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ONE "REALIST'S" VIEW OF NATURAL LAW FOR JUDGES

Even if sometimes bewildered by technical detail, plagued by woodenness of administration, or outraged by cynical lawyer's trading on the fact that a given matter turns "not on justice, but on law," no man can wrestle long with the things of law without becoming aware that under the very things which sometimes bewilder, plague or outrage him there pulses an urge for right, or decency, or justice: a drive toward an ideal attribute which men may well conceive as a proper and indeed the proper ultimate objective of all law and of all legal institutions. The concept of Natural Law seems to me an expression of this urge: an expression informed by the urge, and directed to its greater realization; yet an expression only partially effective, because baffled in part as it moves toward realization, baffled by the very legal technique which its objective is to criticize and remedy.

In saying this I am conscious of departing from one solid tradition in regard to the use of the term. "Natural Law" has been used as the designation of a body of principle for the right ordering of any human society; principle which for that reason is so broad as to require perplexing labor to give it any application concrete enough to give service in practical legal work. To me principle as broad as that appears to be not a lawyer's Natural Law, nor Natural Law in a lawyer's sense. A lawyer, or indeed a jurist, has as one major function the dealing with detailed principle and rule applicable to a given going society, in terms accurate enough to let any relevant particular persons or groups know where they stand. A lawyer's Natural Law is an effort to bring the philosopher's Natural Law to bear in lawyerlike actual regulation of the multiple specific problems of human conflict. There is even another tradition in regard to the use of the term, Natural Law: a tradition of which some of Grotius'
writings and some of Mansfield's decisions may remind; a tradition in which Natural Law is conceived as a body of applicable rules. I have no desire to choose between the two traditions, which are indeed wholly consonant with each other. I do suggest, however that Natural Law in the philosopher's sense bears on the work of the normal legal scholar who is concerned with Natural Law as a keystone and as a touchstone for his own labors, while it leaves those actual labors still to be done. The labors themselves must be concerned in good part with the formulation, detail by detail, of apposite rules, for the particular legal scholar's own society — rules which are consistent with, and perhaps crowned by, the philosopher's Natural Law. But few of those rules will be dictated by the philosopher's Natural Law. Their purposes may often be, but rarely if ever their form. Whereas matters of legal form are for the lawyer matters of his very substance.

I shall speak of such legal scholar, in this aspect of his distinctively legal work, as a Natural Lawyer; and it is his rules for his society which this paper is dealing with under the designation Natural Law.

In one important aspect it is convenient to conceive Law as made up of rules and normative concepts; broad rules (commonly spoken of as "principles") and more precise ones (commonly spoken of as "rules"); ideal terms of dynamic normative character, both relatively precise ("concepts" — if this is what Pound, say, means by "concepts") and relatively vague ("standards"). Insofar, Law is conceived as something which can and does envisage its own occasional disregard by layman or by lawman, and which can and does nonetheless hold, and hold valid. The breach of duty produces the enforcement, the error produces the reversal. The formulated rules, and those semi-formulated rules which are felt rather than stated, remain as guides to conduct initially, and as guides for the correction or rebuke of aberrant conduct which occurs. They remain also as material to be subjected to critique in the light of the objectives of all law, and,
one hopes, to be slowly themselves corrected and readjusted in the direction of more adequately reflecting justice.

It is at this point, as I see it, that the lawyer’s Natural Law enters the picture. His Natural Law bears a relation to positive law (positive law viewed as a body of actually prevailing rules and concepts) which is curiously similar to the relation of such positive law to actually prevailing human behavior. Discrepancies in positive law do not affect the validity or virtue of the Natural Law; it continues, despite all such discrepancy; it affords a concrete guide to the making of proper positive law, and a concrete guide for the correction of positive law which has gotten itself badly and aberrantly made.

