 18 (1984).
capacity to vindicate the truth of the guiding premise, "If something is to be considered lawful, then it cannot be immoral" – or something very much like it. We shall enquire into the naturalist's guiding premise in section VI.

My purpose in this paper is to offer a natural law paradigm for consideration that is an alternative to the deductive justification stated above, and to try to show its advantages. The alternative paradigm I set forth exemplifies, I think, certain features of the debate that make it easier for the legal naturalist to join issue with views that oppose it and to appear less obstinate. The alternative model is less theoretical, more practical. It is not deductive but "confirmatory-inductive". It is oriented to imply action and conformity on the part of citizen and official whose burden of proof is made easier: showing that a given law is not immoral rather than that it is. The major advantage, then, of the confirmatory model is psychological. Its conclusion demands rational dialogue, not deduction; and the second, or "informational" premise presumes not that law is immoral but that, unless shown otherwise, it is not immoral.

First, some preliminaries. Before introducing the confirmatory model, it is useful to examine a context and some background concepts relating to the debate.

II. THE NATURALISTIC FALLACY

1. Within the history of moral philosophy has arisen an idea called the naturalistic fallacy. The naturalistic fallacy, it is claimed, results from drawing conclusions about matters that are not factual or descriptive but valuative (concerned with what is good or right, obligatory, merited, approvable, worthy, etc.) from premises or

5. In modern times, attributed to David Hume but repeated by G.E. Moore in his refusal to allow an empirical foundation for ethics. Immanuel Kant's moral philosophy resting on the same refusal certainly reinforces the fallacy.
assumptions that are factual. Such an inference is invalid. To draw a conclusion unprepared for by the premises violates validity in logic. Values do not conceptually "follow from" facts. Facts do not entail values. The two kinds of statements are in different grammatical and logical modes. Popularly put, no *ought* can be derived from *is*.

The naturalistic fallacy has found its way from moral into legal reasoning through naturalists' arguments that morality is a logically necessary part of law. And so the analysis or the fallacy and its accusation define part of the debate between the natural and positive legal schools of thought. Sometimes it is denied that the is/ought inference really constitutes a fallacy. Sometimes its fallacious character is acknowledged but is thought avoidable. Sometimes the terms "is" and "ought" are re-analyzed.

It is, however, often necessary and important to make a sharp division between sentences that describe things (state facts) and sentences that evaluate and prescribe things (state what is right or ought to be); and so in many contexts it is not only fallacious to confuse the two kinds of claims but it is essential to distinguish them. Using the distinction enables us to criticize useless or intolerable customs and norms, to enjoin wrong conduct and to denounce existing law\(^6\). This is exactly what we often think we ought to do. Customs and norms, wrong conduct and wrong law can be described—they are social facts. To criticize or replace these facts, we may appropriately prescribe higher-order principles and values with which to justify another course. And so we want to distinguish what exists (the customs or laws or conduct we think wrong) from what ought to exist (their replacement with right values and rules). Let us remember, though, when we acknowledge the usefulness of the naturalistic fallacy, that it is

\(^6\) When the is/ought gap is useful and when it is not is discussed in Virginia BLACK, "Is and Ought: A Gap or a Continuity?", *Vera Lex*, Vol. IX, No. 1, 1989.
these higher-order values of the naturalist that bring enlightened criticism to bear on custom, wrong conduct and law.

If recognizing the fallacy, then, is a useful tool for moral analysis and criticism, why does the juristic natural law theorist sometimes deny the positivist charge that moral naturalism falls prey to it?

2. The typical form of practical legal reasoning is, again, the syllogism. Its first or guiding premise is normally a value (goal, purpose, duty, principle of right, etc.); its secondary, or particular, premise is relevantly informational or factual. Its conclusion is a decisive, nonconditional, legal or policy recommendation to do something that is thought desirable (enact a decree, carry out an authoritative directive, legislate regarding a bill, render a curial decision, obey a law, etc.). All such policy resolutions necessarily appear in the modal language of "we ought" (or "it is imperative or advisable that we..." or "You must..." or "let us therefore", etc.), asserting or denying not what exists or its observable attributes (facts) but what is possible or necessary to do or avoid.

The naturalistic fallacy is alleged to be committed if one overlooks that the guiding premise, in order to imply a policy directive, must itself be modal, that is, must be valuational in some sense and not the assertion of a fact. As an example in violation of this stricture, if one deduces directly from the fact that a particular society has 2000 homeless persons, to the valuative conclusion that "We ought to pass a housing bill", then the naturalistic fallacy is committed, unless, of course, the valuative assumption, "Society ought to provide shelter for its homeless persons", is understood as part of the reasoning. This is because, as we saw, no valuative judgment or recommendatory-type conclusion is validly inferrible from a straightforward factual premise. (From "I had beans for supper last night", it does not follow that I should cook them again —or that I should not.) Descriptive statements are one thing. Modal (normative, deontic, recommendatory, etc.)
resolutions are another. The two distinct grammatical forms do not logically link without a valutational or modal claim already in place in the guiding premise from which to deduce a valid conclusion.

