

1955

Natural Law and the Gentiles - Some Observations on the Denial of Natural Law in Modern Times

Harold R. McKinnon

Follow this and additional works at: <https://scholarship.law.edu/lawreview>

Recommended Citation

Harold R. McKinnon, *Natural Law and the Gentiles - Some Observations on the Denial of Natural Law in Modern Times*, 5 Cath. U. L. Rev. 1 (1955).

Available at: <https://scholarship.law.edu/lawreview/vol5/iss1/2>

This Article is brought to you for free and open access by CUA Law Scholarship Repository. It has been accepted for inclusion in Catholic University Law Review by an authorized editor of CUA Law Scholarship Repository. For more information, please contact edinger@law.edu.

NATURAL LAW AND THE GENTILES

SOME OBSERVATIONS ON THE DENIAL OF NATURAL LAW IN MODERN TIMES

by

HAROLD R. MCKINNON*

The denial of natural law is one of the prevailing characteristics of modern thought. From this two questions arise. What are the grounds of the opposition? And what can be done to revive this doctrine as the accepted basis of our moral and social life?

I

The fact of the denial needs no demonstration. The protests are numerous, incisive and often bitter. As John Dewey expressed it, "The intellectual basis of the legal theory of natural law and natural rights has been undermined by historical and philosophical criticism." To Mr. Justice Holmes, natural law was a fiction invented to account for the fact that certain things seemed necessary in civilized society. On the other side of the Atlantic, Vilfredo Pareto expressed himself in similar vein, saying, "Little or no progress has been made since Cicero's time; and writers on natural law continue to make all possible combinations of the same concepts, save that the God of the Christians replaces the pagan Gods, a scientific varnish is applied, and a pseudo science is invited to reveal just what Milady Nature would have us do." Pareto's criticism was but an echo of the scorn of Montaigne, who had written, "Certainly they are amusing, these people, when they try to lend a certain amount of authority to their laws by saying that some of them are fixed, perpetual, immutable, which they call natural laws and which are imprinted upon human beings by the requirements of their very nature." The late Morris R. Cohen summed up the modern attitude by saying, "The attempt to defend a doctrine of natural rights before historians and political scientists would be treated very much like an attempt to defend the belief in witchcraft. It would be regarded as emanating only from the intellectual underworld."

To one reared, as it were, in the natural law—indeed, to one reared in the Declaration of Independence and in the American tradition—all

* B.A., University of Santa Clara, 1914; LL.B., University of Santa Clara, 1915; member of the California Bar; LL.D., Saint Mary's College of California, University of Santa Clara, and Loyola University of Los Angeles; Member of Advisory Board of American Bar Association Journal; Member, American Law Institute; now Chairman of Board of Directors for Philosophical Research of San Francisco (Mortimer Adler, Pres.).

this is ground for wonder and leads directly to the question, what can account for this strange intellectual phenomenon whereby that which characterizes human reason in almost innate fashion has become the object of such scornful opposition?

II

Before trying to answer this question, let us sketch briefly the doctrine which is under attack.

Do good and avoid evil is the first principle of the practical reason, the equivalent of the principle of contradiction in the theoretic reason. The good thus referred to signifies the totality of goods. One of these goods is the *social* good. In respect to that good, the first principle may be expressed, *Seek the common good and avoid the common evil, or do good to others, harm no one, and render to each his own.*

Do good and avoid evil is the natural law, strictly speaking, with respect to the whole of goods. *Seek the common good, or do good to others, harm no one, and render to each his own,* is the natural law, strictly speaking, in reference to man's good as a social being.

This first principle prescribes the end of laws. From this end are deduced the necessary means, which as such are contained, by implication, in the end. Examples of these are the precepts, do not kill, steal or slander, contracts must be carried out, and so on.

But these are the means considered only universally or generally, that is, considered without regard to the contingent facts of social life, including the changing circumstances of time and place. As such they are inadequate to govern conduct. To govern conduct they have to be converted into laws in the ordinary sense. This conversion consists in the process called determination. Determination is the process by which the universal means are reembodyed in more particularized form which takes into account the contingent circumstances of the society to which they are to be applied and which prescribes what shall be done and what shall not be done in such circumstances. Thus it reembodyes the precept against killing by the laws of homicide; it reembodyes the precept against stealing by the laws of theft and kindred crimes; it reembodyes the precept regarding the performance of promises by the laws of contracts.

In addition to precepts of this character, which are applicable to all societies because they flow from the nature of man as such and are therefore derived by conclusion from the first principle, there are other precepts which presuppose a given type of society and which direct the observance of everything necessary for the general welfare of that society. Thus a traffic ordinance is a determination of a precept calling for effi-

ciency and safety in transportation, the necessity for which flows from the contingent character of a given society such as that of our own day.

