

Voegelin and The End of [Legal] Philosophy

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"Now faith is the substance of things hoped for, the evidence of things not seen."

Introduction

Eric Voegelin taught a course in Jurisprudence at the LSU Law Center for several years while he was a member of the Political Science Faculty of the University. He completed a manuscript on *The Nature of the Law* in 1957. Edited by Robert Anthony Pascal, James Lee Babin and John William Corrington, the manuscript was published, along with several other Voegelin writings, in 1991 as volume 27 of *The Collected Works of Eric Voegelin*. References to this book will be in brackets throughout this paper.

The enterprise of providing the philosophical foundation for natural law is certainly a worthy undertaking. Voegelin's *The Nature of the Law* is such an endeavor, and it deserves close study by any student of the subject and by any person interested in Voegelin's thought. The book is little but weighty, and its value lies in its critique of a century or more of legal positivism and its explicit premises that point the way for a more fully realized development of natural law theory, such as we find in John Finnis's 1980 *Natural Law and Natural Rights*.

With this title I hope to reflect several themes in Voegelin's approach to law and Twentieth century thought. The word "End" signifies the notion of purpose or goal which also equates to Aristotle's belief in "final cause", *telos* or *finis*. We are all familiar with Aristotle's four causes: the material, efficient, formal, and final cause. A failing of the reigning approach in contemporary legal philosophy, positivist, normative jurisprudence was, in Voegelin's opinion, to equate "law" with the process of law making. Using Kelsen's "Pure Theory" as a representative case of normative jurisprudence, Voegelin said: "the lawmaking process acquires the monopoly of the title law." [p 28] In the view which he criticizes, the sole criteria for legal analysis is the process for making law: "whatever power establishes itself effectively in a society is the lawmaking power, and whatever rules it makes are the law." [p 28].

The final end, purpose or cause of a thing is its reason for being. Voegelin's *Nature of Law* is concerned not with mere analysis of law as to form or content but purpose in the life of man. Law's nature is not verbal construction (i.e. command of a sovereign backed by sanction) nor a substantive collection of rules of contract or property. Rather its nature is associated with the philosophy of man's being.

[Legal] I place in brackets to reflect Voegelin's belief that legal philosophy is not distinct from other aspects of philosophy:

The relations among human beings in a society, thus, to a large extent have legal structure. The legal character of social reality, however, is even more pervasive than it appears to be if we

consider nothing more than the specific rules created by members of the society for themselves. [p 23]

He follows this up with his broader reflection that contemporary use of the word law is inadequate to convey a proper concept of law: "the equivocal use of the law in the sense of valid rules made by organs of government and the law that somehow pervades the existence of man in society. What is preserved in this pale equivocation of our everyday language is the profound insight, rarely to be found in contemporary legal theory, *that the law is the substance of order in all realms of being.*" [p 24]

Law's nature is seen in Voegelin's careful choice of words to describe certain aspects of law's elements. Commenting on Plato and Aristotle, he states:

The inquiry into the true order of the polis is the philosopher's principal task. Specific rules are formulated under the aspect that they articulate the true order in society and, if enacted, will secure it. The lawmaking process is studied under the aspect whether its organization will result in rules that will secure the true order. [p 26]

Specific rules do not make the order of society; rather they *articulate* the true order. When enacted they are not the order of society. rather they are a means of *securing* the true order.

The secondary implication of my use of "End" in association with Voegelin's work is to suggest downfall or disintegration, a coming to an end -- a theme that he returns to several times in *The Nature of Law*. In Voegelin's view, legal thought and philosophy were in poor shape in the Western thought of his and our time:

[W]ith the progress of secularism and the disintegration of philosophy in the nineteenth and twentieth centuries, the lawmaking process achieves complete autonomy, *i.e.*, its theorists remove from legal theory the question of substantive order. [p 27]

He speaks of the "state of philosophical disintegration that is manifest in normative jurisprudence." [p 29]. Or again: "While the intention of the rule is not cognitive, the rule nevertheless intends a truth. *That is the point perhaps most difficult to understand in the contemporary state of philosophical disintegration.*" [p 65] Elsewhere Voegelin spoke even more strongly of the times saying that "the insane have succeeded in locking the sane in the asylum . . . the political tentacles of scientific civilization reach into every nook and corner of industrialized society."