Legal positivists claim that naturalists commit the fallacy when they deduce morality "from nature"—hence the "naturalistic fallacy", laid at the doorstep primarily of anyone who endorses natural law ethics based on some concept of, generally, human nature. Socrates, for example, initiated inquiry into morals by invoking human nature and community. And 400 years or so later, the Roman lawyer and philosopher Marcus Tullius Cicero, influenced by the Stoic aspects of the Socratic philosophy, construed "the laws of nature" as laws which reason imposes when it discovers in nature the foundations of right and wrong. Many other ethical theorists followed in this path and continue today to relate morality to human nature.

Having committed the fallacy once, then, by deriving what is good or right "from nature", naturalists, it is contended, commit it a second time. They commit it again when they deduce from natural morality what ought to be positive law, namely, when they hold that certain substantive "natural laws", or moral principles, ought to inhere in positive laws, as, for example, is implied in the guiding premise of the standard, naturalist syllogism. They draw this conclusion, it is reputed, from the fact of law's existence, namely, from a law that, in fact, is taken as authoritative (is declared, enacted, obeyed, administered, enforced, etc.). The fallacy in the naturalist's legal philosophy exactly names this error, positivists contend, of deriving ought (what ought to be law or what is morally right or valid law, etc.) from is (from duly enacted law, obeyed or recognized law, etc.). D'Entrèves, in Natural Law, puts the positivist's objection—
To the positivist there is an unbridgeable chasm between the is and the ought, between fact and value... The question is, after all, how can normative propositions be derived from purely factual statements7.

That intricately developed social relationships comprising the norms of law can be created by a sovereign will or that the complex, patterned modalities of law mirroring our associative life can result from the simple fact of an accepted sovereign declaration—is implied in the position of one of the foremost, modern legal positivists John Austin, 19th century English Utilitarian.

Naturalists think, therefore, that Austin himself unknowingly commits the naturalistic fallacy by inferring law from will. He does not see that law is a system of norms or that will is a fact; on the contrary, he thinks that law is the fact and that morality is the norm. Attempting to sever law from morals, Austin writes—.

The existence of law is one thing; its (moral) merit or demerit another. Whether it be or be not is one enquiry; whether it be or be not conformable to an assumed standard is a different enquiry8.

Naturalists might retort: Legitimate law from the positive will— from power! Then what can "legitimacy" in law mean? Naturalists would argue that from no one's will (be it the state, a democratic polity, public recognition, Caesar or God) can a social norm or a social good ever directly derive. Even personal values are not derivatives of our will. Our will takes its communication from our reason. The naturalistic fallacy is not a special mistake of the naturalist. Positivists, on their own terms, commit it too.

The naturalistic fallacy, therefore, and one of the continuing debates in philosophy of law regarding whether there is a conceptual connection between law and morals, are related. If one

8. The Province of Jurisprudence Determined, 1832.
believes that law is fact\(^9\) ("Legal systems and their laws exist" is like "Elephants exist") whereas in contrast moral judgments and principles are modal, it does seem to be invalid to argue directly from: *It is a fact that proposition P is law (or that legal system X exists in society S)*, to: *Proposition P (or legal system X in S) cannot be immoral*. If, "If P is lawful, then it cannot be immoral", or something very much like it, is a central thesis of jurisprudential natural law, then natural law jurisprudents must repudiate that the above is in all regards, or in all like formulations, a fallacy.

Contemporary legal naturalists Deryck Beyleveld and Roger Brownsword do deny that legal naturalism commits the naturalistic fallacy\(^{10}\). Their explicit formulation of the position which they defend holds that wherever there is positive law–

1. its rules must not be immoral;
2. its administrative processes must not be immoral;
3. its source of promulgation must be morally legitimate.

This three-part thesis boldly moves from law back to morals. It is clear, though, that Beyleveld and Brownsword cannot endorse the view that law's existence is an empirical fact. The co-authors continue–

...the concept of law is the concept of morally legitimate power... there is a necessary conceptual connection between law and morality... Where there is no moral right to enforce an edict, it is not law\(^{11}\).

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9. Not only the view of the positivist John Austin. That law is some kind of fact characterizes American legal realists like Oliver Wendell Holmes and Jerome Frank and also the Scandinavian realists like Alf Ross and Karl Olivecrona. All these "realists" are also positivists in that they deny that basic moral imperatives for social relations are a *conditio sine qua non* of legal systems.


In some sense, law cannot be a fact –not a straightforward, sensory or empirical fact like "I live in Paris". More reasonably, law and legal systems are social or institutional facts\(^\text{12}\) resting on intricate networks of interpersonal relationships –influences, roles, customary norms, responsibilities, contracts and the like. If so, law is clearly a modal enterprise since interpersonal relationships are ultimately described through our purposes, values and decisions\(^\text{13}\).

