Philosophical Anthropology and the Law

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I am pleased to dedicate this Article to Hans Kelsen, whose prodigious work in the field of jurisprudence has made a decisive contribution to this discipline and, whether or not one agrees with his ideas, has made legal scholars throughout the world indebted to him. The Article has a twofold purpose. It is designed to call the attention of the legal profession to a modern branch of research—philosophical anthropology—located in the frontier between the natural and social sciences. Philosophical anthropology originated in the first half of this century on the continent of Europe, reached the stage of early maturity in the second half of the century, and is likely to have a bright future in the English-speaking world. After defining the subject matter of this branch of research and explaining the scope of its inquiry, the Article attempts to predict and evaluate the impact of the discipline on legal theory and practice. The potential fruitfulness of the approach pursued by philosophical anthropology is tested by applying its method of investigation to three values of the legal order which have served as lodestars of legal regulation—the values of security, equality, and freedom. Suggestions of further topics deemed worthy of exploration are made in the concluding observations.

I

PHILOSOPHICAL ANTHROPOLOGY: A GENERAL DEFINITION

In general dictionaries as well as in textbooks devoted to the subject, anthropology is usually defined as “the science of man.” This definition does justice to the etymological signification of the term, but it hardly spells out with sufficient precision the contentual scope of university courses and scholarly publications pertaining to the field. If anthropology were actually treated and taught as “the science of man,” its area of coverage would have to be extremely far-ranging. It would have to encompass the physiological, psychological, and noetic¹ consti-

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1. The term “noetic,” as used in this Article, refers to that layer of the human personality in which bodily movements and emotions are controlled, meanings are as-

tution of human beings and at the same time—since man is a producing as well as an existing creature—all his activities and works. Such comprehensiveness of inquiry would convert anthropology into a superscience, upset the traditional division of labor between the biological, psychological, and social sciences, and allow anthropology to poach on the hallowed preserves of numerous specialized disciplines.

By tacit agreement among the concerned disciplines, the ground to be covered by anthropology has been reduced primarily to the study of primitive man and early forms of society. A university student concentrating his efforts in this field would expect to learn a great deal about prehistoric man, his physique and habits of life, archaeological excavations of fossils and ancient human artifacts, and the cultures of societies displaying tribal or pretribal forms of social organization. And yet, modern anthropology has never quite abandoned a claim to that broader conception of its subject matter which is implicit in the name of the science.² Furthermore, a survey of college curricula, course textbooks, and the literature in general will disclose a certain frequency of anthropological excursions into related areas, such as genetics, evolutionary biology, and sociology. One encounters discussions of racial types and race problems among modern rather than primitive men, investigations into the general nature of culture and the psychology of cultural change, and research into the structure and development of language. Comparisons of early civilizations with more advanced civilizations are also deemed to be within the terms of reference for anthropological studies. General observations on education and personality formation are sometimes coupled with descriptions of child training in an Indian or Polynesian tribe. Reports on ancient kinship groupings may be prefaced by an analysis of the forms and objectives of family organization in general.

In this Article, the concept of anthropology is used in its broad sense, indicating a disciplinary concern with the problem of man which goes beyond an inquiry into the early stages of his career on this planet. The addition of the word "philosophical" indicates a special method to be followed in pursuing a broadly-conceived anthropological objective. The case in favor of using this method must take as its starting point the undeniable premise that a vast body of specialized knowledge about

signed to facts, intellectual and artistic interpretations of reality are provided, and conscious value choices are made. A similar use of the term is made by Joseph Fabry in his discussion of Viktor Frankl's logotherapy. J. FABRY, *THE PURSUIT OF MEANING* 19-23, 28 (1968). "Noetic" includes everything the Germans call "Geist," a term which is broader than the English word "spirit."

2. See, e.g., R. BEALS & H. HOIJER, *AN INTRODUCTION TO ANTHROPOLOGY* 2-3 (1953); A. KROEBER, *ANTHROPOLOGY* 1-2, 7 (rev. ed. 1948); Greenberg, *Anthropology: The Field*, 1 *INT'L ENC. SOC. SCI.* 304 (1968).

human beings is available in the arsenals of the anatomical, physiological, biological, chemical, psychological, psychiatric, ethnological, historical, and sociological sciences. The volume of detailed and often thoroughly verified information about various aspects and sides of human—individual and social—life is truly impressive. Philosophical anthropology is the endeavor to correlate and integrate the findings of the specialized sciences in an effort to gain a picture of Man as a whole. The discipline is new because of the tremendous richness of its empirical substratum—produced by modern developments in the natural and social sciences—but ancient as a basic query raised by men in all ages. Among the many questions that are of great interest to philosophical anthropology is the controversial problem of whether man occupies a special place in the cosmic order, a position which sets him apart sharply and conspicuously from other living creatures. Philosophical anthropology also directs its attention to the relations and connections which exist between the various layers of the human personality, especially the physiological, psychological, and noetic components of human nature. Furthermore, it seeks to discern the ties which link the cultural products of man, such as law, morals, religion, and art, to his biological, psychic, and mental structure.

Whether or not it is possible to formulate an integrated view of human nature in all of its various dimensions is at this time a wholly unresolved question. The possibility cannot be dismissed that the human being is an unfathomable phenomenon, so that nothing more than partial, fragmentary, non-holistic answers to the question "What is Man?" are attainable. But this possibility should not deter one from embarking on the venture of philosophical anthropology, conceived as a calculated risk. It is always a disappointing experience to find oneself unable to integrate specific answers into a discernible totality, and, in view of the contemporary openness of epistemological theory, any self-imposed restrictions on philosophical effort would seem to be a matter of personal choice rather than of necessity rooted in the nature of things.

The wish to transcend the limitations set to intellectual inquiry by rigid doctrines of cognition has produced in some philosophical anthropologists a disinclination to halt their investigations after completion of analysis and description. These thinkers propose to add a further dimension to their activity by extracting meanings and postulates from their research and thus to come up with directions and recommendations for proper attitudes toward life in harmony with what they consider to be the true destiny of the human race.³ If one searches for a special

3. *E.g.*, A. LANDSBERG, *EINFÜHRUNG IN DIE PHILOSOPHISCHE ANTHROPOLOGIE* 9, 82 (2d ed. 1960).

term to designate such axiologically-oriented undertakings and distinguish them from philosophical anthropology in the more narrowly conceived sense, one might introduce the notion of an "anthropological philosophy." A great deal of the classical philosophy of the past would easily fit into this classification. Philosophical giants like Plato, Aristotle, Kant, and Hegel were quite prone to derive principles of right conduct or categorical imperatives from their answers to the fundamental question, "What is man's true nature?"⁴

Philosophical anthropology, as a distinctive modern concept, apparently originated in a lecture given in 1927 at Darmstadt by the German philosopher-sociologist Max Scheler.⁵ In this lecture, Scheler explored the relations between man's vital energies and his spiritual components in a presentation strongly reminiscent of Freud's theory of sublimation, but at the same time critical of certain basic assumptions made by Freudian psychoanalysis. Scheler announced to his audience a plan to prepare a major work on philosophical anthropology but his premature death in 1928 prevented an execution of this project. Certain threads running through the lecture were taken up by Scheler's disciple Paul Landsberg, who published an introduction to philosophical anthropology in 1932.⁶

Most of the seminal developments in philosophical anthropology are very recent. Helmuth Plessner, a German philosopher with a formal training in biology, and Frederik Buytendijk, a Dutchman with academic roots in physiology and comparative psychology, made important contributions to the field.⁷ Arnold Gehlen, a German anthropologist,

4. It is not widely known that Immanuel Kant for 30 years taught a course entitled "Anthropologie" at the University of Königsberg. There exists a formal text of the lectures as well as a compilation of informal class notes taken by a student. Both versions show that Kant supplied his students with various kinds of specific advice on the art of living and also told them in a more general vein: "[M]an is destined by his reason to live in society with other human beings and to cultivate, civilize, and moralize himself in this society, however great may be his animal impulse to surrender himself passively to the inducements of leisurely ease and pleasure." I. KANT, *Anthropologie in Pragmatischer Hinsicht*, in 7 KANT'S GESAMMELTE SCHRIFTEN 324, 324-25 (1917); cf. DIE PHILOSOPHISCHEN HAUPTVORLESUNGEN KANTS 368-69 (A. Kowalewski ed. 1965) (Graf Dohna's lecture notes).

5. The published text of the lecture appeared under the title *Die Stellung des Menschen im Kosmos*. An English translation is available. M. SCHELER, *MAN'S PLACE IN NATURE* (1961). For a discussion of the life and work of Scheler see J. STRAUDE, *MAX SCHELER* (1967).

