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NATURAL LAW AND POSITIVE LAW*

IN American jurisprudence, natural law is both a foundation and a stumbling block. It is a foundation, because it lies at the root of our juristic tradition. It is a stumbling block, because it is rejected by the prevailing philosophy.

The result is a legal system which is actually shaped in large part by a doctrine which in the formal treatment of the subject is vigorously denied. And what is more, this rejection of the doctrine in many cases comes from those who in the administration of our legal system often apply the doctrine with confidence and satisfaction.

The lesson is clear. What the law most needs today is to reexamine its parentage. The philosopher must reexamine it, to find what is truly ultimate in law. The practitioner must reexamine it, so that he will know the meaning of the instrumentalities with which he deals. And by practitioner I mean not only attorney and counsellor, but all those who carry on the affairs of the law, including legislator, judge and executive. All these may draw a lesson from a conversation which once took place between Henry Ford and three laborers. Mr. Ford asked these workers one by one what they were doing. The first one said he was making a dollar an hour. The second said he was laying bricks. The third said he was building a church. Unless the lawyer sees justice as the objective, he is merely working by the hour or laying

*Address delivered before The First Natural Law Institute, College of Law of the University of Notre Dame, December 13, 1947.

bricks. And if he sees that justice, and sees it in the very principle of its being, he will see it in the subject of this Institute, in the much belabored but perennial natural law.

I

The current denial of natural law is one of those strange anachronisms in human thought by which, instead of going forward with a progressively clearer understanding of a doctrine, the course of thought suddenly reverses itself and turns backward toward ancient errors and discredited sophistries. Natural law had pushed its way up from cloudy apprehensions of it among the early Greeks and Stoics to its position in mediaeval thought, whereby it was recognized as the end principle of positive laws, the moral limitation of the ruling power, and the foundation of free government. At that point in history, the prospects were bright. A new era had dawned. It was recognized that the state was entitled to the allegiance of the people, but it was also recognized that the rulers were the servants of the people and ruled with their consent, and that the people possessed rights which were paramount to the will of the ruler. The constitutional mechanism which would define citizenship, restrain tyranny and enfranchise the populace, was yet to be developed, but standing on the mediaeval doctrine of the dignity of man and the nature of society, its growth was clearly prefigured. But then a curious thing happened. The mechanisms of constitution and ballot box went forward; but their doctrinal basis began to disintegrate.

If we look at our own national life, we find these two conflicting forces clearly at work. Natural law had persisted long enough in men's thinking to serve as the explicit foundation of the American republic, both in its political and its juridical aspects. Then the divergence intrudes itself. The practitioners go on, extending the constitutional framework and perpetuating the Anglo-American ideals of reasonableness and natural justice as the test of legislation and deci-

sion; but the philosophers and theorists turn backward and strike with the vigor of rebellion at the traditional basis of our boasted progress.

The habit of viewing laws as ultimately grounded in norms inherent in the nature of man and society gave way to analytical jurisprudence, which viewed laws as pure facts wholly disconnected from morals; to historical jurisprudence, for which the ultimate source of laws is evolving custom; and to positivism of many varieties but all of them united in the concept that under the ever changing stream of fact there is no intelligible abiding substratum and therefore no truth superior to the transient findings of experimental science. And if we wish to look for the nethermost point to which this avalanche of negation has carried us, we can find it in one of the recently published Essays in Honor of Roscoe Pound, wherein the author says that the assertion "that the law-maker should be led by justice and that the courts have to 'administer justice'" is "completely senseless." Moreover, says that author, "There is no justice. Neither is there any objective 'ought' . . . Thus the entire legal ideology—including rights and duties, wrongfulness and lawfulness—goes up in smoke."¹

There is a deep significance in the fact that natural law continues to inspire and integrate our legal system in spite of this defection of the theorists. For this very survival is a fact which to the scientific mind should be suggestive of a hidden reality worthy of inquiry and research.