III. REASON AND NATURE

1. Since the naturalistic fallacy results from some view about nature or reality (some description or fact) serving as a premise for a modal conclusion, it is useful to examine as background the concepts of "reason" and "nature" that serve naturalists as foundations for ethics and so also for law. For even if there is no such thing as a legal fact in the sense that Austin intended –for "fact" is a theory-laden idea– it is often with respect to the use of "reason" and "nature" that the controversy over the legitimacy of

12. The term "institutional fact" as pertaining to law is similar to Morris R. Cohen's "social fact". Development of this promising notion is contained in Neil MACCORMICK and Ota WEINBERGER, \textit{An Institutional Theory of Law}, Kluwer Academic Publishers, MA, 1985. Institutional facts are normative, but the authors deny any conceptual connection between law and objective goodness.

13. A clarifying typology of legal positivism is provided by D'ENTRÊVES, \textit{op. cit.} He distinguishes imperativism (Austin, Hobbes, Ockham), realism, and normativism (Hart, Kelsen). From an entirely different perspective, Walter OTT in \textit{Der Rechtspositivismus Kritische Würdigung auf der Grundlage eines juristischen Pragmatismus} (Duncker & Humblot, Berlin 1976) distinguishes "narrow" legal positivism (which includes Kelsen in the same group as Austin's analytic positivism), from psychological positivism (Jellinek, Bierling and Ross) and both of these distinguished from sociological positivism (Max Weber and Theodor Geiger).
law arises. We may agree that law is a modal concept, a norm. But what about human nature?

The reality or "nature" from which legal naturalists take their premises and attempt from them to deduce what specific moral imperatives the legal system must contain, varies from critic to critic. Within the naturalist school, "nature" has usually meant "human nature" and from the many elements that comprise human nature, we select our capacity for reasoning. By reasoning is meant something like reflecting on our experience of the human situation and its chronic problems, assessing the fittingness of our actions and the likelihood of their consequences; thinking clearly and dialoguing critically on these matters with reasonable fellowmen. Sometimes reasoning has included indemonstrable intuition of certain intrinsic goods which furnish the human person with the goals he should pursue in order to aspire to the best of which he is capable, and which, qua human, he is in any case naturally inclined to follow.

Such a general schema is alleged to lead to what is "right by nature" (what is fitting, proper, due, etc.); and "what is right by nature is rationally measured by our perception and judgment of what things are"14. The schema yields both a teleological philosophy of good ends (namely, the ends proper to our humanness) and a deontic ethic of what is obligatory (namely, fitting, rightful, harmonious relations with our fellows). The written law is informed by these relations, for a belief about what are appropriate and right interpersonal relations has profound implications for what we think legal systems must be. We think legal systems ought to require or facilitate—certainly at least to allow and not to obstruct—whatever orderly relationships and expectations are natural to persons in their social settings, and ensure that their administration is just.

Besides our nature as a rational being\textsuperscript{15}, naturalists have taken as their starting points other realities or natural conditions. The Stoic naturalists believed nature's own visible orders parallel what morality and law should be; the latter are as regular in their consequences as nature's causes are regular in their effects. There is wisdom here, for morality and nature go in the same direction. Each, to evolve and sustain its existence, maintains flexibility and openness to change in reaching its potential, "perfecting itself" within its environment.

Aristotle and, much later, Hugo Grotius and Edmund Burke—and Lon Fuller in our own times—begin with a definition of natural man as a social animal. Since law assists us in regulating our social orders by preventing their disruption, it is not difficult to draw from social nature indispensable conclusions about what the administered law cannot be and cannot interfere with\textsuperscript{16}. Human social nature is an idea so unquestionable that to contemplate its construction by legal convention or its arrangements decided upon and designed by politicians is frightening. Natural society, free and open community, and the derived right to associate with one another are defined by our affiliative inclination and tendency toward cooperation and contractual reciprocities. These practices and consuetudes are so universal, voluntary and necessary that it

\textsuperscript{15} Complexity and variation in the rational basis of modern natural law thinkers, such as Del Vecchio, Dabin, Maritain, and Grisez, is discussed at length and with sensitivity in an excellent chapter, "The Revival of Natural Law and Value-Oriented Jurisprudence" by Edgar BODENHEIMER, Jurisprudence, The Philosophy and Method of the Law (revised ed.) (Cambridge: Harvard Univ. Press, 1974).

\textsuperscript{16} My own natural law writings have also stressed the deontological or "social relations" aspect of the moral law that inhabits the positive law. 1) "Relating Ius to Lex", in Das Naturrechtsdenken heute und morgen (eds. D. MAYER-MALY and P.M. SIMONS), Duncker & Humblot, Berlin 1983; 2) "Using Law to Understand Society", Memoria del X Congreso Mundial Ordinario de Filosofía del Derecho y Filosofía Social, Vol. IX (Universidad Nacional Autonoma, Mexico 1982).
would be an enormous iniquity to claim a legal right to take them away\textsuperscript{17}.

Thomas Aquinas avoids the naturalistic fallacy by defining law as a rule for the common good; hence instantly he recognizes the modal character of law. But he is a naturalist just the same, emphasizing our natural reason as the guiding instrument of order in human life. "Law is a rule or measure of action by which one is led to action or restrained from acting... The rule and measure of action is the reason, which is the first principle of human action"\textsuperscript{18}.

