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THE FALSE NATURAL LAW: PROFESSOR GOBLE'S STRAW MAN

TO ALL WHO FOLLOW the trends here and abroad in legal philosophy, it has become apparent that the tide which has run so strongly against natural law theory for many decades, has now begun to turn. As the fatal emptiness in the heart of positivism becomes more exposed with each fresh assault upon freedom by evil ideologies and with every new example of antisocial individualism, the natural law position wins more attention and regains more of its ancient prestige.¹ For the natural law position, in the classical and Scholastic sense, is gradually revealing itself for what it is—as a strong central defense point between two extremes, seeking at once to secure for us proper individual freedoms and to impose upon us proper social duties.²

Significant in this turn of the tide is the article of George W. Goble entitled "Nature, Man and Law: The True Natural Law" (A.B.A.J., May 1955). Here, in the reflection of one whose roots are in the watery sands of Holmesian skepticism but whose gropings are towards a deeper metaphysical foundation for law, is a perfect example of the reversing trend in legal philosophy. "Natural law," it now appears, is no longer a term of opprobrium signifying an obsolete mode of thought:—the target has become a "false classical natural law" in contrast to a "true natural law." Holmes is no longer defended as the champion debunker of all ultimate values: rather he is extolled as the idealist and man of faith who is too great to be strait-jacketed in any closed system of absolutes. Religious purposes and the concept of the Will of God are no longer excluded as valid sources of law—it is orthodoxy and authority, as such, which are excluded. Most important, the underlying issue has shifted from the question, "Does natural law exist?" to the deeper question, "Who is to tell us what it is?"

All this represents a real change in the current of jurisprudential opinion. And it is a change for the better.

Professor Goble's thesis runs something like this. Our knowledge of the laws governing the physical universe is tentative, groping, and tainted with the subjectivism of the observer. Certainty and absolutes concerning them are illusory. This is the more true with respect to the laws governing human nature where there is involved the power of abstract thought, free will, and the question of what *ought* to be. The laws governing the conduct of man are not certain, fixed

1. See for example LIPPMANN, *THE PUBLIC PHILOSOPHY* (1955) (the natural law as the answer to the irresponsibility of self-government and excessive freedom); the series of articles on Holmes' philosophy in the A.B.A.J. (the natural law vs. the totalitarian potentialities of some of Holmes' statements; the sympathetic consideration of natural law by such men as Professor Fuller (Harvard Law School) and Professor Northrop (Yale Law School); and the frequent symposiums and institutes on natural law (for example in 13 *OHIO ST. L. J.* (1952) and at Notre Dame). See generally FRIEDMANN, *LEGAL THEORY* (1949), c. 10.

2. The writer develops this more fully in *What Does Natural Law Jurisprudence Offer?*, 4 *CATHOLIC U. L. REV.* (1954) and in *Natural Law Jurisprudence and the Cleavage of Our Time*, 39 *Geo. L. J.* 365 (1951). But the restatement of natural law that is developing will be far more than a rehash of the past: it will be a natural law deepened and enriched by its resistance to the onslaught of positivism.

and universal but rather the constantly revised product of a long evolution wherein experience demonstrates to man's consciousness what is good and what is bad. Consequently the classical natural law theory which asserts that there exists for all eternity an ideal body of perfect and complete rules, demonstrated by reason or revelation, valid for all places and all men—is clearly untenable. There is no way of infallibly determining such supposedly ideal laws since men disagree; and all that such laws really represent is the articulation, in the language of absolutes, of the special preferences and customs of some particular person or group. In effect these "natural laws" are merely arbitrary orthodoxies which lead to the suppression of freedom and ultimately to inquisitions, gas chambers, salt mines, the protection of vested interests, segregation, child labor and the like. The only true natural law is the law of the endless diversity in human tastes and capacities. Under this "natural law," we should humbly tolerate, and even encourage, human diversity and scrupulously avoid imposing any fixed pattern on society. Out of the consequent strife and competition will grow truth, peace, civilization, the master plan of God and a "mystic spiritual tone that gives meaning to the whole." We are progressing gradually to truth and to right by the evolutionary process of accumulating wisdom on the basis of our diverse experiences as to what is true, good, useful and needful. In the long run, the "good" rule, like the truth, will be known by its persuasiveness to mankind as a whole.

