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WHOSE NATURAL LAW?

WILLIAM J. KENEALY, S. J.*

PROFESSOR GEORGE W. GOBLE of the Law Faculty of the University of Illinois has written a challenging and significant article, entitled "NATURE, MAN AND LAW: THE TRUE NATURAL LAW," in the American Bar Association Journal of May, 1955. (Vol. 41, No. 5, p. 403). Professor Goble's article is refreshingly free from the acerbities which too often detract from the substance of controversial articles *pro* and *con* the natural law. The article manifests the kindness and humility of sincere scholarship. It follows a standard of calm and dispassionate controversy which might well assist both proponents and opponents of the classical natural law, if not to *resolve* their differences, at least to *discover* them. Such a mutual discovery, in the opinion of this reviewer, would be a major contribution to the most ancient controversy of the law.

Professor Goble's article is significant because it illustrates the fact that the *status quaestionis* of the old controversy is badly out of joint. It brings into focus the fact that contemporary proponents and opponents of the classical natural law frequently argue about "two different things." The issue is not joined. Professor Goble sets up and rejects a concept of natural law which would also be repudiated by every classicist from Thomas Aquinas to Heinrich Rommen. By "classicists" I mean the scholars and spokesmen of the traditional natural law philosophy as expounded by the medieval scholastics and the modern neo-scholastics. The concept rejected by Professor Goble differs essentially from the classical concept in two fundamental and all-pervasive aspects: the very *meaning* of the natural law, and its *epistemological* basis. Obviously the issue cannot be joined and the merits cannot be argued on the basis of such fundamental misunderstanding.

In discussing the *meaning* of the classical or traditional concept of natural law, I trust that I will be forgiven for quoting an official statement of the Law School of which I am dean. I do so for two reasons: first, I wrote it some years ago in an attempt to set out a concise statement of the classical concept; and secondly, it has appeared annually for some years in the official Bulletin of a Law School dedicated to the traditional natural law philosophy. To the best of my knowledge, it has not been the target of a single shaft of disagreement from the ready quivers of tradi-

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tional natural law philosophers. The statement, with italics as they appear in the original text, is as follows:



WM. J. KENEALY, S.J.

“The purpose of the Boston College Law School is to prepare young men and women of intelligence, industry and character, for careers of public service in the administration of justice; to equip them for positions of leadership in advancing the ideals of justice in our democratic society. With this two-fold objective, students are given a rigorous training in the principles and rules, the standards and techniques of the law, not as positivistic ends in themselves, but as rational means, capable of constant improvement, to the attainment of objective justice in civil society.

“For the Boston College Law School is dedicated to the philosophy that there is in fact an *objective moral order*, to which human beings and civil societies are bound in conscience to conform, and upon which the peace and happiness of personal, national and international life depend. The mandatory aspect of the objective moral order is called by philosophers the *natural law*. In virtue of the natural law, fundamentally equal human beings are endowed with certain *natural rights and obligations* to enable them to attain, in human dignity, the divine destiny decreed for them by their Creator. These natural rights and obligations are *inalienable* precisely because they are God-given. They are antecedent, both in logic and in nature, to the formation of civil societies. They are not granted by the bene-

ficence of the state; wherefore the tyranny of a state cannot destroy them. Rather it is the high moral responsibility of civil society, through the instrumentality of its civil laws, to acknowledge their existence and to protect their exercise, to foster and facilitate their enjoyment by the wise and scientific implementation of the natural law with a practical and consonant code of civil rights and obligations.

“The construction and maintenance of a *corpus juris* adequately implementing the natural law is a monumental and perpetual task demanding the constant devotion of the best brains and the most mature scholarship of the legal profession. For the fundamental principles of the natural law, universal and immutable as the human nature from which they derive, require rational application to the constantly changing political, economic and social conditions of civil society. The application of the natural law postulates change as the circumstances of human existence change. It repudiates a naive and smug complacency in the *status quo*. It demands a reasoned acceptance of the good, and a rejection of the bad, in all that is new. It commands a critical search for the better. It requires an exhaustive scrutiny of all the available data of history, politics, economics, sociology, psychology, philosophy, and every other pertinent font of human knowledge. Of primary importance, it insists that the search for a better *corpus juris* be made in the light of the origin, nature, dignity and destiny of man; and in the knowledge of the origin, nature, purpose and limitations of the state.