Is there not an inconsistency in a philosophy that posits the existence of an order in society that is reflected in law while at the same time decrying the disintegration of that philosophical order? I would argue that it is not. The good conservative can be an optimist. The optimistic conservative has faith in the wondrous nature of the human being even while lamenting the state of the present population and polity of humans.

Voegelinian Themes

Nature

We may begin with a consideration of the word "nature" from the book's title. In ordinary use, as reflected in the *American Heritage Dictionary*, it refers to the "intrinsic character or a person or a thing." The *Oxford English Dictionary* defines nature as "The essential qualities or properties of a thing; the inherent and inseparable combination of properties essentially pertaining to anything and giving it its fundamental character." When we, and Voegelin, refer to the "nature" of the law we are looking to its intrinsic character, its essential qualities or properties. Voegelin identifies the use of "nature" as having the same meaning for Aristotle as "form" on occasion, though he notes an inconsistency in usage by Aristotle. [p 41] At the outset of his book, Voegelin raises the possibility "that perhaps the law does not have a nature. And since the only reason for a thing not to have a nature is its lack of ontological status -- the fact that it is not a self-contained, concrete thing in any realm of being -- there arises the unpleasant question whether the law exists." [p 6] His focus then is on the "ontological status" of "the law," whether law has real existence. Nature also refers to the "order, disposition, and essence of all entities composing the physical universe." If we were to engage in Voegelin's predilection for playful turning of words back upon themselves, we might be tempted to summarize his view by saying: For Voegelin, the nature of law is in the law of nature. But I am assured by those who knew him that Voegelin would not have so characterized his views.

Human nature

Human nature is of considerable importance in Voegelin's schema of law. Where Voegelin is unacceptable to contemporary legal thought is precisely where he is most Aristotelian -- his view of law proceeds from a belief in "human nature". It is that nature of man, his Logos, that is the center of social order, political science and we may assume also, law. The telling verb that he uses reveals much: "unfold" As he discusses Aristotle, he provides his view of law: "The nature of human community unfolds fully in the polis because it provides the social environment for the full unfolding of human nature":

The inquiry into the true order of society, regardless of the question whether the surrounding society is a suitable field for its realization, develops, in the classic philosophers, into an autonomous occupation of the human mind--an enterprise that can be successful only because the true order of society is the order in which man can unfold fully the potentialities of his nature. The nature of man, his Logos, becomes the central theme of a science of social order; the science of human nature, philosophical anthropology, becomes the centerpiece of political science; and the nature of man, as it unfolds in the existence of the philosopher, as well as in the disordered human existence of the surrounding society, becomes the empirical material for the inquiry. [p 52]

The Aristotelian point of view is seen also in his borrowing of the term: the *bios theoretikos*. "Aristotle insisted that a society was ordered truly only when it made possible the *bios theoretikos*." -- "the contemplative life" as he identifies it in the Supplementary Notes that are reprinted with *The Nature of the Law*, [p 74]. Or again as he puts it,

Natural law has theoretical justification insofar as it translates the insights gained by a theory of the nature of man into the language of obligatory purposes. As example may serve the Aristotelian translation: By theoretical insight the *bios theoretikos* is the full unfolding of human potentiality. Translated into a moral rule: man should strive to find this fulfillment in his personal existence. Rule of natural justice: society should be organized in such a manner that the fulfillment of the purpose is possible, at least for those who wish to attain it. [p 81-2].

The end to be attained by law and society is the completion of the unfolding in the mature man: the *spoudaios*. [p 74] Although he expresses it in a conditional form, Voegelin believes "it is the purpose of human existence to bring this [human] nature to its full realization . . ." [p 66].