To a supporter of natural law theory, understood in the traditional sense, there are many questionable aspects of this interesting thesis. We may lay aside the totally inadequate and unfair description of "classical natural law theory."³ We may also pass over the illogical argument that uncertainty with respect to the laws of physical causation is tantamount to uncertainty with respect to the laws in the realm of purpose and value.⁴ We may even overlook the fact that all of the Professor's major examples of the horrible tyrannies which allegedly result from belief in absolute truths involved, not natural law absolutes as he seems to imply, but values which had nonnatural law origins, i.e., Communism, Nazism, and various revealed religions.

To be sure, these defects in Professor Goble's argument are real and notable. But what arrests one's attention even more is the capacity of the Professor to face in all directions at once. Like St. Paul, he is all things to all people. One wonders that so many seemingly incompatible things can be held together in one philosophy. How can we be so uncertain of our ends yet so certain of our progress? How can absolute truth be so illusory yet the existence of God and a "master plan" so believable? How can all values be relative to the individual and

3. Professor Goble in his one-paragraph summary, gives no idea of the richness, subtlety, and depth of the classical tradition, stemming from Plato and Aristotle and coming on down through the Stoics, Cicero, Augustine, Aquinas, Bracton, Coke, Suarez, Grotius, and dozens of others. One would think these thinkers never grasped the difficulties or offered proof, but simply built up an artificial code out of air. See CAIRNS, *LEGAL PHILOSOPHY FROM PLATO TO HEGEL* (1949) (chapters on Plato, Aristotle, Cicero and Aquinas). Pound is no source for a discriminating approach to natural law.

4. As if it is as hard to know when a man is good as it is to know who or what made him. The distinction between efficient and final causes (or between causality and volition) and the different methods of approaching them are so well known in legal philosophy that Professor Gobel's failure to note them is remarkable. See IHERING, *DER ZWECCK IM RECHT* (1877).

still there ensues an accumulated general wisdom of good? Again, by what alchemy is the allowance of unrestrained diversity of human activity to result in peace and civilization? And how is this doctrinaire tolerance to be reconciled with a forceful rejection of Communist slavery, Nazi butchery, or religious bigotry?

Supposing these to be answered, one wonders further why it is that the "good, the useful and the needful" of Professor Goble are to be known by their persuasiveness to the experienced mind of man, yet the "good" of the classical natural law cannot be discovered by "reason." And how, having undermined any possible natural law structure by showing that all absolutes are illusory, is the Professor able to limit the ensuing collapse to what he calls the "classical" natural law theory? By what method does he manage to narrow down his attack to a "classical" type of natural law and avoid destroying those natural law theories which make absolutes of freedom,⁵ of human dignity, and of the simple virtues and decencies commonly recognized in the ethical thought of Judaism, Christianity, Islamism, Buddhism, and Confucianism?⁶

One may well be puzzled that all these things can stand together in one philosophical vision. But all comes clear when we inspect the bases of the cohesion of his thought. At heart the Professor sees that most human judgments are of a personal and tentative nature and that as between men of different tastes, there is no known authoritative principle of selection among them; so that any authoritarian requirements of conformity are alien to the natural freedom, growth and variety of human desires. At the same time he discerns dimly, amid the twists and turns of history and through the relativity of tastes, a gradual betterment of the world and the formation of a general consensus of what is good and true.

On the first score, it is clear to him that the classical natural law system which in his view merely freezes transitory and special tastes into the social structure is evil; whereas the natural law theory of inalienable natural rights is no problem at all, being on the side of freedom and diversity.

On the second score, the Professor sees that this relativity of values is limited by his very ideas of the *good* and of the *true*. Law, says the Professor, is what experience teaches mankind to be "good, useful and needful"; and "truth" is a supreme good toward which we struggle. These are perennial goals transcending our tentative experiments and conclusions in search of them. In the light of these ideas, the Professor is able to perceive through all the wanton happenings of history, the residual fact of a general human progress in gaining wisdom and building a better world.