“This is the traditional American philosophy of law, the philosophy upon which this nation was founded and to which this nation, by its most solemn covenants and usages, is dedicated. It is opposed today, even

by some within the legal profession, by the philosophies of positivism, pragmatism, realism and utilitarianism — all of which have an ideological common denominator in subjectivism — and none of which can offer an intellectually adequate reply to the destructive philosophy of totalitarianism.” Cf. *Boston College Bulletin*, Vol. XXVII, No. 2, April, 1955.

I believe that this capsule description of natural law philosophy is in complete harmony, not only with the classical concept of Maritain, Gilson, Rommen and the modern neo-scholastics, but also with that of Aquinas, Suarez, Vittoria and the medieval scholastics. Hundreds of professors, teaching the classical concept in universities today, would undoubtedly write a better description; but I am confident that none would dispute the substance of the statement quoted. If this is so, if the statement fairly represents the *meaning* of the classical natural law concept, with particular reference to its notion of immutability and universality, its distinction between ends and means, its requirement of change and improvement, and its search for the good and the better, then I find it difficult to escape the conclusion that Professor Goble has *not* come to grips with that concept. I think that he is chastising the wrong horse.

Professor Goble seems to contemplate the classical concept as meaning a completely closed system of principles and rules, immutable and universal, incapable of change and improvement, and therefore a hindrance to the pursuit of truth and an obstacle to the development of a better system of justice. He states:

Holmes, *unlike the natural law man*, did not believe that because he firmly held certain views, they were necessarily universal or infallible truths, or that the acceptance of

them by others was essential to the preservation of civilization or the republic. . . . The classical natural law on the other hand, *by definition, must forever remain unchanged*. While experience has required its devotees to recede from this position from time to time, *by hypothesis the system is immutable*. *No amount of experience or new light may be used as the basis for altering it or revising it*. It seems to me therefore, that the Holmes' view makes possible the continuous advance of the standards of human conduct, whereas the natural law view, *having in theory already attained perfection, retards it*. (p. 474, emphasis supplied).

I trust that the above quotations do not distort Professor Goble's context. That context misses the meaning of the classical natural law of the scholastic tradition. In fairness to Professor Goble, his context has considerable relevance to the “natural law” theories of Pufendorf, Thomasius, Hobbes, Spinoza and their followers in the seventeenth and eighteenth centuries. This was the era of the various “state of nature” theories which fascinated the autonomous rationalism of the times. The “state of nature” theories inspired an orgy of abstract reasoning which gave birth to deductively constructed systems purporting to regulate and to crystallize all legal institutions down to incredible details: prescribing the rules affecting contracts, debts, the acquisition and use of property, inheritance, the family, constitutional and international law — and even procedural laws in the alleged “states of nature.” Such theories were frequently utilized for rather practical purposes: sometimes to strengthen the contemporary political, economic and social *status quo* by dignifying it with the blessing of “natural law”; sometimes to undermine the prevailing *status quo* by damning it with the condemnation of “natural law.” But all such “state of nature” theories, with their closed and

crystallized legal systems, were and are alien and hostile to the classical concept of natural law. Their authors are the express adversaries of the scholastic system. I need not point out that the theological phrase *status purae naturae* has only a verbal similarity to the philosophical "states of nature" of rationalism.

It is quite true, of course, that the classical natural law postulates some *fundamental* principles, which are considered immediately self-evident principles of the practical reason, as certain, universal and immutable. But this is a far cry from a closed legal system. The fundamental principles of the natural law are generally divided into a *primary* principle and its immediate specifications, called *secondary* principles. The primary principle is usually phrased in such terms as "What is good is to be done, and what is evil is to be avoided," a principle which includes "What is just is to be done, and what is unjust is to be avoided." As immediate specifications of the primary principle, the secondary principles find familiar expression in the (still general) terms of the Decalogue. The secondary principles share the certainty, universality and immutability of the primary principle. But when we advance from these fundamental principles, we enter the field of *derivative* principles and standards and applications of the natural law to concrete problems.