The evidence of natural law in our system is so widespread as to be undeniable. In the first place, there is implicit evidence of it in all those laws which reflect the *jus gentium*, that is, laws which are so spontaneously expressive of the human conscience that they are characteristic of the legal systems of all civilized countries. Such are the laws against

¹ Vilhelm Lundstedt, *Law and Justice: A Criticism of the Method of Justice in INTERPRETATIONS OF MODERN LEGAL PHILOSOPHIES, ESSAYS IN HONOR OF ROSCOE POUND*, 450, 451 (1947).

murder, theft, treason and all those acts deemed *mala in se* as contrasted with *mala prohibita*. Such laws are but implicit evidence of natural law because, while they reflect natural law, they contain no explicit reference to their natural law foundation. If the foundation be doubted, however, one may ask, why are certain evils considered *mala in se*? If there be no higher law, why is not a statute dealing with murder in the same class as a traffic ordinance or a law governing the endorsement of a negotiable instrument? The answer is that however trenchant the negation of the philosophers the lawmaker persists in considering himself as morally bound in the one case and not in the other.

But the case for natural law in our legal system does not rest alone upon such implicit evidence of it, however cogent that evidence may be. There is explicit evidence of it also.

It is conspicuously evident in equity, which received its foundation from the importation into the Roman law of the *jus gentium* and the Stoic morality as correctives for the omissions and inequities of the *jus civile*. Later, under the influence of Christianity, as Pomeroy says, "the signification of *aequitas* became enlarged, and was made to embrace our modern conceptions of right, duty, justice, and morality."² In England it was likewise in response to the rigidity and incompleteness of legal forms that equity arose, first in the conscience of the Chancellor and next in a system of positive jurisprudence expressly founded upon the eternal verities of right and justice. As a result, says Pomeroy, "the principles of right, justice, and morality, which were originally adopted, and have ever since remained, as the central forces of equity, gave it a necessary and continuous power of orderly expansion, which cannot be lost until these truths themselves are forgotten, and banished from the courts of chancery."³

But perhaps the clearest and most explicit adoption of natural law in our legal system occurs in the constitutional

² POMEROY, *A Treatise on Equity Jurisprudence*, Sec. 8 (5th ed, S. F., 1941).

³ *Op. cit.*, Sec. 59.

guaranties of natural rights. These rights had been proclaimed with classic dignity and precision, in the preamble of the Declaration. The Declaration was echoed in the constitutions of some of the original states, as in that of Virginia which still provides, "That all men are by nature equally free and independent, and have certain inherent rights, of which, when they enter into a state of society, they cannot by any compact deprive or divest their posterity, namely, the enjoyment of life and liberty, with the means of acquiring and possessing property, and pursuing and obtaining happiness and safety."

While the Federal Constitution failed to incorporate these principles in itself as the constitutions of Virginia and other states had done, the same result was achieved in our Federal system by a process which is now historic and which bears eloquent witness to the vitality of natural law in our jurisprudence. This historic process was initiated a century and a half ago in the doctrine of implied limitations of legislative power. A case in point is *Calder v. Bull*, decided by the Supreme Court in 1798, in which Justice Chase said, "I cannot subscribe to the omnipotence of a state Legislature, . . . although its authority should not be expressly restrained by the constitution, . . . An act of the Legislature (for I cannot call it a law) contrary to the great first principles of the social compact, cannot be considered a rightful exercise of legislative authority. . . . The genius, the nature, and the spirit, of our state governments, amount to a prohibition of such acts of legislation; and the general principles of law and reason forbid them."⁴ From this, Justice Iredell dissented, saying that in the absence of a constitutional provision the courts cannot invalidate a law "merely because it is, in their judgment, contrary to the principles of natural justice."⁵

⁴ 3 Dallas 386, 387, 388, 1 L. ed. 648, 649 (1798).

⁵ 3 Dallas 386, 399, 1 L. ed. 648, 654 (1798).

The issue raised by Justices Chase and Iredell demanded a solution, for it went to the core of the Supreme Court's responsibility. That the solution came in the manner in which it did is a sign of that persistence of natural law which defies its critics even to the present day.