Therefore a law is an application of the first principle of the practical reason prescribing the common good, which application is made by determining the generally necessary means of the common good to relate them to the contingent facts and circumstances of social life, thus rendering those means serviceable as guides of just conduct and as criteria of legal judgments in case of contests as to legal rights and duties.

III

Such is the doctrine, in essential terms. What, then, is the explanation of its present disrepute?

I think that the chief source of opposition is the anti-metaphysical character of modern thought. This anti-metaphysical bias takes various forms, but generally speaking it amounts to a denial that there is any valid form of knowledge other than the tentative findings of the experimental sciences. Under this doctrine, nothing is absolute, and all is relative. Things cannot be defined, but only described. All reference to man's unique nature is spurious, because man differs from other animals not specifically, essentially or qualitatively but only in degree. The very concept of *nature* being rejected, anything purporting to be a law rooted in such a nature is similarly inadmissible.

The attacks on metaphysics run all the way from saying that it is harmless subjective day-dreaming to charging that it is the enemy of freedom by its serving as the basis of an authoritarianism in the moral and political spheres. The latter criticism accounts for the crusading spirit which so often characterizes the anti-metaphysical partisans. From their viewpoint, instead of vilifying man, they are leading a campaign for his liberation from medieval bonds. The shift is from the barren slavery of fixed ends to the rich liberty of uninhibited means. In law, the point of reference is not the common good which is to be found in the nature of man and human society, but human and social experiment out of which the good is supposed to flow.

Against this anti-metaphysical background, natural law seeks in vain to reestablish itself. Natural law doctrine involves two foundations, the foundation of law in morals, and the foundation of morals in metaphysics. The metaphysical foundation being removed, the whole structure collapses.

The situation was never described more graphically than by Mr. Justice Holmes when he said that he saw "no reason for attributing to man a significance different in kind from that which belongs to a baboon.

or to a grain of sand",—from which he proceeded consistently to say, "Our morality seems to me only a check on the ultimate domination of force, just as our politeness is a check on the impulse of every pig to put his feet in the trough".

The anti-metaphysical bias is so deeply rooted that it survives even the observation that its consequences may be the amoral, totalitarian state. Thus Max Lerner, in a book which is a tribute to Holmes, says of Holmes' doctrine regarding the empty character of rights, "We have here the behavioristic definition of law, squeezing it dry of all morality and sentiment"; and Harold Laski, a similar devotee, says that Holmes states law "in terms of an irresponsible and unlimited will such as Hobbes himself would have strongly approved".

Allied to the anti-metaphysical position is the objection to anything absolute in law. If there is no nature, there is nothing universal or immutable. By asserting that there is anything absolute about law, natural law doctrine has to go without recognition by modern thought.

The intellectual offense to the modern mind which is created by the absolute has been aggravated by a gross abuse of natural law which purported to *deduce* all positive laws from the first principle,—as if the law of negotiable instruments were derived by way of conclusion from the nature of man! Dean Pound once told the writer that in his early years he had been so prejudiced by such nonsense that it took him a long while to view the doctrine in its purer context.

A further impediment to general acceptance of natural law is the setting with which it is popularly associated. That setting is scholastic, Thomist, Catholic. There are, of course, adherents of natural law outside those circles, but the identification is conveniently made and, once made, forthwith sets off the opposition. As a noted educator once said, after Mr. Robert M. Hutchins had published one of his early books on education, "Mr. Hutchins has gone metaphysical and will please no one but the Catholics". (As if the Catholics had a monopoly of metaphysics!)

The objection is really two-fold, that it is scholastic and that it is Catholic. Scholasticism is in disfavor because it maintains that there are some absolutes and that there is some certain knowledge and it lends itself to the authority of the Church. The Church is in disfavor because it speaks with authority in morals and in faith. Thus the doctrine comes to be known as the "theological natural law", thereby exposing it to the double prejudice of the anti-theological as well as the anti-Catholic mind.

Associated with these things is still another barrier, that of terminology. To the thinker whose convictions place him generally in the sphere called Thomist, a whole set of convenient terms is readily

available, but such a thinker deludes himself if he supposes that such terminology is meaningful or welcome to the non-scholastic mind. Imagine a discourse to a modern non-scholastic audience which proceeds in terms like theoretic and practical reason; first, indemonstrable principle of the practical reason; first, intrinsic principle of operations that are proper to a being; final, formal and efficient causality; conclusion and determination; speculatively-practical and practically-practical. This would be incommunicability at its worst; and incommunicability arouses heat rather than light, hostility rather than understanding.