The *derivatives* do *not* share equally, some do not share *at all* in the certainty, universality and immutability of the fundamental principles. They do not bask in the sunshine of immediate self-evidence. They must be laboriously cultivated in the much dimmer light, sometimes in the darker twilight, of mediate evidence. In the field of

derivatives there is certainty, probability and mere possibility; there is growth, change and improvement. Incidentally, even the truths called "self-evident" in the Declaration of Independence are not self-evident in the *philosophical* sense. They are derivative principles of natural law. They must be demonstrated by argument. It is only the fundamental principles of the natural law which are held to be self-evident, and consequently certain, universal and immutable. From this position devotees of classical natural law have *not* receded "from time to time." It is a fair question to ask: *what* fundamental principle, *what* principle held to be certain, universal and immutable has been relinquished at any time by devotees of the classical natural law?

That natural law does not mean a closed legal system, is evident from the fact that the fundamental principles do not tell us automatically in *concrete* applications what is good or evil, just or unjust, wise or unwise; what is idolatry, murder, theft, adultery, perjury or calumny. It is evident from the fact that the natural law envisions an enormous number of actions which are *indifferent* in themselves, and which receive their morality (and suitable legality) from the *relative* elements of time, place and circumstance, and from the *subjective* elements of intention and motive. It is evident from the fact that the natural law concept requires the construction, maintenance and improvement of a *corpus juris* to meet the needs of a constantly changing human society; and that it demands that this perpetual task be performed by the scholarly and practical use of the expanding data of human knowledge and experience. This is utterly incompatible with Professor Goble's idea of the "attained perfection" of the classical natural

law concept. The possession of a compass does not make the navigator's job unnecessary.

Professor Goble objects to the traditional natural law concept because he believes it has been used to further objectionable causes and to obstruct desirable social and economic reforms. He states:

Exponents of classical natural law are usually able to find or create natural law principles which support what they want to believe. . . . Before the Civil War both pro-slavery and anti-slavery advocates invoked natural law as the basis for their views. . . . During the nineteenth and early twentieth centuries the opposition to legislation prohibiting child labor, reducing working hours for women, and improving working conditions in hazardous industries, was based partly upon the principle that by natural law, freedom of contract could not be interfered with by legislation. (p. 473)

The first quoted sentence pinpoints an unfortunate psychological weakness which afflicts *all* men when they are blinded by emotions, prejudices and the smoke of selfish interests. Natural law exponents can claim no immunity from the weakness which, I dare say, sometimes leads positivists, pragmatists, realists and utilitarians "to find or create" respective principles "which support what they want to believe." *All* of us need to overcome this weakness by an intensification of scholarly criticism and dispassionate controversy. The chief examples cited by Professor Goble are, to say the least, weak indictments of the classical natural law. The nineteenth and early twentieth centuries spanned the era of *laissez-faire* rugged individualism, which stemmed from the philosophies of Rousseau, Kant, Austin and the Manchester School of Economics. It is true that the Supreme Court of the era utilized the *terminology* of "nat-

ural law" to deify an abstract concept of liberty of contract for the protection of vested property interests to the detriment of human rights. But the philosophers mentioned above, and the proponents of *laissez-faire* rugged individualism are again the express adversaries of the classical natural law philosophy. Again, it is fair to ask *what* representative natural law philosopher or spokesman held the principle that "by natural law, freedom of contract could not be interfered with by legislation"? A philosophy is one thing, its terminology is another; but its terminology in the mouths of its express adversaries is a great source of confusion, misunderstanding and embarrassment. Economic Liberalism itself recognized the classical natural law philosophy as its prime adversary.

Professor Goble's criticism of classical natural law, on the basis of its alleged "attained perfection" and immutability, seems analogous to the criticism of those who reject natural law philosophy because it defends *absolute* natural rights. Natural law does indeed imply the existence of some human rights which are absolute and inalienable, such as the right to life, worship, marriage, property, labor, speech, locomotion, assembly, reputation, etc. These are absolute in the sense that they derive from human nature; they are not mere hand-outs from the state; the state is bound to protect them and cannot destroy them even though, by physical force, the state has sometimes prevented their exercise. They are *not* absolute in the sense that they are unlimited in scope. It is a commonplace in classical natural law philosophy that human rights, even the most fundamental mentioned above, are *limited*. They are limited in the sense that they are subject to specification, qualification, expan-

sion and contraction, and even forfeiture of exercise, as the equal rights of others and the demands of the *common good* from circumstance to circumstance, and from time to time, reasonably indicate. Human rights are absolute only in the sense of the minimal requirements of a just and ordered liberty. But this is not the stuff of a closed system of immutably "attained perfection." This is the stuff which requires the constant study, scholarship, experience and experimentation implied in the quotation I have made from the Boston College Law School Bulletin. For the above reasons I believe Professor Goble has misunderstood the *meaning* of the classical natural law philosophy.