6. A. LANDSBERG, *supra* note 3.

7. H. PLESSNER, *DIE STUFEN DES ORGANISCHEN UND DER MENSCH* (2d ed. 1965); H. PLESSNER, *Die Aufgabe der Philosophischen Anthropologie*, in *ZWISCHEN PHILOSOPHIE UND GESELLSCHAFT* 117 (1953); F. BUYTENDIJK, *WOMAN: A CONTEMPORARY VIEW* (1968); F. BUYTENDIJK, *ALLGEMEINE THEORIE DER MENSCHLICHEN HALTUNG UND BEWEGUNG* (1956). On Plessner and Buytendijk see M. GRENE, *APPROACHES TO A PHILOSOPHICAL BIOLOGY* 55, 119 (1968).

devoted his life work to the task of reconstructing a synthesized picture of man out of the parts supplied by the special sciences.⁸ Adolf Portmann, a distinguished Swiss zoologist, sought to demonstrate that man in his psychic, noetic, and social development is determined significantly by biological factors.⁹ Martin Buber's essay *What is Man?* is an excellent illustration of the potentialities inherent in the holistic approach.¹⁰ A recent treatment of the subject by Erich Rothacker gives a vivid and suggestive account of the crucial problems.¹¹

In the United States, interest in philosophical anthropology is in its early stages.¹² But translations and interpretations of relevant foreign works,¹³ coupled with a new search by many in the younger generation for a more comprehensive view of the "human condition,"¹⁴ would seem to suggest possibilities for future growth.

II

THE SCOPE OF PHILOSOPHICAL ANTHROPOLOGY AS APPLIED TO LAW

In his lectures on anthropology, Kant drew a distinction between a "physiological" and a "pragmatic" branch of that science. Physiological knowledge of man, he said, aims at "exploration of that which nature makes of human beings," while the pragmatic approach is concerned with what "[h]e, as a free agent, makes of himself, or is able and ought to make of himself."¹⁵ Kant thus divided anthropological research into studies of the equipment with which nature has provided man, on the one hand, and the ways in which man utilizes, or ought to utilize, this equipment, on the other.

Among the pragmatic monuments of man's inborn and developed capabilities are the products of culture, such as the systems of law, eth-

8. A. GEHLEN, *MORAL UND HYPERMORAL* (2d ed. 1970); A. GEHLEN, *UR-MENSCH UND SPÄTKULTUR* (2d ed. 1964); A. GEHLEN, *DER MENSCH* (6th ed. 1962).

9. A. PORTMANN, *NEW PATHS IN BIOLOGY* (1964); A. PORTMANN, *ZOOLOGIE UND DAS NEUE BILD VOM MENSCHEN* (1956). On Portmann see M. GRENE, *supra* note 7, at 3.

10. M. BUBER, *What Is Man*, in *BETWEEN MAN AND MAN* 118 (1965).

11. E. ROTHACKER, *PHILOSOPHISCHE ANTHROPOLOGIE* (2d ed. 1966).

12. For a Roman-Catholic point of view see J. DONCEEL, *PHILOSOPHICAL ANTHROPOLOGY* (1967). See also Edel, *Some Relations of Philosophy and Anthropology*, 55 *AM. ANTHROPOLOGIST* 649 (1953); Zaner, *An Approach to a Philosophical Anthropology*, 27 *PHILOS. & PHENOMENOLOGICAL RESEARCH* 55 (1966).

13. Marjorie Grene has provided interpretations of the thoughts of some of the leading European thinkers. See M. GRENE, *supra* note 7.

14. For an inquiry into the meanings of human existence relevant to such a search, see J. FABRY, *supra* note 1, at 33-54, 81-97; V. FRANKL, *MAN'S SEARCH FOR MEANING* 154-60, 171-76 (1963).

15. I. KANT, *supra* note 4, at 119.

ics, and religion, as well as the works of art and technology. Although Kant did not include them in the scope of his anthropological lectures,¹⁶ they are clearly of interest to modern anthropology, understood in the broad sense of a "science of man." The philosophical branch of that science is concerned particularly with the *relations* between man's nature and his culture. It seeks to investigate and clarify the connections which exist between man's physiological and psychological traits and the accomplishments of his mind which give meaning and content to civilization.

In the area of law, the question whether the norms and institutions of law have their roots in certain biological and psychic components of human nature occupies a prominent place in philosophical anthropology. But at the same time, this discipline must inquire whether and to what extent the control functions exercised by the noetic part of the human constitution—including man's rational and reflective faculties—are able to mold or modify instinctual tendencies for specified purposes in the field of legal regulation.¹⁷ When this question is reached, the normative query as to whether or not it is *desirable* in a certain context to shape human nature will often obtrude itself with embarrassing conspicuousness. Without delving into the troublesome problem concerning the permissible scope of scholarly investigation, a *hypothetical* treatment of normative issues, supported by persuasive empirical evidence, should clearly be deemed a legitimate subdivision of the academic province. The feasibility, limits, and probable results of certain modes of social control through law can be indicated when one assumes that in devising a system of law the community wishes to accomplish certain effects deemed by it to be beneficial.¹⁸

An inquiry into the dispensability or indispensability of law as an institution is also within the purview of philosophical anthropology since that inquiry involves the question of whether there is a "will to law" endemic to human nature. Any relations that might exist between such a will to law and the human power drive would be included within this complex of problems. In this area, some overlapping of philosophical anthropology with legal sociology cannot be wholly avoided. As a mat-

16. See note 4 *supra*. In these lectures, Kant talked about the way human beings use, or should use, their faculties of perception and their senses. He also discussed the traits which he deemed peculiar to certain ethnological groups.

17. This aspect of philosophical anthropology is emphasized by Thomas Würtenberger. Würtenberger, *Jurisprudenz und Philosophische Anthropologie*, 7 DIE VIELSTIMMIGKEIT DER WISSENSCHAFT 85, 98-100 (1958-1959).

18. A treatment of issues of social policy and social ethics on this basis has been previously advocated. See F. VINDING KRUSE, *THE FOUNDATION OF HUMAN THOUGHT* 233, 251 (1949). See also F. VINDING KRUSE, *THE COMMUNITY OF THE FUTURE* 94-99 (1952). I have stated my views on the problem. See E. BODENHEIMER, *TREATISE ON JUSTICE* 44-56 (1967).

ter of general principle, philosophical anthropology should confine itself to research into the ties that exist between law and the individual psychology and needs of human beings. On the other hand, legal sociology is engaged in investigating the dependencies of legal norms and arrangements on the political, economic, and social configurations arising from the interaction of men and groups.

Questions have been raised as to the legitimacy and value of philosophical anthropology which have a particular relevance for the law-related part of the enterprise. Such criticisms are usually rooted in the distinction made by Kant between the "empirical" and "noumenal" segments of human nature and his assumption that man's "Geist,"¹⁹ which produces his cultural works—including the law—possesses a far-reaching degree of autonomy and self-reliant power vis-a-vis his "physis." Ernst Cassirer, a German-born Neo-Kantian philosopher, speaks for many other thinkers:

We cannot define man by any inherent principle which constitutes his metaphysical essence—nor can we define him by any inborn faculty or instinct that may be ascertained by empirical observation. Man's outstanding characteristic, his distinguishing mark, is not his metaphysical or physical nature—but his work. It is this work, it is the system of human activities, which defines and determines the circle of "humanity."²⁰

Cassirer thus answers the question "What is Man?" in terms of his culture rather than his nature. He proposes to examine what man *does* without linking it closely and decisively to what man *is*. He does make the non-Kantian concession that in the performance of this philosophical task no possible source of information, including biological and psychological data, should be ignored. But in giving consideration to such evidence, he says, one is merely moving around in the outer court of the properly human world without having passed its threshold.²¹ What is of primary importance to Cassirer is the discovery of "general structural principles" underlying mankind's productions. He seeks to bring to light fundamental categories, unifying concepts, and formal patterns not restricted to any particular age which are helpful in analyzing and comprehending man's manifold cultural activities in their connectedness. Any unity discerned by such a philosophical synthesis would not

19. See note 1 *supra*. "Noumenal" is derived from the Greek word *nous*, denoting man's mind with its reflective and rational capacities.