The solution came in the due process clause, pursuant to which no person may be deprived "of life, liberty, or property, without due process of law."

But what was "due process"? Was it, as its words imply, a mere procedural safeguard, or did it include substantive rights as well? Coke identified it with the phrase "law of the land" in the thirty-ninth chapter of Magna Charta, a phrase which Justice Johnson said was "intended to secure the individual from the arbitrary exercise of the powers of government, unrestrained by the established principles of private rights and distributive justice."⁶

The signs were unmistakable. An express constitutional clause being needed to satisfy those who were discontent with implied limitations, due process was to supply the need by including substantive rights.

The culmination occurred in the application of the due process clause to state legislation through the Fourteenth Amendment. The question was whether due process, interpreted in the substantive as well as the procedural sense, served to bring under the protecting arms of the Fourteenth Amendment the entire bill of rights which was contained in the first eight amendments. The Supreme Court's answer to that question constituted an explicit judicial affirmation of natural law which is now the settled doctrine of the Court. For in answer to the question, the Court held that not all the enumerated rights were protected by the Fourteenth Amendment but only those which involved those "immutable principles of justice which inhere in the very idea of free govern-

⁶ Bank of Columbia v. Okely, 4 Wheat. 235, 244, 4 L. ed. 559, 561 (1819).

ment,"⁷ those "fundamental principles of liberty and justice which lie at the base of all our civil and political institutions,"⁸ and those immunities "implicit in the concept of ordered liberty."⁹ And moreover, said the Court, this is so "not because those rights are enumerated in the first eight Amendments, but because they are of such a nature that they are included in the conception of due process of law."¹⁰

Thus natural law, excluded from the judicial chamber as an abstraction, reentered the chamber in the concrete garb of the constitution. It was an illustration of the fact, frankly acknowledged by Justice Harlan in a later case, that "the courts have rarely, if ever, felt themselves so restrained by technical rules that they could not find some remedy, consistent with the law, for acts, . . . that violated natural justice."¹¹ It is also an illustration of the realism of the poet Horace, "*Naturam expellas furca, tamen usque recurret*. You may drive out nature with a pitchfork, yet it will always return."¹²

It is to this adherence to natural law under the aegis of due process that we are indebted for the protection by our courts of one after the other of our cherished rights: the

⁷ *Holden v. Hardy*, 169 U. S. 366, 389, 42 L. ed. 780, 790 (1898).

⁸ *Hebert v. Louisiana*, 272 U. S. 312, 316, 71 L. ed. 270, 273 (1926).

⁹ *Palko v. Connecticut*, 302 U. S. 319, 325, 82 L. ed. 288, 292 (1937).

The tests mentioned in the *Palko* and other cases cited were enumerated by Mr. Justice Frankfurter in *Louisiana v. Resweber*, U. S. Supreme Court L. ed. Advance Opinions, Vol. 91 — No. 5, pp. 359, 365 (1947).

In a special concurring opinion in *Adamson v. California*, U. S. Supreme Court L. ed. Advance Opinions, Vol. 91 — No. 17, pp. 1464, 1476 (1947), Mr. Justice Frankfurter discussed the subject again, saying, "In the history of thought 'natural law' has a much longer and much better founded meaning and justification than such subjective selection of the first eight Amendments for incorporation into the Fourteenth. If all that is meant is that due process contains within itself certain minimal standards, which are 'of the very essence of a scheme of ordered liberty,' *Palko v. Connecticut*, 302 U. S. 319, 325, 82 L. ed. 288, 292, 58 S. Ct. 149 (1937), putting upon this Court the duty of applying these standards from time to time, then we have merely arrived at the insight which our predecessors long ago expressed."

¹⁰ *Twining v. New Jersey*, 211 U. S. 78, 99, 53 L. ed. 97, 106 (1908).

¹¹ *Monongahela Bridge Co. v. United States*, 216 U. S. 177, 195, 54 L. ed. 435, 443 (1910).