In other words, while he repudiates the absolute standards of classical natural law as too restrictive of liberty, he adopts sufficiently broad absolute standards of his own to permit him to measure a forward movement of mankind towards

5. For example the Jeffersonian variety expressed in the *Declaration of Independence*. The doctrine of inalienable natural rights has had an army of supporters. See 11 ENCYC. SOC. SCIENCES, *Natural Rights*; GIERKE, *POLITICAL THEORIES OF THE MIDDLE AGE* 81-82 (Maitland transl.); BLACKSTONE, *COMMENTARIES* 123-125.

6. For example the injunctions to honesty and kindness; the prohibitions of such common torts and crimes as trespass, assault, murder, stealing, and rape; and the rule against breaking contracts. Are these not still valid absolutes, granted problems of definition and hair-line cases?

them while still allowing for the lack of principles of order among individual values.

By this means, the Professor has extricated himself from the dilemma of a goalless progress: man has the unparticularized goals whose essence are truth and goodness: the path to them may be tortuous but it is at least onward. He is also enabled to conceive a God, a master plan, and an accumulated wisdom, while still holding to the uncertainty and relativity of our knowledge: there is an ultimate truth and a God; it is our knowing that is subjective and weak, not the thing to be known. Moreover, he is released from the consequences of unrestrained variety and an unlimited tolerance: variety must be within the ambit of the good and the true, and tolerance must not be of the evil and the false. Finally he has justified himself in assigning to intelligence and experience the role of determining what is good and true, while denying the classical natural law assignment of this same role to the light of reason. The classical theory attempted, in his eyes, to fix immutably and universally the detailed conclusions of reason—but since these were supposedly perfect, complete and beyond revision, they could only retard human progress in contrast to his open-ended system which allows for gradual correction and discovery.

There is a double blind spot in the Professor's vision, which prevents him from seeing the inner contradictions of his thesis. He is blind to what the traditional natural law theory is. And he is blind to his own metaphysics. By reason of these blind spots, he fails to perceive that he has adopted the natural law benefits without sacrificing inconsistent nonnatural law features. In order to retain his ideals, progress, and God, what the Professor has done is to distinguish in his mind between our judgments of particular goods and truths (which are changeable and relative in value) and the ideas of goodness and truth (which have a constant and universal value and validity.) But he fails to see that insofar as he has thereby solved his own problem of the relativity of values, he has simply backed his way onto the ground of classical metaphysics and psychology upon which was built the very natural law theory which he attacks.

According to that metaphysics and psychology, there exist such transcendental attributes as the true and the good. "Good" is defined as that being which perfects and completes a thing in the line of its own particular essence; it is that which answers to a given character; it is what every living thing desires for itself because of its suitability to its natural inclination; in sum, it is what the Professor calls the good, the useful, and the needful. The good for man is what fits his natural inclination. And this inclination is precisely toward goodness as such, with freedom to select particular goods, like life, friends, truth and God, that appear to lead to that general end. Further, man judges whether a particular thing partakes of this general goodness by the power of the proposition to persuade him of its cogency; by his mental experience of its reasonableness; by the light of his reason.

Thus the Professor's false conception of traditional natural law theory has obscured from him the basis of his thought. He has thereby deprived himself of the benefit of centuries of systematic development and philosophic experience with the idea of goodness. Nevertheless, what he favors still represents, in its

essence, the dominant idea of natural law theory that comes down from Plato and Aristotle through Cicero, Augustine, and Aquinas to the Neo-Scholastics of today. According to that theory,⁷ natural law is simply the system and order of goodness as knowable to our reason; it is the logical extension and application of the philosophic idea of good into the realm of law. Having as its prime precept the rule that good should be sought and evil avoided, and as its end the common good, it develops a social and legal order, binding man to seek goodness in general, but leaving him free to choose among particular goods that fall within the ambit of the general end. Its influence on the positive law of the State is limited to the influence that a general directive has upon particular applications and the influence that a general principle has in calling for a logical corollary.