20. E. CASSIRER, *ESSAY ON MAN* 68 (1944).

21. *Id.* at 68. The word here changed to "outer court" reads "precincts" in the text. It is clear from the context that in Cassirer's opinion, a scholar applying the descriptive methods of psychology, sociology, or historical science to an interpretation of the products of man's mind would be moving around in the outskirts or antechambers of the noetic realm.

be a unity of the individual products—because they are highly diversified—but rather a unity of the “creative process.”²²

Hans Kelsen's Pure Theory of Law would appear to be the type of intellectual endeavor which meets and fulfills Cassirer's specifications. Kelsen has in great detail analyzed the morphology of developed systems of positive law, abstracting from the substantive content of particular legal orders in an effort to elucidate the structural patterns common to them. Among other matters, he has inquired into the characteristics that positive law exhibits in contrast to other modes of social control, the basic conceptual tools used in legal science, and the interconnections between these basic notions. He has also set out to elucidate the order of rank which exists between the various normative sources employed in the administration of justice. In this way, he has attempted to reduce the baffling multitude of legal phenomena to certain lasting forms which in their interrelations appear to possess some degree of inner unity.²³

There is doubt whether philosophical anthropology could make any significant contribution to an evaluation of Kelsen's teachings. It is true that Kelsen's doctrinal scheme may be traced to the inclination of reasonable men to prefer orderly thinking to disorderly rambling, and to the human propensity for finding connections between seemingly disparate things. There might be a debatable issue whether the Kelsenian focus has centered too exclusively on the order function in law and legal science, but it would be foolish to deny that this aspect of legal reality is deserving of the closest scrutiny. But in exploring questions of this kind one would still, in Cassirer's contemplation, wander about in the outskirts of the relevant realm of thought. After the threshold to the edifice of the Pure Theory of Law is passed, an appraiser of the theory would have to delve into the merits of the analytic propositions set forth by Kelsen in regard to the relations between law and the state, the hierarchy of legal sources, the significance of the “basic norm,” and many other problems treated by him. Logic and the empirical observation of legal tool-making and tool-use would seem to have more value in approaching this task than psychological studies regarding the nature of man.

The reasons for the remoteness of philosophical anthropology from Kelsen's principal concerns must be sought in the fact that his work deals chiefly with questions of structure and form, an area in which the creative activity of man enjoys a great deal of freedom from physical and psychological necessities and needs.²⁴ When one enters the field

22. *Id.* at 70.

23. H. Kelsen, *THE PURE THEORY OF LAW* (1967).

24. It would be very difficult, for example, to trace the forms of art known as

of substantive legal regulation—an area deliberately “bracketed” by Kelsen for methodological reasons—a decisive shift of the horizon takes place. It can hardly be gainsaid that tort rules dealing with assault and battery have their roots in the human desire for bodily integrity, that the law of libel and slander is related to the strong urge of human beings to be respected as persons, and that the wish to be free from arbitrary domination accounts for many legal measures designed to increase the equality of men, groups, and races.

These observations are in no way meant to suggest that certain natural human impulses, more or less automatically and of their own force and momentum, “produce” certain norms of the law.²⁵ Human nature is too much of a welter of heterogeneous and partially conflicting propensities to be capable of serving as an engine for a more or less one-dimensional causation of social norms. Aggressive and cooperative impulses may dwell within the same person. Self-serving and other-regarding inclinations may be mixed in varying proportions. The desire to exercise power over others may be strongly or weakly developed. Moreover, since human nature is in many important respects flexible and malleable, legal and social policy may attempt to foster and encourage certain traits, such as competitiveness, self-assertiveness, or their opposites, and thereby to direct the confusing multiformity of human drives into laid-out grooves. Even the most obvious instance of a close correlation between facticity and normativity—the recognition of a legal right of self-defense in response to the human instinct of self-preservation—demonstrates a statistical rather than a necessary causal relation, since it is reported that some primitive legal systems did not make an allowance for the exercise of this right.

The denial of strict causal relations between facts and norms does not imply, however, the absence of connections between an empirically-observed human nature and a teleologically-oriented regulatory social system. Although the collective will is able to mold and condition human behavior to a far-reaching extent, few will deny that the physiological and emotional qualities of human beings set practical limits to such efforts.²⁶ We can no longer assume with Kant that human nature is

renaissance and baroque to certain typical features of human nature. With respect to the substantive uses of architecture, on the other hand, it is clear that its utilitarian function relates to man's need for shelter and its decorative element to man's aesthetic strivings.

25. The author agrees with Kelsen that a “natural law” does not exist either in the sense of a logical link between an “is” and an “ought” or in the sense of a strict causal determination of legal norms by certain natural impulses. See H. Kelsen, *REINE RECHTSLEHRE* 409-13 (2d ed. 1960).

26. Suppose the population explosion would reach the point where drastic legal measures enforcing a 20 year moratorium on human reproduction become imperative. Suppose, further, the lawmakers have come to the conclusion that mandatory use of birth

sharply bifurcated into a sensate and a noumenal zone, and that the noumenal part, consisting of free will enlightened by reason, allows men to shape the world imperiously in the image of their minds. Modern ecology has taught a lesson with respect to the limits of subduing outer nature, while modern psychology and a look at the contemporary scene teach that social policies which tamper too much with some basic inner needs of human beings produce highly deleterious effects threatening the integrity of the social structure.

Another objection to the relevance for law of philosophical anthropology might come from the ranks of legal sociologists. They might advance the argument that laws are for the most part passed as a result of the occurrence of political, economic, and social events and not in response to the biological or psychological characteristics of men. A price control law, they might say, has its origin in the determination to combat inflationary trends that have arisen in the economy. A law legalizing abortion stems from the desire to alleviate the conditions caused by the population explosion. While the sociologist will in their opinion be helpful to the lawmakers by furnishing empirical data in support of, or opposition to, a proposed enactment, they might deny that the philosophical anthropologist can be of use in the performance of legislative tasks except to contribute some generalities known to everybody.

It is true that many laws are passed to cope with political, economic, and technological problems, but examples of laws that have their foundation in some facets of human nature have already been given. The significance of philosophical anthropology for law becomes most evident when one considers, not particular enactments, but the general fabric of values which law is designed to protect and promote. Judging from historical as well as present-day experience, the most important of these values are security, liberty, and equality. The next three parts of this Article are designed to demonstrate that these values have not been arbitrarily singled out as lodestars of legal regulation but that they have deep ontological roots in the constitution of human beings.

III

THE CLAIMS AND LIMITATIONS OF SECURITY

There appears to be wide agreement among psychologists and psy-

control devices is futile and unfeasible, especially for the unsophisticated masses of people, or that production of birth-control devices in sufficient quantities is impossible under existing economic conditions. Lawmakers throughout the world therefore decree that men may have intercourse only with men and women only with women. This would be a drastic example of the type of problem referred to in the text.

chiatrists today that human beings in their early, formative years have a strong need for security.²⁷ Family disintegration and separation of parents may do considerable damage to the mental equilibrium of the child and upset his feeling of belonging. If he is moved about from one home—perhaps a foster home—to another, his psychological health and sense of identity may become adversely affected. Neglect by the parents to give their offspring some safe basis of orientation in life, defined by certain limits to free-wheeling self-assertion, may have serious consequences for his later adjustments to society's requirements. It also has often been said that young people thrive best in an environment in which certain culturally transmitted values and customs impart a reasonable measure of steadiness and rhythm to life in the family and beyond it.

The child's quest for security is related to his drive for repetitive experiences, a facet of human existence which was strongly emphasized by Freud.²⁸ Since the human being's early confrontation with the world has an almost traumatic impact on him and forces him to absorb new impressions in a bewildering succession, he finds a great deal of comfort and relief in the recurrence of an event with which he is already familiar. This is true particularly in instances in which he found the earlier experience to be pleasurable. Although the compulsive features of this drive will diminish in force in the normal individual as he moves towards maturity, the wish for the "reinstatement of an earlier condition" is apt in some form to accompany the individual throughout his life.²⁹ It would be an attractive task for philosophical anthropology to investigate the relation of this phenomenon to the striving for recurrent regularity which manifests itself in legal rules and legal institutions.

Adults are in need of security in several significant respects.³⁰ First, and perhaps foremost, they insist on safeguards for their bodily and mental integrity. The tort law providing redress for personal injuries and the criminal law punishing homicide and assault promote physical safety.³¹ The mental and emotional integrity of the human

27. See S. COOPERSMITH, *THE ANTECEDENTS OF SELF-ESTEEM* 204-08, 236 (1967); E. ERIKSON, *CHILDHOOD AND SOCIETY* 138, 412 (2d ed. 1963); A. MASLOW, *TOWARD A PSYCHOLOGY OF BEING* 52 (2d ed. 1968); A. WATSON, *PSYCHIATRY FOR LAWYERS* 196-97 (1968); Plant, *A Psychiatrist Views Children of Divorced Parents*, 10 *LAW & CONTEMP. PROB.* 807, 812-14 (1944).

28. S. FREUD, *Beyond the Pleasure Principle*, in *THE MAJOR WORKS OF SIGMUND FREUD* 651 (1952).

29. *Id.* at 645, 651-52.

30. Frederik Buytendijk has intimated that the security needs of women might be stronger than those of men. F. BUYTENDIJK, *WOMAN: A CONTEMPORARY VIEW* 169-70 (1968). Since the correctness or incorrectness of this view may have a bearing on certain problems of legal regulation in the family law field, the matter is one of direct concern to legal-philosophical anthropology.