¹² *EPISTLES*, I, x, 24, quoted by HEINRICH A. ROMMEN, *THE NATURAL LAW*, 267 (St. Louis, B. Herder Book Co., 1947).

inviolability of conscience, the right to express one's convictions, to acquire knowledge, to work at one's chosen calling, to educate one's children, and to those other conditions of freedom and self-realization which, as the Court says, are implicit in natural justice.

This persistence of natural law in the hands of the practical jurists is a sign of its compelling reasonableness, a reasonableness which sets practitioner against theorist even when they are combined in the same person. Nothing else can explain the phenomenon of Justice Holmes who as a philosopher poured his scorn upon natural law, but as a judge felt compelled to decide a case on what he termed "fair play" and "substantial justice";¹³ or the more explicit confession of Judge Dillon who, though accepting the doctrines of analytical and historical jurisprudence from a theoretic standpoint, abjured the doctrines in his practice, saying, "If unblamed I may advert to my own experience, I always felt in the exercise of the judicial office irresistibly drawn to the intrinsic justice of the case, with the inclination, and if possible the determination, to rest the judgment upon the very right of the matter. In the practice of the profession I always felt an abiding confidence that if my case is morally right and just it will succeed, whatever technical difficulties may stand in the way; and the result usually justifies the confidence."¹⁴

Looking therefore at our legal system in the concrete, it may fairly be said that the system possessed in large measure a natural law foundation, and that natural law has continued to inspire and integrate it in conspicuous degree in spite of the most persistent and devastating attack to which a doctrine could possibly be exposed. Has this just happened, or is there an abiding, objective link between man-made laws and those first principles of the practical, human reason to

¹³ *McDonald v. Mabee*, 243 U. S. 90, 91, 92, 61 L. ed. 608, 609, 610 (1917).

¹⁴ *LAW AND JURISPRUDENCE OF ENGLAND AND AMERICA*, 17 (1894), quoted by POUND, *LAW AND MORALS* 36, 37 (1926).

which, with greater or less fidelity and subject to whatever lapses, man ever returns in the practical art of government by law? That it is the latter, analysis will surely show.

II

There are three levels of law. Since it is of the utmost importance that these three levels be carefully distinguished, a uniform terminology is greatly to be desired. I will use the terminology proposed by Professor Mortimer J. Adler, namely, *principles*, *precepts* and *rules*.¹⁵

Of these, the ultimate reality is the *principle*. It is the practical judgment that good must be done and evil avoided. It is not a conclusion drawn from premises by reasoning, but in a sense an intuitive judgment, a self-evident or first principle. Hence it cannot be proved or demonstrated, and by the same token it need not be proved or demonstrated. It is the counterpart in the practical reason of the principle of contradiction in the theoretic reason. It is the starting point, the foundation, of the science of right and wrong.

At the outset, it is important to observe a basic distinction. The principle *Seek the good* directs man to his end, which is happiness, or the possession of what is good for man as man. But man's nature being complex, his happiness involves a multiplicity of goods. Therefore, the first principle may be expressed in two ways. It may be expressed simply *Seek the good*, to refer to the whole of goods, or it may be broken down into several principles, to refer to the various goods. Some of these goods relate to man's private life. With these we are not here concerned. The good with which we are here concerned is the common good, that is, the good of the whole community, which to the individual is but a partial good because man, though a social being, is not simply a social being,—a distinction which, by the way, separates a free society from a totalitarian one.

¹⁵ *A Question About Law*, in *ESSAYS IN THOMISM* 207, 212 (1942).

For our subject matter, therefore, the principle is *Seek the common good*. This is the natural law, strictly speaking, or if by law we mean positive laws, perhaps we may better say this is the principle of laws.¹⁶ But this principle, likewise, is capable of being broken down by analysis into the three propositions expressed by Ulpian in the third century, *do good to others, avoid injuring others, and render to each his own*. The first two of these are the principles of general justice, that is, of justice to the community, and therefore they are also called legal or social justice. The third—*render to each his own*—is the principle of special justice, that is, of justice to the individual, which from the viewpoint of the state is called distributive justice and from the viewpoint of another individual is called commutative justice.