Of equal significance, I believe, is Professor Goble's misunderstanding of the *epistemological* basis of natural law. This basis answers to the question of *why* natural law men hold what they hold. Professor Goble says:

Since reason is fallible, the principal problem posed by this view of natural law [quoted, by the way, from Dean Pound] is how or by whose reasoning is this infallible law to be determined. When two or more men or groups of men of equal sincerity believe themselves to be endowed by the Creator with the power to ascertain and enunciate it, and they are in disagreement, by what criterion is the choice to be made between them? . . . History furnishes so many examples of fighting faiths later rejected as unconscionable that it is difficult for one to believe that *sincerity or certitude* is a reliable test of truth. (p. 407. Emphasis supplied.)

Witness the comparatively recent condemnation of millions of innocent people to death in gas chambers, to imprisonment in slave labor camps and to banishment in the salt mines because of the *certitude* of their condemners as to their own racial superiority or the infallibility of their political systems. . . . Before the Civil War both

pro-slavery and anti-slavery advocates invoked natural law as the basis for their views. (p. 473.)

Mr. Justice Holmes has been one of the great critics of the classical natural law theory. He said, "The jurists who believe in natural law seem to me to be in that naive state of mind, that accepts what has been familiar, and accepted by them and their neighbors, as something that must be accepted by all men everywhere." Holmes believed that "*Certitude is not the test of certainty*," and that "we have been cock-sure of many things that were not so." (pp. 473-474. Emphasis supplied.)

I have supplied the italics in the above quotations. From these quotations and their context, and I trust they do not distort the context, I infer that Professor Goble believes that the epistemological basis of natural law philosophy is: *the criterion of truth is subjective certitude or sincerity of subjective conviction*. This is simply not true. It is diametrically opposed to the epistemology of classical natural law. It is fair to ask for the name of *one* responsible natural law spokesman who makes subjective conviction the criterion of truth. On the contrary, natural law philosophers unanimously set up *objective evidence* as the criterion of truth. The philosophers of various theories of *subjectivism*, Descartes, Spinoza, Leibnitz, Berkeley, Hume, and their followers are again the express epistemological adversaries of classical natural law.

The natural law is founded upon the existence of an objective moral order and the knowability of objective truth. Quite consistently, and necessarily, it makes *objective evidence* the criterion of that truth. To argue for or against natural law, or any one of its principles, or any application of its principles, on the basis of mere subjec-

tive certitude or sincerity of conviction, would be as irrelevant and immaterial as any similar argument in any intellectual field — philosophical, scientific or legal. Subjectivism is sheer intellectual defeatism.

According to Professor Goble “the principal problem posed” by the natural law, when “two or more men or groups of men of equal sincerity” are in disagreement, is this: “by what criterion is the choice to be made between them?” The natural law philosopher answers: objective evidence. And to the question as to who shall make the choice, the answer is: whoever undertakes to evaluate the objective evidence. This is the epistemological basis for the civil law rules of evidence. This is the standard underlying our legal trials. This is the standard applied by our supreme courts in the difficult *due process* cases, which touch natural law principles most closely. To abandon objective evidence for a subjective standard would be to open the flood-gates of arbitrariness and capriciousness. Subjectivism is simply incompatible with natural law philosophy.

In criticising natural law, Professor Goble cites Holmes to the effect that “Certitude is not the test of certainty” and that “we have been cock-sure of many things that were not so.” With this observation of Holmes, I agree. My agreement rests upon the objective evidence of my own personal errors and the objective evidence of the history of human thought. Furthermore, my agreement extends to the epistemological principle which seems to be *implicit* in the words of Holmes: namely, that there *is* a rational basis for making a distinction between “certitude” and “certainty”; that there *is* an intellectual difference between error and truth; and that *at least some* cock-sure errors of the past have been overhauled

by the relentless pursuit of objective truth. To me this means that there are in fact *some* objective truths known with certainty on the basis of objective evidence. And if there are some so known, what limits shall we put to the critical and dispassionate pursuit of others? But this is the epistemology of classical natural law.