31. Even a legal prohibition of cigarette advertising on radio and television may

person is the focal point in the prohibition of libel and slander. This branch of the law is rooted in the need for respect, which is a common trait of human beings.³²

Secondly, men are desirous of protecting their family relations. All or most legal systems, including primitive ones, therefore have rules against wife-stealing and adultery. One also finds in modern legal systems prohibitions of child abduction and interference with parental rights. Alienation of affection has been made the subject of legal sanctions in the laws of some Anglo-American jurisdictions.

Men are also concerned about the safety of their possessions and the security of their transactions. The former was declared by Locke and Bentham to be one of the primary objectives of legal ordering.³³ The latter has been referred to as the "security of orientation," permitting men to pursue a reasonably safe and predictable course in planning and handling their personal and business affairs.³⁴ It is particularly in this area that clarity and consistency of legal pronouncements, as well as continuity in legal adjudication, are highly desirable and form part of the "morality of law."³⁵

There is another rubric of security which is gaining increasing attention and recognition in all civilized countries of the world. Certain hazards, risks, and vicissitudes are incident to human life in general or to conditions of life in modern technological societies in particular. The most important among these are disability or impairment of earning capacity resulting from old age or sickness, unemployment, or industrial or traffic accidents. The possible or likely occurrence of such contingencies may create apprehensions and fears in a human being which are apt to interfere with the effective discharge of his social functions. Although contemporary industrial societies attempt to meet this problem with the help of systems of private insurance, workmen's compensation, welfare, and social security, the relative merits of private and public ways of solution are still being debated in the United States.

be linked to the security value, understood in a broad sense, because its purpose is to reduce stimuli to the smoking habit and thereby to increase bodily security against the infusion of deleterious substances.

32. Harold Lasswell and Abraham Kaplan appear to define "respect" principally in terms of social class position or prestige. H. LASSWELL & A. KAPLAN, *POWER AND SOCIETY* 56 (1950). Myres McDougal identifies the term with "access to other values on the basis of merit, without discrimination on grounds irrelevant to capacity." McDougal, *International Law, Power, and Policy*, 82 *RECUEIL DES COURS* 137, 168 (1953). The word is used in the text in the broad sense of consideration for the integrity of the inner core of the human personality.

33. J. BENTHAM, *THEORY OF LEGISLATION* 109-13, 115-19 (1904); 2 J. LOCKE, *TWO TREATISES OF CIVIL GOVERNMENT* § 124 (1924).

34. R. ZIPPELIUS, *DAS WESEN DES RECHTS* 124-26 (2d ed. 1969).

35. L. FULLER, *THE MORALITY OF LAW* 39, 44-46, 63-65, 79-81 (rev. ed. 1969).

Particularly controversial is the question whether and to what extent the government should guarantee maximum security against the hazards of life to all citizens regardless of individual means. In regard to one important part of this question, available studies suggest, according to Gordon Allport, that a certain amount of social and economic insecurity is conducive to personal growth, while threats to security which create an unwholesome amount of anxiety are often responsible for poor citizenship and antisocial conduct.³⁶ Assuming that the line between healthful and stifling forms of security is not purely a matter of individual emotional predisposition, philosophical anthropology might be able to make some constructive contributions to the solution of the problem.

There is a further aspect of the need for security which is highly sensitive and often concealed from public view. Many, if not most, people are reluctant to confront directly the pluralism of heterogeneous and often conflicting views of the world and to make a free, personal choice among them. The task of formulating for oneself a set of coherent principles for guidance in life is fraught with so many uncertainties and difficulties that many human beings prefer to take refuge in the shadow of a protective cloud. The medieval order responded to this tendency by providing for a unity of the ontological, ethical, and religious views of the world. Calvin's Geneva and some Puritan communities in early America exhibited a similar approach. A revival of the phenomenon in an ideological rather than religious garb has occurred in twentieth-century fascist and communist societies. In all of these instances, the official philosophy of life has tended to claim a monolithic exclusivity, and legal rules and institutions have often helped in cementing the ideational monopoly.

The rise of liberalism in the open societies of the Western World has brought about a pluralism of religions and philosophies contending for the allegiance of men. This did not create a problem of serious proportions as long as a person was born into a certain religious or cultural setting, supported by family or group tradition, which he would normally accept as obligatory on him. The widespread erosion of traditional authorities in recent decades has exposed to full view the dimensions and ramifications of the problem, confronting men with a perplexing situation.³⁷

The liberal world-image is still strongly committed to the view that restrictive policies in matters of religious, ethical, or political conviction are solely the result of power usurpation by authoritarian elites, while

36. G. ALLPORT, *PERSONALITY AND SOCIAL ENCOUNTER* 353, 360 (1960).

37. Cf. E. ERIKSON, *supra* note 27, at 279, 412-13.

common men are by nature predisposed towards openness of mind and tolerance. However, there may be an element of self-deception in this assumption.³⁸ Recent polls eliciting popular responses to questions of freedom of expression, reactions of students in the United States, Western Europe, and Japan to the enunciation of views deemed by them to be on the wrong side of the political or social spectrum, and conversions of sophisticated and superior minds to a faith providing a sheltered haven of elaborated beliefs attest to the human propensity—adverted to by Nietzsche³⁹—to limit personal horizons. There can be little doubt that the difficulties experienced by many men in accommodating themselves to a bewildering anarchy of competing philosophical and ethical systems is a corollary of the human urge for security.

The striving for security is not, however, an absolute and unconquerable one. Single-minded concentration on the security value has never been a feature of progressive legal systems; these have always sought to measure security against other basic needs of men, including the drive for freedom. Although man has an inclination to live within circumscribed horizons, the countertendency to break out of these limits is also present in his makeup, especially in strong and dynamic individuals. Daring, physical or mental adventure, emotional growth, intellectual curiosity and inventiveness may drown out in such individuals the organism's regressive trends, the yearning for safety, and the addiction to repetitive experience.⁴⁰ Since expansivity and transcendence of limits have operated as creative forces in the enlargement of human individual and social potentialities, it is likely that minute over-regulation by a tightly closed legal system for the sake of a general security in the conditions of life will lead to stagnation or regression. If there are no wilderness areas in the park of the law, if all paths are clearly cut and neatly trimmed, and if no space is left for spontaneous growth, then security has been raised to the level of an absolute value. If a society, for reasons that appear cogent to it, decides to encapsule all or most activities within the casings of regulatory and restrictive norms, in a manner which may promote order but hem in growth, it should do so with full awareness of the possible consequences. Both

38. See also E. FROMM, *ESCAPE FROM FREEDOM* 36, 133-34, 141 (1941).

39. F. NIETZSCHE, *THE USE AND ABUSE OF HISTORY* 44, 70 (rev. ed. 1957).

40. Freud took the position that the drives for self-actualization and self-perfection exist only in a few individuals whose libido has been sublimated into creative cultural activity. S. FREUD, *supra* note 28, at 654. This pessimistic thesis has been disputed by other psychologists and psychiatrists. See A. ADLER, *INDIVIDUAL PSYCHOLOGY* 103-04 (1956); F. BUYTENDIJK, *supra* note 30, at 169-70, 180; K. GOLDSTEIN, *HUMAN NATURE IN THE LIGHT OF PSYCHOPATHOLOGY* 111-12 (1940); A. MASLOW, *supra* note 27, at 29-30, 46, 204 (pointing out, however, that in the United States at the present time the number of "self-actualizing" persons is rather small).

philosophical anthropology and psychology may be useful in illuminating the road to decision on such fundamental questions of policy.

An instance when the human urge for security frequently suffers a jolt is at the point of change in the law. Even when such change is prospective rather than retroactive, some expectations based on the previous state of the law are apt to be disappointed. Arrangements of a contractual character that were habitually entered into in the past may be declared to be contrary to public policy in the future. Accustomed ways of dealing with private property may be subjected to restrictions deemed necessary for reasons of environmental protection. Personal preferences in the selection of business customers, employees, or members of associations may be upset by laws designed to provide equal opportunities for all. The strength of the sense of security, which normally tends to buttress the status quo, has frequently manifested itself, in this country and others, when far-reaching questions of law reform were entrusted to determination by popular plebiscite.

It is just in this crucial area of legal change that security exhibits its Janus face. Order, regularity, and social homeostasis appear safeguarded by customary ways of doing things, but the appearance may easily be a deceptive one. There are times when, paradoxically, security can be preserved only by change, while the refusal to promote it will result in insecurity and social disruption. After the needed alterations in the structure of society have been accomplished, the law will, of course, attempt to conserve and perpetuate the innovations in a newly-secured equilibrium.