The next level of law, which we will call *precepts*, is made up of conclusions which are immediately and necessarily drawn from the principles and which constitute the means for the attainment of the social good which is expressed by the principles. They are sometimes called the secondary principles of the natural law. They consist generally of the *jus gentium* which I have mentioned, propositions which characterize the laws of all societies because they are necessarily deduced from the principles. It is true that these precepts are a part of the natural law, in the sense that they are not of man's making but are conclusions from the principles, but on the other hand they differ from natural law strictly speaking in the sense that they are the result of a process of reasoning, as contrasted with the indemonstrable and ultimate character of the principles. Both principles and precepts are incapable by themselves of governing action,—for different reasons, however: in the case of principles, because they specify only the end, and action depends on specification of means; in the case of precepts, because they specify

¹⁶ This proposal is made by Professor Adler in *A Question About Law*, above cited. I think that the proposal constitutes an important contribution to clarity on this subject, because of the confusion which has arisen from use of the term *law* for both the *principle* and the *rule*.

the means only generally and without reference to the contingent circumstances which are always involved in action. The inadequacy of the precept in a specific case may be illustrated by the precept against killing. Obviously the precept aims at wrongful killing, but it fails to define the circumstances which make killing wrongful as against those which make it justifiable, and it also fails to specify the punishment. What the precept needs, to serve as a guide of action, is to be embodied in a more specific mold, that is, to be determined by receiving that particularization necessary to bring it to bear upon the contingent facts of life as they exist in the concrete. It is akin to the process by which a craftsman, in order to build a house, determines the general form of a house to a particular shape. The house cannot come into concrete existence without the general form. The general form cannot result in a house without the reduction to a particular shape.

Out of this process of determination of precepts arises the law in the lawyer's sense, the positive *rules* which govern specific cases. To this third level of law can be applied St. Thomas Aquinas's definition of law as "an ordinance of reason for the common good, made by him who has the care of the community, and promulgated."¹⁷

When we enter this third level, we enter a new world, which is in sharp contrast to that of the other two levels. For whereas at the first two levels the reason is necessarily governed by objective "oughtness", either in the sense of first principles or of conclusions necessarily drawn therefrom, now, at the third level, all is tentative and uncertain, contingent and changeable. The reason is that rules involve facts, from which two consequences flow. The first is that since facts are infinite in number, they cannot all be comprehended by human reason. Therefore any rule which is based upon them must be based upon the generality of experience

¹⁷ SUMMA THEOLOGICA, I-II, q. 90, a. 4.

and will be defective to the extent that it fails to provide for the unknown or the unusual case. The second is that facts change, and therefore laws must change, to preserve a reasonable relation to facts.

In comparison, therefore, with the principles and precepts of natural law, which are necessary propositions and bind reason in their grasp, the rules of positive law are relative, contingent and changeable. The tax statute, for example, or the law governing the relations between capital and labor, or the law which will govern the use of atomic power, represent efforts by the lawmaker to bring the precepts of justice to bear upon facts of such inexhaustible complexity and profound changeability that the justice of those laws can never be more than approximate and tentative. Therefore, far from being final or conclusive, they need amendment and revision to keep pace with the findings of the social sciences and with the evolution of the social order to which they apply.

It may be of passing interest to note that this doctrine of the essential relativity and contingency of positive law, which sounds so refreshingly modern in an age dominated by science, was actually laid down by a mediaeval monk writing in a monastic cell. In fact, so impressed was this monk, St. Thomas, by the relativity of laws that he said that "suitably to introduce justice into business and personal relations is more laborious and difficult to understand than the remedies in which consist the whole art of medicine,"¹⁸ a confession which, in view of the state of medicine in St. Thomas's day, was a confession indeed!