On the basis of broad, natural relationships comprised of universal social practices, such as assignment of responsibilities, deliberation, negotiation of conflicting interests, recognition of obligations, respect for property, and the like\textsuperscript{19} —"...the constants in human life attested to by social continuity and cultural, generational inheritance, from which the moral figures of natural law emerge"— legal postulates like civil freedom, \textit{audi alter am partem}, and the rule of law, take their meaning and urgency. These are useless, however, if only endorsed by reason. In citing our social nature as the foundational reality for law, such affiliative inclinations as trust and good will must underlie them all.

Human nature, for instance, is the only referent (besides God) that can make sense of legal equality, a basis of developed legal systems. "Equal" takes its meaning from our sensory discernment of things which are alike; hence without reference to the common

\textsuperscript{17} John Locke derived from natural law the natural right of self-ownership upon which the universal legal norms of justice rest. Unless some understanding of ownership connects closely with what is natural to what we are within communal life, property is mere convention—an artifice—and so politics may define it for its own purposes.


qualities of our species, equality under law (if we were not too blind even to conceive of it) would be an artificial notion, an ad hoc appeasement difficult to sustain and incomprehensible as a legal ideal. Ordered justice would become a temporary arrangement that government at will could remove or re-design. Even-handedness of justice, impartiality of judgment, open hearings — these age-old standards of natural justice are standards of reason's own internal morality. If their inclusion in law were not secured, time's passing would destroy the cultural norms and associative orders on which law is dependent.

That there are human-species reasons different from our rationality, like our common abhorrence of pain, also offers a strong case for legal naturalism. It is impossible even to conceive how the evil of, say, inflicting wanton cruelty on an innocent child can have little to do with human sentience, which is so innate that exceptions are seldom found. Evil is quickly discerned, but whether or not a society has a legal system is often moot. Hence there are more good reasons for law's definition to reflect the preference of our species not to suffer or be treated wickedly than to support the notion that a legal system can be barren of moral foundation.

Naturalists claim that the moral and legal fundamentals examined above, rooted in physical, psychological or social reality, bear conceptual relationships of one kind or another to law, to the criteria, definition, meaning, identifying components or constitutive rules inhering in the nature of developed legal systems, even if this nature is multivocal, contestable and broad-ranging, and especially if it is interdisciplinary, as I believe law is20.

2. Naturalists' favored concept in identifying aspects of human nature that best ground morality is human reason. Emphasizing our social inclination, both Aristotle and John Locke gave human reason primacy in their natural law philosophies. Even if the

20. The therapeutic view taken by Edgar BODENHEIMER, op. cit.
existence of human reason can be called a fact, reason's capacities comprehend infinitely more than facts. This unique capacity of reason for going beyond itself in manifold ways serves the naturalist in vindicating that something so fundamental as life's moral requisites are in logical congruence with our nature. Sir Frederick Pollock, eminent legal historian, sums up this reason-in-nature route of the naturalist when he says the central idea of natural law, from the Roman Republic to modern times, was "an ultimate principle of fitness with regard to the nature of man as a rational and social being, which is, or ought to be, the justification of every form of positive law"²¹.

Not mere existence, then, but what reason can do furnishes naturalists with their starting point. One of the things reason does well is to assess values. Reason is that human capacity that reflects upon and organizes—and in so doing, discovers—values and human goods, like prosperity and health and peace and knowledge. Propitiously, reason—no one denies—is also that human capacity most prominent in law, in law's procedures and in law's necessity to assess values. And so, using human reason as a kind of transition between what is natural to man and what morality and legal systems require, does not, from this perspective, seem far-fetched. For whether or not legal systems are facts, they are surely not known through sentience or will or power. On the contrary, sentience, will and power confront our reason, the natural property of man, in order to know themselves.

3. But if what we say about reason is true, where is the naturalistic fallacy? If the consequence of the guiding premise, "If something is to be considered lawful, then it cannot be immoral", is a discovery of reason, if law is rational, and if moral and social goods like equality and ordered justice are inherent in law's

²¹. Essays in the Law (1922). In the English common law tradition, natural law is taken to be reason itself. It is not a coincidence that the kind of rational activity involved in moral judgment is exactly the kind of activity involved in legal judgment.
meaning, then no "ought" is derived from "is" at all. For what reflective reason yields is never the kind of fact that knowing I have a toothache or that there are oak trees in my backyard claims to be, but a consistent and multi-dimensional perspective on social experience that can be remembered and reflected on to reach a vindicated conclusion.

When law is understood in its full, normative and institutional sense based on the public nature of reason and guiding the associative orders inspired by our nature, then if "lions roar" is fact, there is no such thing as "law is fact" or a fallacy based on this mindless claim. The human value resting on the desire to preserve one's life in a healthy condition, or the human value resting on the desire to maintain loving relationships with one's family is as in touch with the facts of our nature as that prosperity is better than poverty, knowledge than ignorance, brotherhood than hatred, courage and discipline than debauchery — values which can discover no reasons for their denial.