IV

THE POLYMORPHOUS CHARACTER OF EQUALITY

The task of infusing some degree of security and stability into the life of a society is not the only objective of a legal system. Throughout its long career in history, the law also has had to face the fateful problem of human equality and inequality. In the prologue to the oldest national code whose text has been preserved, King Hammurabi of Babylonia stated that in undertaking the codification his special concern had been to make sure that "the strong will not deprive the weak of their rights."⁴¹ The natural inequalities of strength, energy, determination, and capability existing among men have always furnished a potent incentive for the formation of hierarchical orders based on the principle of rule and subjection. Although the law has played a part in the consolidation of such orders, an unbiased study of the major legal

41. W. EILERS, *DIE GESETZESSTELLE CHAMMURABIS* 12 (1932) (author's translation); 1 J. WIGMORE, *A PANORAMA OF THE WORLD'S LEGAL SYSTEMS* 86 (1928).

systems of the world will show that it has also done a great deal in curbing abuses of power by rulers and dominant elites. This aspect of legal ordering has brought about significant realignments between the horizontal (coordinative) and vertical (subordinative) constituents of the social structure.

Equality has been described as a "protean" word which carries a number of meanings.⁴² In the context of a philosophical anthropology that turns its attention to the law, the concept refers to the common traits of human nature as well as to the treatment of human beings by the law. Of special interest to the discipline is the question of whether the equal or unequal treatment of men by the legal order can be explained and justified in terms of their basic common qualities and needs. The exposition which follows analyzes various law-related meanings of equality and then raises the question of whether the manifestations of the quest for equality can be traced to some ontological roots in the human psyche.

A. Concepts of Equality

It may be that the only type of equality recognized by the legal order is formal equality before the law. In Perelman's definition, the rule of law understood in this sense merely requires that "all who are alike in the eyes of the law be treated in a fashion determined by law."⁴³ The equality produced by this axiom presupposes adherence to rules which group people, things, and events into generalizing classifications with the expectation that the rule be applied equally to all situations coming within its purview.⁴⁴ A uniform and impartial enforcement of the rule is demanded, but no safeguards are erected against the adoption of arbitrary or unreasonable differentiations leading to highly inequalitarian results. If a legislature passes a law barring persons with red hair from obtaining a driver's license, formal legality is preserved as long as the law is enforced with even-handed objectivity against all who possess the classifying trait. Not even the total exclusion of entire groups of people from participation in certain aspects of the political or social life for reasons of prejudice or supposed "inferi-

42. Schaar, *Equality of Opportunity and Beyond*, in *EQUALITY* 228 (Am. Soc'y for Pol. & Legal Phil., *Nomos* 9, J. Pennock & J. Chapman eds. 1967); cf. J. STEPHEN, *LIBERTY, EQUALITY, FRATERNITY* 179 (1967). For an excellent explanation of the various denotations of the concept see Oppenheim, *The Concept of Equality*, 5 *INT'L ENC. SOC. SCI.* 102 (1968).

43. C. PERELMAN, *JUSTICE* 24 (1967).

44. It has been observed correctly that the equality secured by this principle is intrinsic to the very notion of a rule. *E.g.*, Berlin, *Equality as an Ideal*, in *JUSTICE AND SOCIAL POLICY* 128, 132 (F. Olafson ed. 1961): "To fall under a rule is *pro tanto* to be assimilated to a single pattern. To enforce a rule is to promote equality of behaviour or treatment." See also E. BRUNNER, *JUSTICE AND THE SOCIAL ORDER* 21, 26 (1945).

ority"—as exemplified by the policies pursued in the Union of South Africa—would be in conflict with formal legality as long as certain well-defined criteria are used in segregating the privileged from the disadvantaged groups.

A step upwards on the equality ladder is reached when the legal order confers on all persons and groups within its jurisdiction the right to equal consideration of their interests. Such a right would have its source in the recognition that all men are equal in the sense that they possess a common humanity and are therefore entitled to a hearing with respect to their basic needs and claims.⁴⁵ The acknowledgment of this right would not exclude the creation of far-reaching differentiations and inequalities by the law as long as procedural due process is accorded in the presentation of demands and reasons are given in support of the final decision. The need for justification of an megalitarian disposition is likely to operate as a brake on arbitrary action without, however, setting up a positive barrier to such action.

A measure of substantive due process is added to the formal and procedural aspects of equality by making it mandatory upon lawmakers to treat men and situations equally or similarly if they are in fact equal or similar under the prevalent community standards. If this principle is bolstered by a constitutional guarantee of equal protection, it would render inoperative a law denying driving privileges to persons with red hair, unless the community was convinced of a causal connection between hair color and capacity for safe driving. The "equality to equals" standard might still sanction wide disparities in the granting of rights if the community was committed to a belief in the inequality of the races or sexes, or the perniciousness of certain political, social, or religious ideas.⁴⁶

A further post on the road towards equalization is reached when certain factors such as race, sex, religion, national origin, or ideological conviction are declared inadmissible criteria of differentiation by virtue of law. The implementation of this policy may lead to an allocation of basic rights to all members of a community, such as the right to life, liberty, property, education, and political participation. A social order based on equality of rights has taken a long step towards the elimination of discrimination if the grant of equal rights is matched by re-

45. On the right to equal consideration see R. MARCIC, *RECHTSPHILOSOPHIE* 27 (1969); Benn, *Egalitarianism and Equal Consideration*, in *EQUALITY*, *supra* note 42, at 61, 66, 69; Husserl, *Justice*, 47 *INT'L J. ETHICS* 271, 281 (1937); Spiegelberg, *A Defense of Human Equality*, 53 *PHIL. REV.* 101, 105, 107, 121-22 (1944).

46. Professor Stone points out that the principle, as such, would justify the most outrageous laws, such as a law penalizing all persons who are deemed (by any single criterion) to be inferior, provided that the penalty for all of them was the same. J. STONE, *HUMAN LAW AND HUMAN JUSTICE* 326 (1965).

spect for these rights by the organs charged with the administration and enforcement of the law. It is true, on the other hand, that the recognition and enforcement of basic rights may inereely offer a formal as distinguished from an effective opportunity for the practical exercise of these rights. Thus a right to vocational liberty may appear theoretical in the contemplation of people unable to find suitable employment in their chosen line of work. The right to property may become severely reduced in its potential scope when a certain stratification has taken place in the ownership of natural and industrial resources and the chances to make a decent living are not open to all. The actual realization of a right to education depends upon the existence of a sufficient number of educational institutions and the financial terms offered by them.

A society may meet the problems arising from a discrepancy between formal and actual opportunities by supplementing the equality of basic rights with a guarantee of the equality of basic needs. This may entail granting privileges to disadvantaged persons in order to take care of primary urgencies. Policies aimed at this objective might include the enactment of minimum wage laws, the institution of systems of welfare and social security, and the adoption of a full employment program. If the benefits resulting from such programs are only adequate to insure the minimum necessities of life, granting social rights will prevent starvation and utter destitution but may preserve the existence of large economic inequalities. If the disparities in the distribution of property become so extreme that they threaten the social equilibrium, further measures of varying incisiveness may be taken by society to reduce the gap between wealth and poverty in their most glaring manifestations.

What is probably the most radical panacea for a final solution of the equality problem was proposed by Karl Marx when he enunciated the slogan, "From each according to his abilities, to each according to his needs," as the supreme goal of social action in a communist society.⁴⁷ If such a system were put into effect, distribution of goods would be unequal while there would be equality in the consideration and satisfaction of the varying needs of people without reference to the nature, extent, and quality of their contributions to society. While the satisfaction of needs might not include the most fastidious and expensive desires of men, it would, according to the interpretation given to the principle by the Belgian socialist economist Ernest Mandel, extend to "all the rational needs of man" and be far in excess of bare minimum needs.⁴⁸ That the implementation of the principle would presuppose a

47. K. MARX, *CRITIQUE OF THE GOTHA PROGRAM* 10 (1966).

48. 2 E. MANDEL, *MARXIST ECONOMIC THEORY* 663 (1968). This interpretation,

degree of economic affluence and abundance not in existence anywhere in the world today is admitted by all protagonists of the idea.

B. *Source of the Quest for Equality*

The anthropological roots of the equality postulate are diverse and cannot be reduced to a common denominator. All of the hints and suggestions made here are highly tentative and will require further exploration and substantiation. No attention is paid to facets of the equality problem which a legislator can safely ignore, such as mere envy or resentment felt because of the superior position or accomplishment of others.

The principle of legality, demanding that human acts and arrangements be judged on the basis of impartially-administered rules, is probably founded in the human need for security, discussed in part III. An habitual adherence to preannounced rules of conduct makes it possible for men to plan their lives without unexpected interferences by their fellowmen and also affords them a shield against being tossed about like puppets by the organs of government. The more far-reaching demand for equality of consideration seems clearly related to the human urge for respect. This urge might be called an offshoot of the security need because it expresses a longing for a society of mutual concern, a haven into which an individual is received as a welcome participant in social action.