Such a view of the nature of man is distinctly at odds with a society intensely focused on physical pleasure and contemptuous of the idea that the law or the state has anything to do with the soul. Richard Posner declares in *The Problems of Jurisprudence*: "The law is not interested in the soul or even the mind. It has adopted a severely behaviorist concept of human activity as sufficient to its ends and tractable to its means. It has yet to be shown that law changes people's attitudes toward compliance with social norms, as distinct from altering their incentives." In this view, man is little more than ragged claws, responding to external stimuli; the law is stimulus, using pleasure and pain as incentive. In contrast, Voegelin describes punishment as having a larger, more complete function: "While punishment, for example, certainly has the function of protecting the members of a society against the disorganization of their lives by the disturbing actions of their fellow members, it also has the purpose of restoring the personal order in the soul of the delinquent and, as far as that is possible, of reconstructing him as a person. A utilitarian philosophy of criminal law would obscure the problem that, in the order and disorder of society, the Ought in the ontological sense is at stake and that this Ought has its seat in the person of every single man." [p 64].

Validity

Voegelin uses the term validity in several senses. First is the straightforward positivist sense, validity as signifying duly enacted. A law is valid if it has been enacted or promulgated in conformity with a positive rule, say the Constitution. For example a statute on discharges of substances into water would be valid if it was approved by a majority of both houses of Congress and not vetoed by the President. No Positivist would find fault with this use of validity. He expands upon it by observing that validity comes and goes as statutes are enacted and then repealed. The law is in part a flowing stream of these rules moving in and out of validity; a legal order is an aggregate of valid rules. He introduces the uncertainty over the law's content by recognizing that the law may not be known until it is declared by a judge in a particular case.

However, Voegelin goes beyond Positivism in his use of validity. For Kelsen, the top of the legal hierarchy was the human-norm-beyond-which-there-was-no-norm, which he termed the *grundnorm* or basic norm. For Voegelin, the hierarchy continues to God:

The hierarchy of valid rules has as its top stratum the divine and natural law; under this stratum move the statutes of the prince; then follows customary law insofar as it is not in conflict with the royal statutes; next come the decisions of the magistrates, moving within the law as fixed by

the higher strata; and at the bottom come the legal transactions of the subjects -- their buying and selling, their labor contracts, marriages, wills, and so forth. The hierarchy of lawmaking authorities, in reverse order, begins with the subjects, rises through magistrates and the king, and culminates in God. [p 27]

Voegelin's critique of Positivism, as Positivism was reflected in Kelsen, is that it cuts off the hierarchy before it reaches its pinnacle:

With the constitutional procedures, however, we have reached the top of the hierarchy of rules. There is no constitution above the constitution that would link a series of constitutional aggregates into one legal order in the manner in which the statutory sub-aggregates are linked by the constitution. We have arrived at the border at which the problem of validity no longer can be solved intra-systematically through regress to a procedurally higher aggregate of rules. We are faced with the phenomenon that the validity of the law has its origin in extralegal sources. [p 31]

Voegelin goes on to discuss this in a subsection entitled *The Components of Validity*.

Ontological

The term "ontology" has been put to a variety of tasks in philosophy, principally embracing a concept of being. It has moved from being a synonym of metaphysics to Christian Wolff's essences of beings to Kant's analysis of existence to Heidegger and Quine. Voegelin uses "ontological" in a somewhat special way that suggests to me that he wishes to confirm his belief in the existence of the thing to which "ontological" attaches, as we might speak of the ontological object as opposed to the epistemological object; or perhaps the point at which the Idea is instantiated (we might think for example of Beauty being instantiated in a sculpture). Thus he speaks of "The Ought in the Ontological Sense" [p 42]. By this I think he means the "ontological Ought", the ought that has a genuine existence. And he goes on to state:

The norms, thus, acquired the character of projects for the concrete order of society; and at the core of this order we found the Ought in the ontological sense, the tension in society that requires the elaborate efforts to create and maintain the order and, with the order, the very existence of society.

If now we position ourselves at the ontological center of the tension, we see that the lawmaking process is only one among several types of efforts to project and realize the order of society. [p 49].

Observe that he does not speak of the creation or establishment of order in society but rather the projection and realization of the order of society, as earlier we noted he speaks of law as articulating the true order.