The Chinese premier Li Pong, attending the United Nations in January of 1992 to participate in its New World Order Summit, was severely criticized by heads of state and others for taking a principal role in the atrocities that followed the pro-democracy demonstration at Tiananmen Square in Beijing in 1989. When censured at the Summit for his wanton indifference to basic human rights, the Chinese premier said, "Human rights are a sovereign issue". Basic morality, he holds, is ultimately subject only to the existing law of a nation, whatever at the time that law happens to be! Espousing an Austinian sovereign will, Li Pong is a modern Carneades. He is trying to get us to believe not just that law need not avoid evil but, astonishingly, that there can exist no transnational standard for redress of political evils perpetrated upon men and women!22

they are not the remnant of an historical mistake. He is espousing this view today.

I have tried to show it is not clear that the standard, naturalist syllogism concludes a value from a fact. This is mainly because "a legal system exists" is not a fact like "I am working in my study now". Theories determine what are facts, and legal theory is no exception. Through consideration of what is meant by the naturalist's use of "human reason", I have tried to show how selected natural capacities (social affiliation, ordering, reasoning, etc.) are acceptable groundings for morals and law, both of these themselves products of reason broadly defined. Hence to leave morality out of the equation of law seems to me perverse and obstinate. Equality under law, ordered justice, judicial impartiality—in short, the procedures of natural justice—are examples of the unavoidable lamination of the intellect of morality upon the law.

4. All versions of legal positivism, whether they claim authority derives from human will or takes the form of institutions or rules of recognition, imply that morality may be subject to a final, limiting, overriding, jurisdictional power. If it happens that an issue of law is settled by moral principle, such a decision may be desirable, but from the positivist perspective it is only a contingency and not a measure necessitated by law itself. "To the positivist there is an unbridgeable chasm between the is and the ought".

Fallacy or not, it would seem anyone would agree to one impartial truth: Somehow law must connect deeply with what is natural and reasonable and therefore constant and stable in our human condition. Our nature is capable both of respect for the restraints of higher order principles, of acting on these principles, and of understanding that civilization's continuity depends on our manifesting virtue and hating evil. The rules we bind under law cannot ignore evil for the reason that it is evil; any other reason entails that the ethical life is an instrument of ends superior to it,
and that it depends upon these superior ends and is justified ultimately in their terms.

IV. PRAGMATIC VINDICATIONS

Why is moral naturalism important—why is it thought to matter? For what reasons has there been an indefatigable insistence upon an internal connection between morality and certain abiding features of our human condition?

One of these reasons we have stated: A. If what we think should morally be avoided—and hence consistently responded to by the legal system which, borrowing Lon Fuller's words, "puts our interactions under the governance of rules"—is not significantly related to the kinds of beings that human persons are and should try to become, then we run the danger of false gods or the meaning of our existence evaporates.

"Why?" can be answered by more than one good reason, hence other reasons also answer to the nature-morality-law connection.

B. Since laws are obligatory, it is logically absurd to think we are ever obliged to commit an evil act.

C. Law's enforcement criterion leads to the same conclusion: We cannot think we ever knowingly consent to a system in which not repudiating evil can effectively and abidingly force us to act. In justifying an action, morality always supersedes the law. Coercing a citizen to act against his public conscience would continually require law to confront morality as its opposition. Unless moral deprivities are forbidden within the legal system itself by restraining principles, the system cannot for long maintain its availability for enforcement against those very deprivities.

Young German border guards who served at the Wall when it divided Berlin are, today, called criminal felons and brought to trial. They shot to kill persons who only wanted to be free.
Last week (Ingo Heinrich) was convicted of manslaughter and sentenced to three and a half years in prison... Said Judge Seidel: 'Not everything that is legal is right'. The principle that an individual may be bound by a higher moral authority, beyond what the statutes provide, was established in West Germany decades ago, during trials of former Nazi leaders...23.

Evil law in East Berlin under Communism forced these young guards to choose between their conscience and following orders. Their legal system put morality and law in opposition. They lived under a system in which this dishonorable confrontation was daily delivered to its citizens. If Heinrich's true and public conscience had been inherent in the law, he and his society would not be at war with themselves.

D. If not forbidden by the moral *sine qua non* that protects the person from abuse and allows conditions to prevail that afford him opportunities to flourish, the misuses of political power would urge upon us a frequent and expectable outcome: oppression and tyranny. Social history offers a serious lesson: Thwarting domination is the problem of society's relationship to government. But law belongs to society, not to government; and law and its enforcement provisions are the only civil instrument that faithfully solves this problem. Would it not be a contradiction if law were not subject to the same restraints for which we use law to prevent the excesses and abuses of power?

Human experience with law and government makes it clear why no fallacy can be involved in deriving morality and law from human nature, even if this relationship is indirect, requiring demonstration within legal theory. The relationship cannot be a causal one, like the force with which a hammer hits a stone. Nor can the law and morality relation be causal in another sense: each shown to be a reliable means one to the other. Nor can it be a mere correlation or "concomitant regularity", temporal relations, such that if one appears, the other always also appears. Linking law and

morality cannot be a mere decision either, because decisions can rest on whimsy, momentary desire, and politics. Even if a decision rests on forethought, just as law cannot rest on will neither can law rest only on reasoned desire. Law's meaning as an abiding general rule excludes that a legislator's will alone makes law.