This should be the answer to criticisms based upon that caricature of natural law by which men endeavored in the last century to deduce a whole legal system from the principles of natural law. Positive rules are not deductions from natural law; they are determinations of it. That is, the

¹⁸ ETHICORUM, V, 15, quoted by ROMMEN, *op. cit.*, 12 p. 252.

area of the functioning of the lawmaker is coextensive with the degree by which the precept is undetermined, namely, by which it needs determination by reduction to a particular form. And this particularization involves a choice among matters which are in themselves indifferent, because it is only to the extent that these matters *are* indifferent that the precept remains undetermined. Therefore it follows that positive laws or rules are the products of acts of the will, in that the will specifies the particular determination to be made from among alternative indifferent ones, although of course the formulation of the alternatives is made by the intellect. In other words, lawmaking is an art. It is a work of prudence. From this it is also evident that laws are made, not discovered, except in the natural law principles in which they are ultimately grounded.

This should also serve to answer the criticism of the natural law as being a glittering generality, incapable of governing the particular case. The natural law is not designed to govern the particular case; but, as Pollock said, neither are the general principles of any science.¹⁹ A science is made up of principles and applications. Natural law is the principle of laws. Laws are the applications of that principle in the government of human conduct. Without the laws, the principle is sterile. But without the principle, the laws would be irresponsible and anarchic.

Finally, what has been said should undermine the charge that natural law involves a fixity which is an obstacle to progress. Natural law itself is timeless, in that man is eternally related to the common good and to his neighbor by the bonds of justice. Law involves constancy and change. The constancy is in the principle, which lies behind the facts; the change is in the rule, which includes the facts. Progress in law can come from two directions. It can come from

¹⁹ Review of BROWN, *INTERNATIONAL SOCIETY: ITS NATURE AND INTERESTS*, XXXIX *Law Quar. Rev.* (1923), quoted by CHARLES GROVE HAINES, *THE REVIVAL OF NATURAL LAW CONCEPTS* 330 (1930).

those changes in rules which are necessitated by greater knowledge of circumstances or by change in circumstances. It can also come from an increased awareness of the natural law itself, as it has in the abolition of slavery, the emancipation of women and the recognition of the common good as the end of government, and let us hope, as it will some day, in the abolition of racial discrimination and war.

III

Natural law has survived because men naturally think in terms of it. The legal realists tried to exclude values from laws, but in vain. The values which they thrust out through one door reentered through another. And any effort to place those values at any point short of the ultimate principles of the practical human reason is similarly futile. There is no choice between these principles and some other source of values. The only choice is between values and an effort to remake man without values, the consequences of which we have lately witnessed. These consequences are not happy ones, and they are radically alien to the tradition by which we live. Moreover, their appearance in the twentieth century constitutes a warning that however rugged is the force of natural law in human thinking, there is no guaranty, even in a civilization in which that doctrine has been the major thread for a millenium and a half, that that thread may not be temporarily lost, with results which threaten the extinction of justice and the death of that civilization. Truth will rise again, though it be crushed to earth. But it *can* be crushed to earth, and at this moment it is crushed to earth in the larger portion of the globe.

We who retain the truth in our practice, toy with an alien philosophy at our peril. As a man thinks, so is he, or so he will be. Even now the signs are not wanting. A moral science has discovered a divine power in the atom, which for lack of values has already been used experimentally on human beings and now challenges not only constitutional guar-

anties but life itself. The family, the unit of society, is a vanishing institution. Education is on a starvation diet, deprived of the fundamental orientations of philosophy and the things of the spirit. Thus we in the democracies, on whom has fallen the burden of world leadership in a critical hour, are ourselves "disregarding the omens and disdaining the stars."²⁰

If the legal philosophers persist in denying our birthright, salvation must lie with the practitioners, whose profession Dean Wigmore called a "priesthood of justice." In order to discharge the duties of that priesthood, the legal profession must recapture its standing as a learned profession. And mere knowledge of facts is not learning, even though those facts be laws. A higher intellectual dedication remains, a dedication to those principles which give to laws their meaning, their purpose and their ultimate claim to the allegiance of men.

If legal education takes its part in this high task, and if the practitioner rises to the responsibility thus presented to him, the day may yet be saved, and the struggle for law and justice which has been the glory of Western civilization may be prolonged to avert that crisis which now threatens to dim its light forever.

Harold R. McKinnon

²⁰ G. K. Chesterton.