When these vague and general manifestations of the equality principle receive a substantive concretization in the "equality to equals" notion, the psychological source of the postulate is more difficult to discern. A certain mystery surrounds this fundamental constituent of the human sense of justice, but there is reason to believe that, like the demand for equality of consideration, it has a deepseated root in the desire for esteem. If two people with approximately equal accomplishments are rewarded in a conspicuously unequal manner, or if two persons who have committed a similar infraction are subjected to highly disparate penalties, the disadvantaged person will have a feeling of degradation, of disrespect for his personality, although this may not have been the motivation of the authority dispensing the benefits or deprivations. In view of certain modern proposals—and also proposals in earlier times—in favor of a wholly individualized "existentialist" jurisprudence without general rules and standards,⁴⁹ philosophical anthro-

if it reflects the mainstream of Marxist ideological thinking, appears to contain an answer (albeit not a very precise one) to the question raised by Hans Kelsen concerning the meaning of the principle. See H. KELSEN, *supra* note 25, at 384.

49. See Bodenheimer, *Classicism and Romanticism in the Law*, 15 U.C.L.A.L. REV. 915, 919-22 (1968).

pology could perform a useful service in clarifying the psychological connections of the equal-treatment axiom.

In past and present societies, violations of this axiom have in most instances been asserted in situations where persons and groups deeming themselves equal to others received unequal treatment at the hands of the law. The Marxian demand for equal satisfaction of needs regardless of the quality of achievement makes it desirable to look at the other side of the coin. Marx assumed that nobody could possibly complain of unjust and unequal treatment if society gratifies all of his needs. This assumption seems to ignore the fact that men do not evaluate their own position as isolated individuals but are prone to compare their place in society with that occupied by other individuals. When that is done, a member of a communist society who puts all his energies, time, and effort into socially constructive work will find that those of his fellow men whose contributions to the public good are marginal receive the same full satisfaction of their desires. Thus, equal treatment of unequals may produce feelings of iniquity similar to those brought about by the opposite policy.⁵⁰ This might not be a matter of serious concern if such feelings did not develop into socially deleterious attitudes. If, on the other hand, they had an adverse effect on motivation towards maximum productive effort, this would endanger the very foundation of economic plenty on which the realization of the whole scheme depends. Although the competitive principle can be carried to undue lengths, some external stimuli appear to be necessary in order to overcome the inertial tendencies of the human organism.

One of the strongest forces supporting the "push" of the law toward increased equality of individuals and social groups⁵¹ is the human desire to be free from domination by others. The "equality to equals" principle still allows the creation of social systems organized on a strictly hierarchical basis. Friedrich Nietzsche, for example, who considered equality a pernicious and poisonous idea, described justice in terms of this principle.⁵² At the same time, he advocated an order of "castes," in which the rights, privileges, and duties assigned to the gradated strata of the population were allocated on an exceedingly inegalitarian basis.⁵³ This was generally the configuration of society during the Middle Ages, although the sharpness of the class divisions was mitigated by humanitarian principles which were anathema to Nietzsche.

50. Accord, H. KELSEN, *What Is Justice?* 15-16 (1957).

51. See Pennock, *Law's Natural Bent*, 79 ETHICS 222, 225 (1969).

52. 16 F. NIETZSCHE, *The Twilight of the Idols*, in THE COMPLETE WORKS OF FRIEDRICH NIETZSCHE 108, 108-09 (1915).

53. F. NIETZSCHE, *The Antichrist*, in THE COMPLETE WORKS OF FRIEDRICH NIETZSCHE 217, 217-20. (1915).

When modern legal systems replaced the social pyramid by a system of general rights granted to all regardless of class status, many believed that relations of domination and subjection had thereby been excised from the social order. Jeremy Bentham, for example, was convinced that equality of property rights would ultimately result in equality of property distribution. If the laws put no shackles upon industry and trade, he said, we shall see "great properties divided little by little, without effort, without revolution, and a much greater number of men coming to participate in the moderate favours of fortune."⁵⁴ The realization that an equal assignment of rights does not *per se* eliminate the possibilities of economic domination has produced further pushes toward increased equality, such as the Marxian theory.

Although the desire of men to face other men on the basis of equality, rather than subordination, has played a tremendously important role in political, social, and legal history, it has been kept in check and to some extent offset by certain counter-tendencies which also form part of the texture of human nature. First, there is an inclination on the part of some strong-willed individuals and groups to gain power over their fellow men and exercise it with a minimum of restraint. Friedrich Nietzsche erroneously hypostatized the will to power as the sole determinant of human action. But his doctrine is true to the extent that the domineering instinct is always latent and ready to explode under propitious circumstances. It has usually operated as a force antithetical to the rule of law, as Nietzsche correctly observed.⁵⁵ While a developed system of law seeks to subject human conduct, private as well as official, to certain restrictions on socially undesirable forms of self-assertion, the will to power is bent on expanding one's freedom of action, if necessary at the expense of others.

Depending on particular political and social conditions, the inroads of the power drive into the demarcated domains of the law may manifest themselves in two different forms. They may result in the open creation of sectors in the social order where autonomous rule by free discretion—with slavery as its most extreme example—replaces the rule of law. Under different (and usually more advanced) historical conditions, the resistance of power structures to law-imposed restrictions may assume the form of evasions or cautious circumventions of established norms or procedures. In this view of the social process, a polarism exists between the will to law, operative as a stabilizing and limit-setting force—subject, of course, to rearrangements of the social equilibrium—and a will to power, seeking to break and transcend legal

54. J. BENTHAM, *supra* note 33, at 123.

55. F. NIETZSCHE, *Genealogy of Morals*, in *BASIC WRITINGS OF NIETZSCHE* 512 (1968).

bounds in the interest of a free-wheeling and expansive assertion of personal and group dynamism.

The second force working against the realization of equality in society is a readiness on the part of many people, under certain historical or sociological conditions, to give up their independence and submit more or less unconditionally to the will of a leader or leadership group. It is doubtful whether this striving should be interpreted, in the average case, as a wish for masochistic surrender of one's self to the power of another.⁵⁶ It is more likely that this inclination is related to the phenomenon, discussed in part I: people find a great deal of comfort in entering the safehaven of a closed ideational system of beliefs, viewing the leader as a symbol of the system. Freud has suggested that, when masses of people identify themselves with an authoritarian personality, they usually do so on the assumption that this personality "loves all the individuals in the group with an equal love."⁵⁷ Everything depends on the persistence of this illusion, he said; if the illusion is destroyed, the group faces disintegration. If this is true, a masochistic annihilation of the ego is not a precondition for the establishment of leadership relations. The charismatic tie is maintained in the belief that the leader respects the personalities of his followers. Even the idea of equality may surreptitiously enter into the consciousness of the group members. Although some command and some obey, all are "equal" in the sense that they are the servants of a common cause. As long as the authority in power can sustain this belief by its actions and attitudes, the notion of equality may not become wholly eradicated in the setting of a nonegalitarian society; it is merely transferred to a different level of consciousness.

There is another phenomenon which militates strongly against the possibility of creating a radically egalitarian form of society: the natural inequality of talent, capacity, and proficiency. Its existence does not obviate the recognition of equal rights and the equal satisfaction of basic needs but appears incompatible with a complete equality of decision-making power. If, for example, decisions at the Space Center, at Houston, affecting the safety of the astronauts were made by majority vote of all employees, it is doubtful that the most desirable results would be obtained. Where special powers of judgment based on expertise—as distinguished from commonsense reactions to problems of general concern—are needed, it cannot be said that all votes are entitled to equal consideration or weight. This fact, together with others already men-

56. Erich Fromm seems to be inclined towards this position. See E. FROMM, *supra* note 38, at 141-42, 152-53.

57. S. FREUD, *Group Psychology and the Analysis of the Ego*, in S. FREUD, *supra* note 28, at 674.

tioned, makes it unlikely that conditions of absolute equality will ever be established in human society.

V

THE COMPLEX RELATION OF FREEDOM TO LAW

It is reasonable to assume that security and equality, to the extent that they are deemed worthy goals of social action, cannot be realized without the active help of the law. Even though some adherents of anarchical theory contest this hypothesis, much historical evidence can be adduced in support of it. Disintegration of the law has usually been accompanied by a sharp increase in insecurity and crime.⁵⁸ Even though the majority of men in a community may be able and willing to make non-violent adjustments of their mutual relations in the absence of an organized system of legal controls, a small minority of unstable or overaggressive persons can easily disrupt the entire community.⁵⁹ There is also much reason to believe that the natural inequality of men with respect to physical strength, mental capacity, and attitude toward others manifests itself more conspicuously under unregulated conditions than in a social order governed by law. Although John Locke believed that human beings in a state of nature would face each other as equals,⁶⁰ this is an assumption whose validity cannot be taken for granted. Locke himself was quite ready to concede that the supposed natural equality of men in unorganized society was attended by many inconveniences and opportunities for injustice, so that some form of legal regulation was imperative.⁶¹

While the values of security and equality may be presumed to depend on artificial means of effectuation through collective social action, this is not in the same sense true of freedom. Though a public declaration of a state of anarchy would be unlikely to initiate a reign of security and equality, it would, at least for the time being, inaugurate a dominion of absolute freedom. There would be no laws segregating socially desirable actions from undesirable ones, and no machinery would be set up for the purpose of repressing the latter.