Professor Goble places great emphasis upon errors of the past, and upon the contradictions and disagreements of the past and present — particularly those concerning political, economic, social and legal problems. As an argument specifically against natural law, this proves altogether too much. Its probative value, if any, militates against *any and all* philosophies. Positivists, pragmatists, realists and utilitarians differ considerably as to what in the concrete is positivistic, pragmatic, realistic and useful. But such differences surely do not constitute the intellectual basis for rejecting the philosophies of positivism, pragmatism, realism or utilitarianism. Natural law philosophers agree on the fundamental principles of the natural law; they differ on its derivative principles and standards; and there is wide divergence of opinion as to the concrete applications of its derivative principles and standards to the constantly changing political, economic, social and legal conditions of human society. But what do such differences of opinion prove? Surely not the invalidity of the fundamental philosophy. Such differences demonstrate that the area of opinion is larger than the area of certainty. Such differences prove the finiteness of the human mind and the enormous complexity of the human problems which we must constantly strive to solve as best we can. Our differences should indeed humble us and make us more tolerant of the opinions of others; but they should not defeat us or

discourage the relentless pursuit of objective truth. Because they do *not* prove the incapacity of the human mind to know with certainty (*i.e.*, without prudent fear of error) some objective truths on the basis of objective evidence. As a matter of fact, "when two or more men or groups of men of equal sincerity" differ, they may *both* be wrong; but the significant thing is that their very differing is predicated upon the assumption that there *is* some objective truth to differ about, and that the pursuit of objective truth *is* worth-while. Error is simply unintelligible without the existence of objective truth attainable by human reason.

It is obvious, I trust, that this commentary on Professor Goble's article is in no sense an attempt to prove the validity of natural law or the soundness of its epistemology. It is simply an attempt to show that Professor Goble has misunderstood the *meaning* and the *epistemology* of the classical natural law philosophy. It is my personal opinion that there are three factors which have induced such a misunderstanding on the part of Professor Goble and many others in the legal profession. They are: *first*, the misuse of natural law terminology, in the nineteenth and early twentieth centuries, in support of *laissez-faire* rugged individualism; *second*, the almost complete unfamiliarity of most members of the profession with the writings of the great natural law philosophers, and a consequent reliance upon secondary (and sometimes unscholarly) sources of information; and *third*, an unfortunate propensity, on the part of some natural law enthusiasts, to claim too much for their philosophy.

Concerning the *first* factor: many United States Supreme Court opinions of the last

century, indicated by Professor Goble, which exalted property and contractual rights to the detriment of other basic human rights and the genuine needs of the common good, are excellent examples. Regarding the *second*: the writings of Holmes and the article by Professor Goble are, I believe, clear instances. As to the *third*: I have reference to the naive mentality which would say "all we have to do to solve our problems is to apply the natural law." This mentality has its counterpart, of course, in that which would say "all we have to do to solve our problems is to be realistic" or "pragmatic." It is quite like the simplicist attitude of the naive citizen who would say "all we have to do to solve our problems is to apply the Constitution." The fact is that the classical natural law philosophy teaches, as one of its prime tenets, that the natural law and its fundamental principles are *inadequate* to solve the complex problems of human society. The natural law demands implementation by civil law; and such implementation frequently involves, not merely research and argumentation, certitude and probability, but also trial and error experimentation. But this is not the natural law dismissed by Professor Goble.

Wherefore I have entitled this commentary "WHOSE NATURAL LAW?" Whose natural law does Professor Goble dismiss? Not mine. Not that of the Boston College Law School. Not that of the medieval scholastics. Not that of the modern neo-scholastics. Not that of the classical tradition. Whose? I confess that I look forward to the opportunity to sit down informally with Professor Goble some day to discuss, and if possible to clarify, for our mutual satisfaction, the *status quaestionis* of the oldest controversy of the law.