The Ought

With this term, we again find a Voegelin adaptation of a word used in philosophy. He gives it his own special meaning, perhaps. The classic problem of natural law thought is the difficulty of

moving from "ought" to "is". In Part I, *Of Virtue and Vice in General*, of Book III, David Hume makes his well-known distinction between "is" and "ought". At the end of Section I of Part I, Book III, where Hume argues that moral distinctions are not derived from reason, and before moving on to argue that they are also not derived from a moral sense, Hume declares:

I cannot forbear adding to these reasonings an observation, which may, perhaps, be found of some importance. In every system of morality, which I have hitherto met with, I have always remark'd, that the author proceeds for some time in the ordinary way of reasoning, and establishes the being of a God, or makes observations concerning human affairs; when of a sudden I am surpriz'd to find, that instead of the usual copulations of propositions, *is*, and *is not*, I meet with no proposition that is not connected with an *ought*, or an *ought not*. This change is imperceptible; but is, however, of the last consequence. For as this *ought*, or *ought not*, expresses some new relation or affirmation, 'tis necessary that it shou'd be observ'd and explain'd; and at the same time that a reason should be given, for what seems altogether inconceivable, how this new relation can be a deduction from others, which are entirely different from it. But as authors do not commonly use this precaution, I shall presume to recommend it to the readers; and am persuaded, that this small attention wou'd subvert all the vulgar systems of morality, and let us see, that the distinction of vice and virtue is not founded merely on the relations of objects, nor is perceiv'd by reason.

Hume follows Hobbes in the separation of law and morality by sharply differentiating "is" and "ought"; never do the two meet. Both writers display another characteristic of legal positivism by stressing the absolute need for all real things to be found in sense experience. In this they are empiricists. Empirical or scientific knowledge is the only genuine form of knowledge. The claimed existence of a thing beyond sense experience can have no bearing upon what people accept as real. With Bentham we see this attitude most pithily expressed in his famous declaration that natural rights are nonsense, "nonsense on stilts."

Rejecting these Positivists, Voegelin declares the existence of the Ought. This Ought is the order underlying man's existence. It is much like the Natural Law for Aquinas in the *Summa Theologiae*:

Question 91 -- Second Article

Wherefore, since all things subject to Divine providence are ruled and measured by the eternal law, as was stated above (A. 1); it is evident that all things partake somewhat of the eternal law, in so far as, namely, from its being imprinted on them, they derive their respective inclinations to their proper acts and ends. Now among all others, the rational creature is subject to Divine providence in the most excellent way, in so far as it partakes of a share of providence, by being provident both for itself and for others. Wherefore it has a share of the Eternal Reason, whereby it has a natural inclination to its proper act and end: and this participation of the eternal law in the rational creature is called the natural law. Hence the Psalmist after saying (Ps. iv. 6): *Offer up the sacrifice of justice*, as though someone asked what the works of justice are, adds: *Many say, Who showeth us good things?* In answer to which question he says: *The light of Thy countenance, O Lord, is signed upon us*: thus implying that the light of natural reason, whereby we discern what is good and what is evil, which is the function of the natural law, is nothing else than an imprint

on us of the Divine light. It is therefore evident that the *natural law is nothing else than the rational creature's participation of the eternal law.*

Voegelin sounds the same theme in *The Nature of the Law*:

Man has the experience of *participating, through his existence, in an order of being that embraces not only himself, but also God, the world, and society.* This is the experience which can become articulate in the creation of symbols of the pervasive order of being, such as the previously indicated Egyptian *maat*, or Chinese *tao*, or Greek *nomos*. He furthermore experiences the anxiety of the possible fall from this order of being, with the consequence of his annihilation in the partnership of being; and, correspondingly, he experiences an obligation to attune the order of his existence with the order of being. Finally, he experiences the possible fall from, and the attunement with, the order of being as dependent on his action, that is, he experiences the order of his own existence as a problem for his freedom and responsibility. Within the range of society, the realization of the order of being is experienced as the burden of man. When we refer to the *tension* in social order, we envisage this class of experiences. In order to link them more closely with the problem of *normativity* in legal rules, we can speak of them as the Ought in the ontological sense. [pp 43-4]

The Ought, he says, it discloses itself in the experience of tension between empirical and true order.