The terms natural law and positive law themselves create a flood of misunderstanding, for if either is *law*, the other is *law* in such a different sense that some explanation is obviously required as a condition of the use of the term in the two phrases. The same may be said of the term "absolute norms of conduct", for if the term *norm* there signifies the positive determination, the qualification "absolute" is gravely erroneous and uselessly arouses opposition.

There are many other terminological difficulties. Without exploring them further, it is sufficient to say that on this point alone—the mere point of the verbal vehicles of communication—the fate of natural law may hang in our time.

IV

It has not been difficult to portray, in broad outline, some of the chief sources of present day opposition to natural law. To convert this opposition, however, is a matter of such difficulty that it is not at all surprising that little or no progress has been made in that direction. For the task is a huge one. Merely to state it reveals its all but overwhelming dimensions, because as indicated, one part of the task is nothing less than converting the intellectual world from positivism to the *philosophia perennis*.

Not being a philosopher, the author is not competent to discuss such an undertaking. It is interesting, however, to observe the evolution of a distinguished contemporary philosopher's thoughts on that subject. In 1938 Mortimer J. Adler delivered the Aquinas Lecture at Marquette University. The title of the lecture was *Saint Thomas and the Gentiles*. In it Mr. Adler posed the problem and sketched a proposed plan for its solution. In essence he suggested that in order to convert the philosophic gentiles the Thomists must proceed inductively, by way of the order of learning, *with* the positivists, not against them. The other way—proceeding from the principles—had failed, because the positivists do not accept the principles. Mr. Adler did not minimize the difficulties; in fact, he said, it would probably require genius and certainly vast patience and perseverance.

That was in 1938. Since then Mr. Adler has retreated even from that position. Now, with a staff of assistants in San Francisco and with the collaboration of some colleagues in other parts of the country including Mr. Maritain, he is engaged in a long-term project called the *Summa Dialectica*, the object of which is not to strive for doctrinal agreement but to chart the areas of agreement and disagreement on the great questions from ancient times to date. Mr. Adler and his colleagues are convinced that the retreat is necessitated by the existing incommunicability between philosophers and that the first step in putting philosophy back on its perennial course must be the restoration of philosophic discourse, and that the best means of doing that is through a dialectic which proceeds with strict neutrality to chart the various doctrines and the harmonies and diversities between them.

Lawyers and students of jurisprudence may well leave such high technical tasks to the philosophers, but unless we are to be completely defeatist on the subject of natural law in our own time, we should meanwhile keep the cause alive wherever we can. In that respect, the doors are not all closed against us. The modern philosopher may scoff and rail against the natural law, but men of action like lawyers and judges are generally more docile. Thus natural law survives in our legal system in important respects such as in equity and in judicial interpretation of the due process clauses of federal and state constitutions. Even Holmes, when it came to deciding cases, spoke of "substantial justice" and "fair play". In these fields—the fields of the judiciary, and of the lawyer—there is an audience, and we should not neglect it just because we cannot reach the philosophers themselves.

To do this a few things should be done, consisting chiefly of stripping the doctrine of obscurities, abuses and distortions so that where prejudices are not invincible it may find new adherents. I have space but to illustrate with a few examples.

To propagate is to teach. And to teach natural law it should be axiomatic that we begin with experience rather than with the natural law. This is so because whereas the order of exposition begins with the principles the order of learning begins with experience. It goes from the known to the unknown. Everybody knows laws. Therefore we should start with laws and proceed through the precepts of which the laws are determinations, to the principle of the common good which is the purpose for which the laws are made.

Akin to this is the necessity of stressing the relativity of laws. This is a scientific age. And the conclusions of science are relative because they are descriptions rather than explanations of experience. In these circumstances, any undue stressing of the absolute is not only a distortion

but also a tactical blunder. Rules of law are highly relative, because they are man-made determinations of precepts derived from the natural law. The only thing absolute about law is the principle. Even the precepts which are deduced from the principle, though they constitute necessary means of the common good and hence are speculatively-practical in character, are not strictly absolute, because they are intermediate between the principle and rules of law and as such they partake of the nature of each. They partake of the nature of positive rules in that they deal with means, are dispensable in certain cases, and they are directed toward the welfare of the political community. In these respects there is an element of relativity in them. But when we come to the man-made positive rule of law, the degree of relativity is very high, because what man does in making a law is to *determine* what is left *undetermined* by the principle and the intermediate precepts. Natural law is *discovered*; positive law is *made*. The making is free, and therefore relative, insofar as it is a determining of a particular just way of realizing the common good prescribed by natural law where there are other just ways of doing so. The reason for positive laws is that people must know what the regulations are; they already know the natural law by the light of their natural reason. It is true that there is an absolute element in laws, but that is in the end which is served by laws, not in the particular means by which the end is served.