58. See Andenaes, *General Prevention—Illusion or Reality?*, 43 J. CRIM. L.C. & P.S. 176, 187-89 (1952) (report on the "policeless" period in wartime Denmark); Newman, *Punishment and the Breakdown of the Legal Order*, in RESPONSIBILITY 128 (Am. Soc'y Pol. & Legal Phil., Nomos 3, C. Friedrich ed. 1960) (similar report on East Pakistan).

59. For this reason extra-legal, voluntary associations were created for law enforcement purposes in the frontier communities of the American West, at a time when the legal instrumentalities of organized government had not as yet been extended to these settlements. See F. TURNER, *THE FRONTIER IN AMERICAN HISTORY* 343-44 (1947).

60. 2 J. LOCKE, *supra* note 33, § 4.

61. *Id.* §§ 7-8, 123-25.

The statements often heard to the effect that every law is an infraction of liberty, and that law operates only in the interstices of freedom, are a reflection of the idea that unfettered liberty presupposes a condition of non-law. The question on which anarchists and their adversaries sharply disagree is whether or not liberty and non-law can maintain a relation of coexistence *for any prolonged period of time*. There is a great deal of historical evidence—which philosophical anthropology would do well to supplement by more intensive studies—that conditions of unregulated freedom may easily turn into states of hierarchical stratification or economic dependency. The prevalence of near-anarchy during certain periods of the Middle Ages resulted in the formation of feudal forms of order in which the freedom of the lower strata of the population was severely limited. When the law failed to regulate employment relations during the laissez-faire period in 19th-century America, conditions of economic dependency arose between the non-owners and owners of the means of production, notwithstanding the formal existence of freedom of contract. The convinced anarchist might reply that future improvements of human nature will render the recurrence of such results improbable. At this juncture of mankind's history, the burden of substantiating this hope cannot be discharged with facility.

Judging the matter on the basis of non-utopian assumptions, it might be stated that law is almost invariably an infraction of liberty and at the same time a necessary condition for the existence and maintenance of liberty in society. Although this statement sounds like a Hegelian dialectical sophism, it is not self-contradictory if one realizes that the word "liberty"—which, like many words of the English language, is not univocal—is used in two different senses. "Liberty" in the first part of the statement refers to the absolute right of an individual to do as he pleases, while the point of reference in the second part of the proposition is the conception of an apportioned, circumscribed, limited form of liberty.

The right to "do one's own thing" is virtually everywhere limited by the prohibition of certain acts deemed highly deleterious to organized society. Foremost among the instances of proscribed conduct are acts of killing, maiming, robbing, and raping. Their outlawry is non-controversial; there are no legislative lobbies perturbed about overcriminalization which demand the repeal of penal code provisions relating to them. Most legal orders also have restrictions on property and contract rights, such as anti-nuisance laws and nullifications of contracts deemed contrary to public policy. Freedom of speech has rarely been treated as an absolute right by constitution-makers and courts.⁶² The

62. Almost all provisions in state constitutions in the United States guaranteeing

freedom to discriminate on grounds of race, sex, or religion has been subjected to substantial restraints in this country and many others.

As Malinowski correctly observed, law in civilized society has been used as a vehicle for balancing and portioning out freedoms.⁶³ This is true not only for societies dominated by a liberal philosophy but also for other forms of society.⁶⁴ Whatever the scope of actually recognized liberties may be in a particular social order, they are restrained at least to the extent that they conflict with other men's liberties or with fundamental interests of the collective entity. The concept of a restriction, of course, is not a synonym for annihilation. The law protects an area in which the individual is free to act as he desires; the purpose of the protection is to prevent trespassing upon another man's area of freedom or injury to the public domain. The extent of the area safeguarded by the law will, of course, vary substantially in different nations and different historical circumstances.

The liberties apportioned or equalized by the law may be of a negative or positive character. The legal order may confine its task to protecting the negative right to be free from constraint. Here again, the right will not be an absolute one, since the community will reserve the power to apply compulsion against lawbreakers. Or the law may go a step further by assisting men in realizing the positive freedom to pursue their objectives and develop their capacities for the benefit of the social whole.⁶⁵ In the latter case, the legal order may grant a right to work, to choose one's avocation, and to prepare for it by appropriate education. These rights, again, are rarely accorded without some qualifications, such as age limits, ability tests, and licensing requirements.

The foregoing analysis of the relation between freedom and law finds some support in the writings of those philosophers who have attempted to define justice in terms of the realization of human liberty.

freedom of speech also impose responsibility for an abuse of the right. See D. FELLMAN, *THE LIMITS OF FREEDOM* 55, 135 (1959). In the United States Supreme Court, the view that the first amendment guarantees an absolute freedom to speak has remained a minority position.

63. B. MALINOWSKI, *FREEDOM AND CIVILIZATION* 22 (1944).

64. Although the freedoms granted in other societies may sometimes be quite limited in scope, a complete denial of freedom exists only under conditions of slavery.

65. Some authors have taken the position that the term freedom should be limited to freedom from constraint, while the positive freedom to pursue purposes and actualize one's potentialities in a proper social setting should be denominated by some other word, such as "opportunity." See, e.g., M. CRANSTON, *FREEDOM* 4, 18, 22 (2d ed. 1954); F. HAYEK, *THE CONSTITUTION OF LIBERTY* 11-13, 16-17 (1960). This view has been challenged. Friedrich, *Rights, Liberties, Freedoms*, 1954 *ARCHIV FÜR RECHTS UND SOZIALPHILOSOPHIE* (Beiheft No. 40) 109, 114-17; Fuller, *Freedom—A Suggested Analysis*, 68 *HARV. L. REV.* 1305, 1306-07, 1312 (1955). See also Jones, *Freedom and Opportunity as Competing Social Values*, in *LIBERTY* 227 (*Am. Soc'y Pol. & Legal Phil.*, Nomos 4, C. Friedrich ed. 1962).

None of them, with the probable exception of Max Stirner,⁶⁶ have chosen to equate justice with the untrammelled right to do whatever one desires to do. For example, one of the most influential protagonists of laissez-faire liberalism, Herbert Spencer, enunciated the principle that "every man is free to do that which he wills, provided he infringes not the equal freedom of any other man."⁶⁷ Similarly, Immanuel Kant characterized justice as the creation of conditions under which the free will of one person can coexist with the free will of everyone else.⁶⁸ In both of these definitions, it is the equalization and harmonization of individual freedoms that is demanded as a prerequisite for justice. Everybody is obligated to conduct himself in a manner which shows respect for the sphere of freedom allowed to other members of the community. It is unlikely that such an accommodation of individual interests could ever be accomplished without the active assistance of a structured system of legal norms.

Philosophical anthropology becomes relevant to the relationship between freedom and law in testing normative problems regarding freedom against the empirical facts of human psychology. Legal approaches to fundamental social problems are always influenced by widely-shared views concerning the nature of man. The legal anthropology of 19th-century liberalism, for example, took as its starting point the assumption that a maximum of competitive self-assertion was going to produce an optimum condition of collective happiness. This assumption has been subjected to numerous challenges in the 20th century. The most far-reaching challenge proclaims that a wholly pluralistic pursuit of diverse ends by men will lead to social disorder and economic chaos, and that the supreme power in society must therefore have authority to prescribe the ends and means of individual action. This position has found a famous literary expression in the statement made by Dostoyevski's Grand Inquisitor to the effect that human beings are most eager to surrender their fundamental freedoms, including the right to make decisions about good and evil, to a secular or spiritual authority, in exchange for the liberty to make a living and enjoy some measure of permissiveness in the erotic sphere.⁶⁹

There can be little doubt that the desire for negative as well as positive freedom is firmly rooted in the structure of the normal personality. Men do not like to be constrained, chained, or put in a cage.⁷⁰

66. M. STIRNER, *THE EGO AND HIS OWN* 156-71 (1963). Stirner seems to include the right to kill within the scope of absolute individual rights. *Id.* at 190.

67. H. SPENCER, *JUSTICE* 46 (1891).

68. I. KANT, *THE METAPHYSICAL ELEMENTS OF JUSTICE* 35 (1965).

69. 1 F. DOSTOYEVSKY, *THE BROTHERS KARAMAZOV* 296-97, 304 (D. Magarshaok transl. 1958).