Not being causal, the relationship that makes sense of the belief that if a judgment is lawful, then it cannot be immoral, must therefore be rationalistic in the same way that in justifying personal judgments, conceptual relationships inhere between persons' values, beliefs, purposes and actions. As we shall see, the justificatory model for practical legal reasoning is the same.

V. THE CONFIRMATORY MODEL

1. As we saw, the naturalistic fallacy is claimed to invalidate the naturalist's standard syllogism which we stated as:

1. If something is to be considered lawful, then it cannot be immoral.

2. Judgment P (legal rule, enactment, etc.) is immoral.

3. Therefore P is not law (or not legitimate or valid law).

I want now to suggest an alternative model as a replacement for the deductive syllogism above. In contrast to the standard deductive model, I call this new model pragmatic because its conclusion is less theoretical and more action-oriented: It lightens the burden of proof on the citizen, or on the official, to rationalize, before complying with the law, whether the law is immoral. This alternative model thus follows the model of practical legal reasoning; its guiding and informative premises together imply an

24. R. S. Peters, The Concept of Motivation, (Routledge & Kegan Paul, London 1966). The idea that purposes are reason-explanations, that is, that they are rationally, not contingently, related to our motivations and actions, has today gained philosophical pre-eminence over behavioristic and pragmatic analyses of action.
act, and normally, an act of legal compliance, whereas the standard model, in concluding, "Judgment P is immoral", disposes the reasoner to disobey the law.

The confirmatory model too can be set up in syllogistic form for convenience of review.

1. If something is to be considered lawful, then it cannot be immoral.
2. Judgment P (rule, directive, holding, etc.) is not immoral.
3. Therefore P is law (and I should therefore comply with it without moral scruples, etc.).

The second, or informational, premise has changed; it now states that a given judgment (rule, decision, etc.) is not immoral. Accordingly, the conclusion has also changed; it now states that therefore P (judgment, rule, decision, etc.) is law.

We see that the confirmatory model is practical because as it stands, its form is inductive. Its conclusion is therefore not certain but probabilistic—certainty about its truth is a matter of degree—because it draws a conclusion that is not logically inferrible from the premises. The premises could thus be true and the conclusion false. Similarly, the conclusion could be true but not because of the premises.

In standard confirming processes, informational premises can equally confirm other hypotheses setting forth different conditions. This is because more than one kind of event can cause the same effect. Given the antecedent of our guiding premise, an informative premise could, for instance, confirm that if something is to be considered lawful, "then it must be approvable by the people", or "then it must be shown to be necessary". Since law's meaning requires multiple criteria, its not being immoral cannot be a sufficient but only a necessary criterion for its being law. Something's not being immoral, therefore, can equally confirm a guiding premise that is not about law at all but about a principle of practical action: thus, P's not being immoral could confirm that if
something is to be considered law, then it must be possible to do. Actions that are not immoral are often possible to do.

2. Enduring the necessity to decide upon what we nevertheless cannot be sure about, is common to our vulnerable reason and to our proclivity to err. In deciding what to do (resolving a practical problem, voting for a candidate, passing a bill, complying with the law, etc.), we often, and should, leave our minds open to new information or new ideas to play a part in our reflections. But in drawing conclusions from our thinking, we can be wrong.

There is much value in the inductive model, however, for as with practical but always incomplete experience, its arrangement and the certitude of its guiding premise give us some grounds for thinking our reasoning is sound. I would argue that this is all we can expect; for however adamant we are in holding that laws must not be permitted to contain egregious wrongs (which our guiding premise asserts) we may never be certain that the specific law or administrative decision we are presently examining (P) is one of these immorality-avoiding injunctions or that, as a result of this provision, it is legitimate law. The confirmatory model states that P is under consideration. It is under consideration by those vested with the responsibility of making law; and it is under consideration by those enjoined to obey it. The necessity to think about the laws that are set before us, while yet giving their existence the benefit of the doubt ("Therefore P is law"), presents us with a psychological, not a logical, advantage. We may finally conclude that a law is a perfectly good one. That still does not mean that a better law may not be discovered by reapplying our reason to experience.

The benefit of stating the second premise as we do therefore illustrates the requirements of practical reason, namely, that as new, appropriate factors appear, reasons, as with life's daily decisions, may and should modify our actions or policies. Deciding whether or not to obey a law (render a curial decision, apply an administrative directive, resolve a legal problem one way or another, etc.) should, in just this way, respect openness and
flexibility which the exercise of law demands. The informational premise allows for the aposteriori inspection and evaluation of newly relevant facts. Toward this end, citizens' and officials' attention is drawn to the informational premise, "Judgment P is not immoral", where the toleration essential to civic association leaves our thinking open and critical with respect to a range of acceptable answers—some no doubt requiring reflection (should I oppose the draft?), others intuitively clear (should there be a law prohibiting wanton property damage?). Accordingly, with the confirmative, or inductive, model stating the naturalist's position, compliance with the law is, by default, a readier posture for citizen, judge, official and legislator.