The Professor may try to turn back from this unwitting consequence of his philosophical progress by reverting to the doctrine of the uncertainty of all knowledge and all values. But he must know that he cannot have it both ways. Either he has a standard to measure the true and the good; or he does not. He cannot have a measuring rod that is not a measuring rod. It would be convenient to say as against the skeptics that there is an ideal truth and an ideal good which serve as the basis for measuring progress towards them; and as against the natural law thinkers that there is *no* such ideal to serve as a basis of measurement. Reflection will show that the appearance of having achieved such a non-ruling ruler is illusory. All that has really happened is that he has been taken in by his own subtle disguise of the choice that he has made.

Brought to this point, the crux of the issue which such thinkers as Professor Goble must face is whether or not the idea of "the good" has any definite meaning. Is "the good" a completely equivocal and essentially empty word to be applied as a subjective tag to our separate and variable personal judgments? Or is it a definable ideal with an objective essence which remains ever the same under varying applications?

If the former is the case, then Professor Goble has no right, in logic, to talk about such things as progress, master plans, ultimate truth, grand strategy, the City of God, building toward a higher destiny, and the like. We are simply in a sea of relative and unstable subjective values with no logical basis of preferring one value to another, no principle of hierarchy or permanent validity among goods.

On the other hand, if the latter is true—if "good" has some definite though inclusive content—Professor Goble has no right in logic to attack the classical natural law concept of the good.

Granted his courage to face the alternatives, which of the two will the Professor choose? It is submitted that he must choose the latter, if he is to retain his progress, his ideals, his hope, his God. And if that is so, then he cannot attack the very classical natural law which he has thereby adopted. What he *can* attack is a *false* idea of classical natural law. He can continue to attack a natural law theory that purports to offer a detailed code, discoverable by reason, that is to say, a perfect closed, unchangeable body of particular rules good for

7. For a general history and exposition of the natural law theory, see ROMMEN, *THE NATURAL LAW* (1947).

all times, places, and persons. He can attack, as he does, any natural law theory which shields tyranny, vested interests, slavery, segregation, and the like. He can attack the warped nineteenth century natural law which put too much emphasis on natural liberty and property rights and too little emphasis on natural duty and social responsibility. He could also, if he would, legitimately attack a natural law which asserts that the clergy of a church or the political elite of some society are its authoritative spokesmen.

All this is to say Professor Goble can attack faulty applications of natural law theory based upon bad internal logic or upon errors of fact. And these attacks would be good because, when he finishes, *he will have destroyed a straw man*. He will have demolished a false conception of the traditional theory, not the traditional theory itself.

After all, the traditional theory does not attempt to set up a detailed code good for all times, persons, and places. On the contrary, it lays down certain broad general directives which remain the same while the detailed applications vary as means to a fixed end may vary under the impact of changed circumstances and greater knowledge. There is as large a place in this system for trial and error, experiment and gradual discovery of the right rule for particular cases as ever there may be in Professor Goble's own program. This is made abundantly clear in the Scholastic scheme.⁸

Nor does the classical and Scholastic natural law theory claim to be rightfully interpreted only by some infallible or select elite. On the contrary it claims to be known precisely by the light of our intellect, i.e., by the intellectual persuasiveness, the rationality, of the true and the good that the Professor extols.⁹

Nor again can it be said that the traditional theory imposes too restrictive a pattern on society or conversely that it espouses too broad a liberty in the field of contract and property rights. On the contrary, historically it has been both an ample liberating influence and a wise restraining influence.

Was it not natural law theory that inspired the guarantee of inalienable rights in our Constitution;¹⁰ that called kings and emperors to account to the rights of the people;¹¹ and that moved our courts to override the constraints of arbitrary

8. See Rommen, *op. cit. supra* note 7, at 218-219; Aquinas, *Summa Theol.* I^a II^{ae}, 94, 4.

9. For a discussion of this issue, see GERHART, *AMERICAN LIBERTY AND 'NATURAL LAW'* (1953), and the book review thereof by Constable in 1 *CATHOLIC LAWYER* 143 (1955). Under the Scholastic natural law theory, the light of reason, not the Church, determines what natural law is. Aquinas, *Summa Theol.*, I^a II^{ae}, 91, 2; 94, 2. At the same time revelation can confirm and supplement (but not contradict) the findings of reason.