This does not exhaust the similarity. There is another phase, and one which is crucial both to the effectiveness and to the limits of utility of the lawyer’s Natural Law conception. That phase is that Natural Law meets positive law (as positive law meets particular behavior) within the case-law judge’s realm of thinking and discourse. The lawyer’s or jurist’s Natural Law is properly formulated in rules, in normative propositions attaching prescribed legal consequences to described types of possible fact. They claim, these rules of Natural Law, to be right rules, true rules, the right and true rules, the only right and true rules, the only right and true rules of law. At every step in the judging process they sit at the judge’s side, and counsel steadily that all leeway properly entrusted to case-law judges be utilized to correct any incorrect positive rule-formulation so that it may more closely fit the correct rule-formulation: It is the aim and function of such Natural Law to be thus drawn upon continually as a source of positive law; and this ought to hold no less as to the reading (“interpretation,” “construction,” “application”) or development of statute law than it does in regard to the continuing reformulation of case-law rule and principle.
This same characteristic accounts for what seems to me an inherent limitation upon such Natural Law. Conceived as Law, it must undertake the ordering of a society. Conceived as a guide to positive law, it must deal with the ordering of a society not too greatly dissimilar from the society whose positive law it is to guide. Such a society, as given by history, is always a society which has had to compromise with much which is plain injustice, if justice be viewed as at all determined by the good, as distinct from the necessary. Views will differ about where such injustice is found; but views can hardly differ about the presence of injustice, and of injustice compromised with. And natural lawyers have, it seems to me, whenever they have dealt with a given social structure, found themselves with some regularity doing similar compromise. They have allowed themselves indeed materially greater leeway in working toward their view of justice, than have purely "positive" lawyers; but from compromising they have not escaped.

As indicated, this seems to me altogether proper. Guidance for a particular society must plant its feet in that society. And guidance for a positive legal scheme must rub elbows with that scheme, or grow chimerical.

The above views on Natural Law seem to lead to a number of conclusions which will doubtless be subject to even sharper challenge than the views themselves. The first is that most of a jurist's or lawyer's Natural Law will in a diversified world fail of its very function if its content be sought in formulations so broad as to apply to too many legal times, systems and societies at once. Its very virtue lies in concretization so great as to invite its infiltration into a particular given body of positive law — its infiltration in terms not only of large guidance, but of detailed rule. That other type of "natural law" study to which Wigmore's The Pledge Idea is a monument — the search for inherent coincidence at all times of certain conditions with certain types of legal institution, or of inherent sequences in all places in the devel-
opment of certain types of legal institution — that is a study looking for "natural law" in the sense of sociological sequence of effect upon cause. It sheds lights on the right only insofar as it sheds light upon the necessary, and again only insofar as the necessary conditions the right. Natural Law in the more proper sense has Natural character in that different sense in which Natural means "conforming to ideal essence."

The second conclusion is that Natural Law has a peculiarly fertile field wherever the precepts and concepts of positive law are malleable, are not caught into unchangeable authoritative words, and are subjected by the going tradition itself to constant reexamination and reformulation. It is thus peculiarly at home, it is indeed peculiarly needed, in a case-law system; for a case-law system places responsibility for day to day reformulation of rule and principle upon the bench. In a case-law system the verbal garb of rules is not fixed, and rephrasing to constantly and more closely approach a righter phrasing is not only proper, but is a bounden duty of scholar and of judge.

In such a system the Natural Law of a lawyer is, again, peculiarly at home, and is peculiarly needed, at a period when stress of change and circumstance in the surrounding society is forcing upon the particular body of case-law not only a fuller utilization, but a fuller conscious utilization, of that flexibility which is inherent in any case-law system. Reformulation for the future, but upon the past, has been the pride of our case-law through the centuries; and the extra touch of emphasis upon the future which was the life of American case-law a century ago has for two decades been with us again. No wonder, then, that we find Natural Law in vigorous revival here today.

The third conclusion is that it should occasion mild wonderment to find any Natural Law man and any so-called realist engaged in pegging brickbats at each other. Each sees the positive rules and concepts of here and now as present
and potent. Each regards them as requiring reexamination in terms of their effective going value. Each sees one major guide to their evaluation in the service which they prove on examination either to render or not to render to the society which brought them forth. Each labors for the utilization of the greater leeways afforded by legislation, and the lesser leeways afforded by that case-law system which is built out of the rulings of a nation, to produce a finer and more effective set of guides for conduct and for judging. And it is difficult for me to conceive of the ultimate legal ideals of any of the writers who have been called realists in terms which do not resemble amazingly the type and even the content of the principles of a philosopher's Natural Law.

Finally, it is my belief that the working methods propounded, and followed in actual work, by writers who profess various jurisprudential faiths which have come into labels, and labels which seem to have become rather more combative than descriptive — it is my belief that the working methods of these differently labelled writers form an interesting and highly useful complement to one another. At any rate, this "realist" welcomes the modern Natural Law movement — including those parts of it which he doubtless does not yet understand. Nor does he feel at all backward in urging upon workers in that movement that the so-called realists have been getting the rust off quite a number of ancient and rather admirable legal tools, which any worker in law would do well to look over and even install over his own work-bench. Such a distinction as that between Philosopher's and Lawyer's Natural Law, for example: it is so old, so obvious, so useful — and in these latter days so rusted in neglect.

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