Suppose a previously unthought-of or an as-yet non-institutionalized principle is proposed as a moral reason in justification of a certain law. Those authorized to decide a question of compliance (citizen, official, etc.) have to respect the possibility that the "new" principle is apposite to how they should rule, decide or conduct themselves. A good example of this malleability proper to the judgmental stance is the appearance of natural rights, as we now know them, in the moral and political philosophies of 17th century western thought. Social life would be enormously impoverished if people had not begun to recognize as ineliminably pertinent to legality that natural rights lie within the compass of community itself, that, all else being equal, they supersede considerations of expedience, and that their purpose is to make our dignity as individuals inviolable by government.

3. I call the new model "confirmatory-inductive" because it apes the form of confirmation in the sciences25. Stating the naturalist's position in a confirmatory model with a practical conclusion is forward-looking from the point of view of a strategy for deciding, just as in science, confirmation looks forward to

testing or predicting. The guiding premise is meant less to support the conclusion authoritatively that a law is immoral (as with the standard syllogism) than to stimulate the question. Hence the burden of proof is not on the citizen or official to directly determine the hard question as to whether $P$ should be obeyed or should become law; for that it is law is explicitly, though only with probability, concluded. The German youths who had to determine this conflictful matter for themselves failed in their integrity to conscience; it was too difficult to question the positive law.

A pertinent question of meaning has a lively bearing on interpreting $P$, and so the answer to this interpretation is transmitted to the question of compliance. The informational premise reads: "Judgment $P$ is not immoral". But the contradictory of "not immoral" is not necessarily "moral". It may as well be "indifferent"; that is, neither moral nor immoral but simply reasonable or expedient. There is thus merit in using "not immoral" to provide at first glance a reason for deferring to the authority of law; for a law needs only to avoid immorality, a minimum condition, to warrant compliance (given its other essential features), and there is a good chance that most legal systems of any substance, maturity and duration discover that allowing gross immoralities into their procedures and provisions cannot gain the consensus that effective, public obedience requires.

Any law, therefore (after meeting the "not immoral" criterion), that is understood as simply convenient or conventional or morally indifferent may rightly be deferred to. The burdensome problem of always proving the positive immorality of every law in the system can therefore be more often lightly regarded —though it cannot be disregarded because exactly what judgment $P$ enjoins us to do is always, in theory, open to criticism. Whether to civilly disobey need not always, however, become a ponderous and recurrent dilemma. To see that a law is in touch with the public morality and that, if in doubt or if genuine moral conflict arises, one's reason must examine one's conscience, should answer the question for
most citizens when it arises. The answer will always be provisional; and this is as it should be since our conscience and our deliberations and judgments contain moral error. And the reasoning prowess of our human nature often demands, as a supplement, a public dialogue open to new insights and counsel.

Instead of examining individual situations which only the citizen can know, legislators examine coherence in law and consider such things as available resources, costs, the effects on the constituency, and, we hope, the common good. Importantly, public officials engage in critical dialogue with their peers; for the question of supplying specifics for the informational premise demands reflection. "Not immoral" respects diversity of views as to what exactly is moral and how to facilitate its adaptation. Enacting or administering a law, then (providing law's other requisites are in place), allows officials a less probative stance because the confirmative model, being inductive, offers a heuristic whose truth, unless immorality is decisively obvious or proved, can more or less be taken for granted.

4. Confirmation of any hypothesis is made stronger by ruling out alternative hypotheses (reasons, purposes, principles, etc.) that could also account for the observed results (in our confirming model, some purpose, for example, that could suggest a different conclusion). But in our case, is it possible to strengthen the supporting evidence by ruling out alternative principles?

There are, in fact, no alternatives to the guiding premise as given. This is not because it is false that other conditions also imply that certain judgments are not immoral; it is because these alternatives in the context of natural law philosophy are irrelevant to the principle which is foundational to legal naturalism and which the naturalist wants to defend.

Under these circumstances, the argument as stated is a strong induction. And given the truth of its guiding premise (which we next examine) and the truth of any given secondary premise regarding the morality of the judgment under question, the
argument is so strong that its form is logically equivalent to a deduction.

What, in fact, always lies open and variable, though, is our judgment about P. We have to know what the variable P represents; we have to provide an interpretation that specifies its referent. An unlawful statute may not be law—but what makes a statute unlawful? Which specific rules of conduct are relevant—what is referred to? What situation are we in? Are there exceptions? Are there conflicting, relevant rules of action? Also, rules that many think are not immoral are also open to question, for what yesterday was tolerable, today may not be; justification in moral and legal philosophy has a tendency to improve. All these questions belong to the ethical theory of natural law.

The question, then, is never, Shall I obey an immoral law because it is law? The practical question for citizen and official is, How can I—knowing that the final word is never available and that to justify obeying this law is at best only provisionally correct—avoid an immoral action as best I can? Given the limits of our understanding and the broad meaning of "not immoral", it is normally harder to prove that a public course of action is immoral than that it is not. Confidence in judgment P's being law or in one's legal system being lawful is therefore generally warranted in commanding our respect and compliance.