10. See Manion, *The Natural Law Philosophy of Founding Fathers*, 1 *NATURAL LAW INSTITUTE PROCEEDINGS* 3 (1949) illustrating the views of Hamilton, Wilson, Adams, Dickinson, Otis, Jefferson, and others.

11. For example Coke in *Calvin's Case*, Trin. 6 Jac. 1, 77 Eng. Rep. 377 (K.B. 1610); see discussion and quotations by Wu, *Natural Law and our Common Law*, 23 *FORDHAM L. REV.* 13 (1954). Note: COHEN, *REASON AND LAW* 134 (1950): "We are all generally familiar with the history of Aristotelian and Stoic doctrine of natural law, how it was carried into Roman Law and used to mitigate the rigor of slavery, how it became the intellectual weapon of the people against the claims of popes and emperors, how in the hands of Grotius it proved a powerful instrument for the mitigation of the barbarities of war, or in the hands of American judges has become a powerful influence for the defense of property against the claims of society or of the working classes." See also MAINE, *ANCIENT LAW* 94-96. See note 5.

legislation or action in the name of due process or judicial review?¹² Again, did not natural law lay the foundations for international law;¹³ establish the principle of reasonableness in our common law;¹⁴ and prompt our legislators and judges to prescribe humane social responsibilities toward our less fortunate neighbors?¹⁵

It has been the fate of the traditional natural law position to be always attacked from the two opposite political extremes: those who resist its social responsibilities and those who connive against its grant of individual liberties; and these things often in the very name of natural law. As against the moderating social requirements of natural law, one extreme encourages the license of exaggerated self-determination, particularly in economic matters. As against the inalienable liberties of natural law, the other extreme invents the shackling doctrine that all rights derive from the state as the final and sovereign authority, or more simply, from effective commands.

It was not the traditional natural law theory that contained the errors and dangers that worry Professor Goble. These sins are chargeable to others like Hobbes, Locke, Kant, Rousseau, Austin, Bentham, Dewey, and Kelsen. In fact they are chargeable to all who have helped to destroy the anchorage of law in a transcendental ground of goodness and truth and God, an anchorage that places liberties and duties beyond the pulling and hauling of merely human interests and preferences. Notwithstanding all the loving defenses of the epigrammatic thought of Holmes, that witty and aristocratic jurist was guilty here.

Professor Goble is against, not the traditional natural law theory, but the false image of that theory created by its overzealous friends and its uncomprehending enemies. He is against a false natural law. That is the real villain. And it is time that this villain, based as it is on the historical accretions of misinterpretation and misapplication, be exposed for what it is. For these accretions have overlaid the truth with a repellent coating of falsehood whereby men of good will have been diverted from penetrating to the majestic truth that lies beneath.

Let Professor Goble destroy this straw man set up by the cleverness of such men as Holmes. He will have done a good work. For only thus can he, and others like him, see the clear outlines of the true natural law upon which they are secretly building.

GEORGE W. CONSTABLE

12. See Corwin, *The Natural Law and the Constitutional Law*, 3 NATURAL LAW INSTITUTE PROCEEDINGS 47 (1949); and *Dr. Bonham's Case*, Hil. 7 Jac. 1, 77 Eng. Rep. 646 (K.B. 1610).

13. Grotius, in particular, in *De Jure ac Belli*. See FRIEDMANN, LEGAL THEORY 32-34; and MAINE, ANCIENT LAW 92-96 (1861).

14. See Pollock, *The History of the Law of Nature*, 1 COLUM. L. REV. 29-32 (1901); and Wu, *supra* note 11.

15. For example the "natural" duties to support wife and children, to care for the sick and the aged, to defend one's country, to help the poor—all of which have found frequent articulation in case law and statutory law. To give a single random example: *Weir v. Mosley*, 125 S. W. 798 (Mo.).