70. For a suggestive parable about a man who was put in a cage by a king curious

They will usually be willing to take and obey orders in the execution of a common organized undertaking, but they will resent being made the object of the arbitrary will of another person. They also have a strong desire to use their bodily and mental powers and develop their potentialities and skills.

At the same time, there is obviously a social component built into man's nature which, as a general rule, makes him amenable to the acceptance of restraints on his freedom in the interest of coexistence with others. This side of human nature may be in need of stimulation and encouragement but if man were nothing but a blend of egotism and hostility toward others, ethics and law would have nothing to work with in their attempt to improve man's relations with his fellow men. It is true that the willingness of most human beings to live in a structured world of norms is sometimes obviated by a strong urge to transcend or disregard these norms. But even this counterforce to the natural inclination to accept circumscribed forms of existence amounts to nothing more than a meaningless and futile thrust into an amorphous void unless there are rules to be breached and limits to be overcome.⁷¹ In view of the contention so often heard today that any repression of natural inclinations should be denounced as a violation of human nature, and that anomie⁷² must therefore be preferred to limit-setting by norms, philosophical anthropology would do well to pay a great deal of attention to this facet of the human condition, a region which is still shrouded in partial darkness.

CONCLUSION

The pragmatic value of philosophical anthropology for the analysis and elucidation of legal phenomena depends on the tenability of two basic theses which are by no means generally accepted today. The first of these is the proposition that man has a biological essence, consisting of physiological, psychological, and noetic constituents which cannot without peril be disregarded in the legal regulation of human affairs. Acceptance of this proposition does not, to be sure, entail the conclusion that man's biological essence strangles purposive lawmaking in the sense that any incisive attempt to mold, influence, and improve hu-

to find out what the psychological effects of this treatment would be see R. MAX, *MAN'S SEARCH FOR HIMSELF* 125-28 (1953). For a good account of man's natural striving for freedom see SPENCER, *supra* note 67, at 27-29.

71. Persons trained to deal with juvenile delinquents have made the observation that a young offender who does not encounter a barrier will be inclined to push further into the vacuum until an external halt to his activities is called. This is a problem which merits further exploration.

72. Anomie is a term used by the sociologist Emile Durkheim to denote a state of normlessness or unstructured growth. E. DURKHEIM, *SUICIDE* ch. 5 (1951).

man behavior is a priori doomed to failure. Much too much psychological evidence has been marshalled in past decades in opposition to this view to warrant the hypothesis of a substantial core of immutability and rigidity in human nature. It is assumed, however, that men have certain basic needs, over and above the most pressing physiological needs, which ought to be taken into account by lawmakers in the interest of the health of the social body.⁷³

The second pillar on which much of the usefulness of philosophical anthropology for jurisprudential inquiry rests is the related thesis that the basic needs of men form an ontological foundation for the values protected by the legal order. This position implies a rejection of two extreme views which have been propagated in philosophical literature. The first is the view that values represent purely subjective and emotive reactions to the facts of reality and therefore do not constitute an appropriate object for cognitive philosophical effort.⁷⁴ If this were true, it would be impossible to make objectively meaningful statements concerning the values of the legal order which go beyond a mere description of the axiological views and preferences held by individuals, groups, academic interpreters, or lawmakers. At the opposite pole from this position stands the theory of value-realism, according to which values are non-spatial and nontemporal entities which dwell in a realm of ideal being accessible to human beings through some sort of intuitive contact.⁷⁵ If this were true, lawmaking would above all be a metaphysical enterprise designed to bring to earthly realization those eternally subsisting value essences perhaps glimpsed by men before birth. The view which underlies this Article, in contrast to these two positions, attempts to link social and legal goal values to empirical traits of men which are not deemed to be subjective and idiosyncratic. Since it is, at the same time, conceded that the value orientation of human beings can be canalized, within certain limits, by lawmakers and social engineers, an open-minded attitude eschewing categorical and apodictic statements—in the absence of compelling evidence—on natural impediments or psychological inevitabilities in social control by

73. For an excellent discussion of man's basic needs see A. MASLOW, *MOTIVATION AND PERSONALITY* 35-51 (2d ed. 1970). The needs listed by Maslow, in addition to the physiological needs, are safety needs, belongingness and love needs, esteem needs, the need for self-actualization, the desire to know and understand, and the aesthetic needs.

74. This is, for example, the position of Alfred Ayer and Rudolf Carnap. See A. AYER, *LANGUAGE, TRUTH AND LOGIC* 107-08 (1950); Carnap, *Philosophy and Logical Syntax*, in *THE AGE OF ANALYSIS* 216-20 (1955).

75. This is the position (influenced by Plato's philosophy) of Max Scheler and Nicolai Hartmann. See 1 N. HARTMANN, *ETHICS* 183-89, 206-12, 217-26 (1932); M. SCHELER *DER FORMALISMUS IN DER ETHIK UND DIE MATERIALE WERTETHIK* 8, 14, 20, 47 (1927).

law is recommended to those who may choose to enter the field of philosophical anthropology.

In proposing some possible topics of research for philosophical anthropology, this Article focused on three values of legal ordering which no theory of justice can safely ignore. It need not be assumed, however, that freedom, equality, and security are or should be exclusive concerns for the architects of the legal order. There are other values that may require or deserve recognition or protection though law. The legislative organs may wish to promote aesthetic beauty or the progress of the arts. They may embark on programs in the field of public health which go far beyond providing security against assaults on the bodily or mental integrity of human beings. They may decide to come to the aid of the human desire for knowledge by passing laws in support of education.⁷⁶ These latter objectives may, however, receive a great deal of furtherance by non-legal action, while the lawmakers can hardly escape the task of wrestling with the fundamental problems of security, equality, and freedom.

It was suggested in this Article that there are deep-seated tendencies in human nature which press for recognition and protection of these three values. At the same time the view was propounded that there exist psychological counterinclinations which militate against an attempt to absolutize any one of these values.⁷⁷ It would then become the task of the legal system to limit, adjust, and harmonize freedom, equality, and security by finding ways and means of normative regulation which are in tune with the basic needs of human beings. No intimation has been made that there is a master solution in discharging this task which can claim to represent "absolute" justice. Different stages of historical development, dissimilar social and economic conditions, and perhaps even variations in national characteristics may require diversified types of legal action to cope with the problem. Even in the context of a concrete historical and sociological setting, there are usually a number of workable alternatives for balancing and ranking the various goal values of societal organization.

76. The values of "wellbeing" and "enlightenment" are included in the value system propounded by Lasswell and McDougal. See M. McDUGAL & ASSOC., *STUDIES IN WORLD PUBLIC ORDER* 18 (1960); see note 32 *supra*.

77. Albert Ehrenzweig makes the point that various attitudes toward justice, which can be observed already among children in the nursery, are necessarily irreconcilable with each other, and yet they coexist. Ehrenzweig, *Psychoanalytical Jurisprudence*, 65 COLUM. L. REV. 1331, 1358 (1965). I agree with the general thought expressed in this statement but would formulate it somewhat differently. A synthesis of the various ingredients of justice is not impossible but (like any attempt to produce a *coincidentia oppositorum*) difficult to achieve. There will always be a residue of unresolved tensions and incongruences in trying to reconcile the multifarious and often inconsistent strivings of men to the extent necessary to avoid social disruption.

The relative and contingent elements in the establishment of justice through law do not preclude the possibility that there might exist a set of social prescriptions which would produce optimum results under given conditions. Just as there are better and worse ways of preserving individual health, there are presumably adequate and faulty expedients for maintaining the health of the social body. The experiences accumulated in the last few decades suggest strongly that it is possible to diagnose symptoms of societal sickness and disintegration with some degree of objective validity, although the judgments of the social physicians may vary considerably with respect to particular syndromes of the collective disease. Their judgments as to the most effective way of curing the patient will diverge even more sharply. But this does not mean that their individual prescriptions are all equally meritorious. One test of the most adequate solution might be the one suggested by Henri Bergson: the emergence of a "new social atmosphere, an environment in which life would be more worth living . . . a society such that, if men had once tried it, they would refuse to go back to the old state of things."⁷⁸ Hopefully, philosophical anthropology can contribute significantly to the creation of the "good society."

78. H. BERGSON, *THE TWO SOURCES OF MORALITY AND RELIGION* 64 (1935). With particular reference to the required adjustments between liberty and equality, Bergson added the thought that "the sacrifice of this or that liberty, if it is fully agreed upon by the citizens as a whole, partakes still of liberty; and above all, the liberty which is left may be superior in quality if the reform, tending towards greater equality, has led to a society where men breathe more freely, where greater joy is found in action." *Id.* at 64.