If we habituate ourselves to believing that whatever is law is not immoral, may we not become indifferent to the morality of law? Many people think that if something is law, then it is ethical; they never think to reason about it. For this reason, we have stated the guiding premise in the confirmatory model, "If something is to be considered lawful...". Such a formulation excludes the flippant assumption that the law-like form of a proposition guarantees its status as law. We have to look and see.
VI. THE GUIDING PRINCIPLE AND THEORY OF LAW

1. In ordinary confirmation, the guiding premise is not, like ours, analytic. It is an empirical, a causal hypothesis, and it is presupposed by statements that stand ready for testing so as to infer (inductively) whether or not the hypothesis is true. Of course, evidentiary claims can be true for a variety of reasons other than what the hypothesis states; if so the hypothesis cannot, at least based on the truth of the evidentiary claims, be conclusively confirmed.

Philosophy of law, however, is not an empirical science, and so here we depart from the analogy with scientific confirmation. We are not trying to discover whether or not certain types of empirical evidence test the hypothesis favorably. The foundational question of law's immorality is not open to the usual type of confirmation. Hence our general premise, "If something is to be considered lawful, then it cannot be immoral", does not respond to empirical statements that can test its truth or falsehood. That is not its purpose. Analyticity in the guiding premise makes it impossible that certain consequences ever can falsify it. Because naturalist legal theory takes it as a logical truth, the guiding principle is indifferent to any consequence we could draw. Only the informational premise, as we saw, and our conclusion can be false.

The purpose of the guiding premise is to establish an irrevocable principle that can advise us regarding a decision to comply with a law (or to pass a law or to rule in a certain way, etc.). It is meant to direct consideration of what we ought to do when confronted with a potential law or act; hence the inductive arrangement of the terms suggests that, while the guiding premise is irrevocably true, the argument as a whole is open as to how a legal mandate or course of action in specific situations ought to be resolved. And this is because the purpose of the model is to awaken practical reasoning. The incompleteness and probable
nature of the syllogism demands, under these conditions, reflection. That is exactly what we want.

2. The ultimate question that confronts us, then, is not the truth of the guiding premise but its acceptability. And to gain acceptability it will have to be confirmed in another way besides empirical testing, which is irrelevant to conceptual truths. It will have to be shown to be acceptable within a body of legal theory, and our first task, as with any conceptual truth, is to argue for the adequacy of meaning of its central terms and how they are related. We need to stipulate and argue for certain definitions of "law" and "not immoral" (e.g., it does not void a right or necessitate an evil; it does not prohibit a basic good; it does not ignore or destroy the general welfare or violate the canons of natural justice). And we need to show in what way the semiformal science of law raises and tries to settle certain problems which these particular definitions rather than others help to resolve. If legal theory does not define "law", then neither naturalist nor positivist can defend his position. Whereas the truth of empirical statements can often stand alone—a single observation confirms them—social and normative claims require justificatory contexts, sometimes elaborate, in which the meanings of their terms and background assumptions are defended.

Earlier we saw (page 25) that "not immoral" is ambiguous: it can mean positively good or it can mean morally indifferent. This is its sense. However we need also to know what are its referents. What precise kinds of actions and values and purposes are immoral? We said that our moral sense is quicker to discern good and evil than whether or not a human order constitutes a legal system. Human nature seems to possess a moral sense. Not so a "legal sense"; whether or not an order is a legal one is contestable. The concept "legal order" is partly constructed and so we turn to legal theory to precise the term, and likewise with related terms like "legal fact" and "human nature".
In this theoretical project, a slavish use of language conventions does not help us very much or we should not have to turn to theory. Taking enforcement, for example, as the most significant sign of law because that is what most people think of merely trades in popularity. Usage can be unthinking, archaic, unrefined and incomplete. It must be respected, though, never perverted, for it is with an agreed-to vocabulary that we have to argue for extending the meaning of a term. Since the basic data for social and legal theory are people's beliefs in shaping their conduct, these beliefs are clothed in the language they know. In sum, what law is—its identification—requires to be shown to be adequate for our theory.

We need also a pragmatic vindication of our guiding premises within a coherent body of legal theory defining its constructs as they bear on law's purposes, relationships, functions, ideals, and consequences. Since the links to nature are indirect, it is in understanding the social experience of mankind that we find clues as to how legal systems are best developed, what ideals are not efficable, and what evils law can disarm. Legal theory cannot rid itself of valuative questions, but the origins of our comprehension of them lie in human nature throughout human history.

Legal theory has also to think through its methodology, including only considerations that favor objective standards of belief. It has also to ask: Are the basic premises axiomatic, derived, basic to other concepts within the system? What is the grammatical or syntactic status of legal norms? How does legal theory relate to economic law? To universal social patterns? To education? (Would a given law obstruct our capacity to learn that racial prejudice is morally unacceptable?) What inconsistencies can be found in opposing theories? Importantly, what consequences result when legal morality is applied? Or when it is ignored?

Finally, what background assumptions about human reality does the development of a legal system make, and are they true? In my judgment, this human reality subverts the so-called "naturalistic
fallacy" and serves as ground for the acceptance of some form of legal naturalism.