This is linked with the point of terminology which I have mentioned, namely the use of the word "law" in the two phrases "natural law" and "positive law". Obviously the word law is used in different senses in the two phrases, because of the radical difference between the first principle, *seek the common good*, and the man-made regulation, which may be a traffic ordinance. The solution does not consist in saying that there are two kinds of laws, natural laws and positive laws. If we define law as a promulgated, authoritatively-made ordinance of reason for the common good, then we should say that law is partly natural and partly positive. It is natural in its source or foundation and positive in its conventional character as something made. On this account, both phrases *natural law* and *positive law* are misnomers.

In the light of this distinction, there is an evident risk of misunderstanding in the use of the expression "absolute standards of conduct". If "standard of conduct" is taken to mean the positive rule, the word "absolute" is misused because positive rules are relative. If "standard of conduct" is taken to mean the common good the phrase is correct only in the sense that the common good, which is absolute, constitutes the end which the rule must serve.

The importance of accuracy of expression on this point is that natural law doctrine has gotten a false reputation of attributing absoluteness to laws. Common strategy dictates that anything which tends to support that impression should be scrupulously avoided. There need be no pious fear of betraying the moral law by stressing relativity in the positive determinations. St. Thomas himself emphasized that laws were imperfect, diverse and mutable and only generally speaking just. He even compared the law-maker's striving for justice to the effort of the physician to cure disease—eloquent evidence of relativity in view of the state of medical science in the thirteenth century!

Similar need for clarification exists with respect to the so-called "theological" aspect of natural law. The premises of theology are revelation; those of the natural law are reason. The Church does not make natural law; God makes it, and the Church is bound by it. True the Church is an authoritative teacher of the natural moral law, but since that law is a matter of reason rather than faith the Church declares that though it belongs wholly to her it does not belong exclusively to her. Moreover, as St. Thomas points out, while the obligation of the natural law depends upon God, it does not depend upon a knowledge of God for its efficacy. As far as knowledge goes, the proximate sources of its obligation—conscience and experience—suffice to make it binding.

Above and beyond all these things, we must remember that we have in our legal system a natural law beachhead to protect. This consists chiefly in the Supreme Court's interpretation of the due process clause of the fifth and fourteenth amendments as including substantive rights and in its defining those rights as those which involve those "immutable principles of justice which inhere in the very idea of free government",¹ those "fundamental principles of liberty and justice which lie at the base of all our civil and political institutions",² and those immunities "implicit in the concept of ordered liberty".³ This frank acknowledgment of natural law is reflected in an opinion by Justice Harlan wherein he said 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."⁴

This beachhead is not immune from attack. Two of the present members of the Court are opposed to it. The concept needs continued

¹ *Holden v. Hardy*, 169 U.S. 366, 389 (1898), 42 L. Ed. 780, 790.

² *Hebert v. Louisiana*, 272 U.S. 312, 316 (1926), 71 L. Ed. 270, 273.

³ *Palko v. Connecticut*, 302 U.S. 319, 320 (1937), 82 L. Ed. 288, 292.

⁴ *Monongahela Bridge Co. v. United States*, 216 U.S. 177, 195 (1910), 54 L. Ed. 435, 443.

support in the literature of the law, in legal education, in briefs in the cases where it is involved and in the various other channels of opinion.

V

These are but a few of the things to be done. There is more to be done.

It is a worthy task, filled with both hope and fear.

It is hopeful, because although in the great tides of human thought natural law rises and falls, it never disappears, since it partakes of the persistence of nature. Thus philosophers deny it, but insofar as they are virtuous they live by it. Jurists scoff at it and then read it into the constitution and into their decisions. The curve of history and the rise of democracy may be measured in its terms. As long as men reason, it will inspire justice and promote the general welfare.

The task is fearful, because at times men cease to reason. Then will alone governs, and in that case natural law and justice go into a night. And when that darkness comes, the defection of the intellectuals bears its heaviest responsibility, for behind the tyranny and the lawlessness is an intellectual corruption.

Unwittingly, the prevailing philosophy of our day has opened the road to tyranny. As A. Lawrence Lowell put it, having gained our liberty with the natural law we Americans have discarded the doctrine and adopted the opinions of the vanquished. It is always dangerous to drop the natural law. It is especially dangerous to do so in the twentieth century which has exhibited an exceptional tendency toward those horrors which go with the denial of the nature of man.

Every age has its crisis. The crisis of our day is that of the natural law. While our philosophers labor among their colleagues to revive the perennial quest of wisdom on this subject, we of the law should take our own part in that great enterprise. In doing so we may hope that if among men of action we can preserve a basic adherence to this great truth the day may be saved until the philosophers themselves resume their rightful place at the head of the quest.