To me, the central problem of philosophy is whether universals have existence. And here we perhaps get the significance of Voegelin's phrase, "the Ought in the ontological sense", for we can append the statement I have just made with Voegelin's phrase: "the central problem of philosophy is whether universals have existence, in the ontological sense." Let us take the universal "beauty". Does "beauty" have a real existence or is the use of the term "beauty" merely an expression of one's feelings? If I say a painting or a flower is beautiful, am I describing a quality of the painting or am I merely describing my own state of mind, an affection rather than a perception? In the same way, we ask whether just or unjust is actually a quality of an act or event or is the use of the term just or unjust merely a statement of an opinion that is personal or conventional in that it is shared by a number of persons? If right and wrong, just and unjust are merely personal and conventional, then we are free to change our mind, our attitude, about a matter *from* say fear of flying to love of flying. Voegelin would have rejected this.

Whether we think of Voegelin as accepting Plato's *universalia ante rem* (before the thing) or Aristotle's *universalia in rebus* (in things) Voegelin was a Realist, and a central feature of his legal thought was the Reality of the Ought: "the Ought is a reality in the experiences we have outlined." [p 66]

One commentator has observed that *The Nature of the Law* does not take up the subject of ethics, with ethics being concerned with the order of the soul. Perhaps. But I would offer the proposition that this was neither oversight nor neglect on the part of Voegelin. Rather, it perhaps reflects his quarrel with Positivism. The Positivists and most modern legal scholars would demand a sharp demarcation of law and morality or law and ethics, the one binding the other only a matter of conscience. They do this to separate law from not-law. And they do this because they often are

very skeptical about the genuine existence of rules of ethics or morality, indicating instead that expressions of moral principles are merely expressions of personal liking or disliking.

Hobbes perhaps is the figure who first took us down this path:

But whatsoever is the object of any mans Appetite or Desire; that is it, which he for his part calleth *Good*: And the object of his Hate, and Aversion, *Evill*; And of his Contempt, *Vile* and *Inconsiderable*. For these words of Good, Evill, and Contemptible, are ever used with relation to the person that useth them: There being nothing simply and absolutely so; nor any common Rule of Good and Evill, to be taken from the nature of the objects themselves; but from the Person of the man (where there is no Common-wealth;) or, (in a Common-wealth,) from the Person that representeth it; or from an Arbitrator or Judge, whom men disagreeing shall by consent set up, and make his sentence the Rule thereof.

For Hobbes the terms just and unjust only signified what the state had declared just or unjust: "Lawes are the Rules of Just, and Unjust; nothing being reputed Unjust, that is not contrary to some Law." . . . "where there is no Common-wealth, there nothing is Unjust." . . . "before the names of Just, and Unjust can have place, there must be some coercive Power."

We find more recently John Austin saying:

Now, moral obligation is an obligation imposed by opinion, or an obligation imposed by God: that is, moral obligation is anything which we choose to call so, for the precepts of positive morality are infinitely varying, and the will of God, whether indicated by utility or by a moral sense, is equally matter of dispute. This decision of Lord Mansfield, which assumes that the judge is to enforce morality, enables the judge to enforce just whatever he pleases.

To separate law and morality (or ethics) is to separate empirical or positive law (i.e. human law, binding law) from non-law.

Now the further agenda of the Positivists and many modern legal philosophers is not only to separate law and morality into separate spheres for analytical purposes and to determine what is binding and to be applied by judge and jury, but also to say what cannot or should not become law. Once a subject is identified as a matter of morality, it is said to be off-limits to positive law; rather it should be a matter only of conscience.

For Voegelin, human law and morality draw from the same underlying source, the true order in which human potential unfolds and is fulfilled. This is seen in his statement:

[T]he true order of society is the order in which man can unfold fully the potentialities of his nature. The nature of man, his Logos, becomes the central theme of a science of social order; the science of human nature, philosophical anthropology, becomes the centerpiece of political science; and the nature of man, as it unfolds in the existence of the philosopher, as well as in the disordered human existence of the surrounding society, becomes the empirical material for the inquiry. The true order of society is living reality in the well-ordered soul of the philosopher,

brought to sharp consciousness by the philosopher's refusal to succumb to the disorder of his environment. [p 52]

Positivists must still have an organizing principle to provide a basis for law. They have their own self-evident propositions. For Hobbes, it was the keeping of Covenant. For John Stuart Mill and many contemporary law scholars, law is to forbid that which causes harm to others. Few people today have actually read John Stuart Mill. But his perspective holds sway. In *On Liberty* he asserts:

The object of this Essay is to assert one very simple principle, as entitled to govern absolutely the dealings of society with the individual in the way of compulsion and control, whether the means used be physical force in the form of legal penalties, or the moral coercion of public opinion. That principle is, that the sole end for which mankind are warranted, individually or collectively, in interfering with the liberty of action of any of their number, is self-protection. That the only purpose for which power can be rightfully exercised over any member of a civilised community, against his will, is to prevent harm to others. His own good, either physical or moral, is not a sufficient warrant. He cannot rightfully be compelled to do or forbear because it will be better for him to do so, because it will make him happier, because, in the opinions of others, to do so would be wise, or even right. These are good reasons for remonstrating with him, or reasoning with him, or persuading him, or entreating him, but not for compelling him, or visiting him with any evil in case he do otherwise. To justify that, the conduct from which it is desired to deter him must be calculated to produce evil to some one else. The only part of the conduct of any one, for which he is amenable to society, is that which concerns others. In the part which merely concerns himself, his independence is, of right, absolute. Over himself, over his own body and mind, the individual is sovereign.

A natural corollary of Mill's libertarian proposition of individual sovereignty is that society may not prohibit those things that people do together through consent. The basis for all this is the underlying concept that all notions of right and wrong (of "ought"), except as it pertains to harm to others, have existence only in the affections. In *After Virtue*, Alasdair MacIntyre has observed that today "all moral judgments are nothing but expression of preference, expressions of attitudes or feelings." Voegelin's *The Nature of Law* preceded many of the legal developments that reflect this rather widely held view of moral judgments but we may with confidence surmise what his reaction would have been. The editors' introduction observes: "*The Nature of the Law* may be characterized as a reasoned invitation to restore holiness to the legal order."

Conclusion

The profound difference between Voegelin (and many other adherents to the natural law tradition) and the Positivists is the view of the nature of man and his place in nature. The argument over the nature of law is as much an argument over the nature of man. For Voegelin law is part of an order that permits and guides the fulfillment of human potential, both rational and spiritual. For that order to have temporal efficacy, it must work through human instruments, including positive law. The philosopher's special role is in developing the standards from the true order by which the empirical law can be measured. Those of us who teach legal philosophy

may find much to admire in Voegelin's belief that we philosophers are as much lawgivers as those in the legislature or on the bench.

The philosophers develop projects of order that they do not expect to be enacted as valid rules through the lawmaking process of their society. The work is done when the dialogue or treatise is written; the projection of the true order is finished. If conditions should arise historically under which such an order could be enacted by an empirical society, all the better, though neither Plato nor Aristotle expects to see these conditions fulfilled. The philosopher, thus, becomes the lawmaker of the true order in his own right, rivalling the lawmaker of the empirical society with its order of dubious truth. [p 53].

According to Voegelin, Plato and Aristotle were unsuccessful, as their own societies disintegrated around them, even as Voegelin saw society disintegrate around himself. The philosopher is a Promethean figure, the bringer of Order, who finds himself rejected by society and in the end rather solitary: "The true order of society is living reality in the well-ordered soul of the philosopher, brought to sharp consciousness by the philosopher's refusal to succumb to the disorder of his environment." [p 52] One calls to mind another figure engaged in heroic struggle, the melancholy Dane, no doubt reflecting the contemplative frustration of his creator: "What a piece of work is a man! how noble in reason! how infinite in faculties! in form and moving how express and admirable! in action how like an angel! in apprehension how like a god! the beauty of the world, the paragon of animals! And yet to me what is this quintessence of dust?"