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## The Dilemma of the Natural Law

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*Mr. Goble returns to the lists in an exchange with Father Kenealy that has won high praise not only for its scholarly tone but also for the mutual courtesy and respect which have been manifested.*

# THE DILEMMA OF THE NATURAL LAW

GEORGE W. GOBLE

## I

FATHER WILLIAM J. KENEALY, in his excellent article, "*Whose Natural Law?*"<sup>1</sup> asks, "whose natural law" I was criticising in my article "*Nature, Man and Law.*"<sup>2</sup> The answer is that the primary target of my criticism was the natural law which developed in Europe in the 17th and 18th centuries and was transported to the United States in the 18th and 19th centuries. Dean Pound called this the "classical natural law," and as quoted in my previous article he defined it as follows:

According to the classical natural-law theory, all positive law, *i.e.*, the whole body of legal precepts that furnish the grounds of actual decision in the courts, [is] but a more or less feeble reflection of an ideal body of perfect rules, demonstrable by reason, and valid for all times, all places and all men.<sup>3</sup>

In the same article Dean Pound also said:

Positive legal precepts got their whole validity from their conformity to these ideal rules [of natural law]. In other words, jurists and judges were striving to make the grounds of decision conform to an ideal philosophical pattern resting on reason and identical with an ideal moral pattern. . . . It was less important to decide particular causes justly than to work out sound, logically consistent and abstractly just rules for the future.<sup>4</sup>

"Thus the natural-law theory," he said, "was kept alive in America long after it had ceased to be a living theory in the Old World. . . ."<sup>5</sup> These natural-law ideas were carried forward in America by what Dean Pound called the "historico-analytical" theory which after performing a certain usefulness in giving our law stability, finally became "an obstacle to growth, a check on all conscious improvement of law, at the end of the century."<sup>6</sup> Of the lawyer of this period Pound said:

It was the confident belief of the historico-analytical common-law lawyer that he could solve any problem whatsoever on the basis of the seventeenth-century . . . Year Books. New forms of doing business, new agencies of menace to the general security, new forms and purposes of association, new conceptions of human relations and new social habits were quite immaterial. Here were the absolute universal . . . conceptions. . . . It was the office of the judge to fit the case to the conception after the manner of Procrustes.<sup>7</sup>

<sup>1</sup> KENEALY, *Whose Natural Law?*, 1 CATHOLIC LAWYER 259 (Oct. 1955).

<sup>2</sup> GOBLE, *Nature, Man and Law*, 41 A.B.A.J. 403 (1955).

<sup>3</sup> POUND, *The Theory of Judicial Decisions*, 36 HARV. L. REV. 802 (1923).

<sup>4</sup> *Id.* at 802-03.

<sup>5</sup> *Id.* at 804.

<sup>6</sup> *Id.* at 807.

<sup>7</sup> *Id.* at 817.

This view explains why, says Pound, "... American state courts from 1890 to 1910 were so confidently dogmatic in holding modern social legislation to be unconstitutional."<sup>8</sup> This theory of law and attitude of the courts is attributable to the natural law by Pound in the opening sentence of his article: "All nineteenth-century theories of judicial decision in one way or another grow out of the natural-law thinking of the seventeenth and eighteenth centuries."<sup>9</sup>

It was this conception of natural law to which I took exception, and I am glad that Father Kenealy seems to be in accord with my objections, or at least concedes that my arguments have "considerable relevance to the 'natural law' theories of Pufendorf, Thomasius, Hobbes, Spinoza and their followers of the seventeenth and eighteenth centuries."<sup>10</sup>

## II

But, says Father Kenealy, the natural law described by Dean Pound is not *the* natural law. It is spurious. Father Kenealy then sets forth a conception of natural law which differs in important respects from that described by Dean Pound. The seventeenth and eighteenth century philosophers named above are the "express adversaries" of the classical natural law, says Father Kenealy. He criticises them for extending the immutability idea to so large an area of the law. Their system purported "to regulate and to crystallize all legal institutions down

to incredible details." In contrast, Father Kenealy's natural law envisages many "derivative principles" which do not have this attribute, but which are only probably or possibly true, and in these derivatives are found the elements of "growth, change and improvement"<sup>11</sup> in the law.

This divergence of opinion raises the question as to who is to say what is the natural law. Who is to say what is the *classical* natural law? The people who write classics don't call them classics. Things come to be what people call them, and sometimes the same name is applied to two or more things. In England "wheat" is called "corn." In America "maize" is called "corn." I see no point in trying to show that "corn" is really "wheat" and not "maize." A number of different systems of law have been called "natural law."<sup>12</sup> I don't know upon what basis it can be claimed that one system is more entitled to that designation than another. Anyway, the matter of labeling seems relatively unimportant. And in any event, if natural-law-type-A is criticised, it can hardly be contended that the criticism is unsound because it does not apply to natural-law-type-B. That, however, seems to be the main theme of Father Kenealy's objections to my article. I criticised the natural law described by Dean Pound. Father Kenealy described another system called natural law, and then took great pains to show that my criticism had no application to it, and further that since it did not, it is obvious that I do not understand his system.

But now that Father Kenealy has put his system of natural law in issue, I hope it will

<sup>8</sup> *Id.* at 822. On natural law theories that influenced early American thinking, see LE BOUTILLIER, *AMERICAN DEMOCRACY AND NATURAL LAW* (1950).

<sup>9</sup> POUND, *The Theory of Judicial Decisions*, 36 HARV. L. REV. 802 (1923).

<sup>10</sup> KENEALY, *Whose Natural Law?*, 1 CATHOLIC LAWYER 259, 261 (Oct. 1955).

<sup>11</sup> *Id.* at 262.

<sup>12</sup> See WRIGHT, *AMERICAN INTERPRETATIONS OF NATURAL LAW* 327-47 (1931), where eight different interpretations of the word "natural" are listed.

not be inappropriate, in this article, to devote some attention to it. Father Kenealy's system as well as the system described by Pound, encompasses what are called "fundamental principles" which are said to be "certain, immutable and universal," and which are "antecedent, both in logic and in nature, to the formation of civil societies."<sup>13</sup> To the extent that Father Kenealy's system incorporates this view it seems to me to be vulnerable to at least some of the criticisms set forth in my article. I shall attempt to show the bases for this opinion.

The title to Father Kenealy's article, "*Whose Natural Law?*" points up the problem: when two or more groups of men of equal sincerity and reasonableness claim universality and immutability for certain principles of law, and they are in disagreement as to what those principles are, by what criterion is the choice to be made between them? Whose natural law is the natural law? Father Kenealy's answer to this question is that the true natural law is that which can be shown to be valid by "objective evidence." My critic says:

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. . . . [N]atural law philosophers unanimously set up *objective evidence* as the criterion of truth.<sup>14</sup>

These positive assertions by Father Kenealy that immutable and universal principles of natural law are established by "objective evidence" are mystifying. I know of no scientific means, or trial and error procedures by which principles of law can

be determined to be immutable and universal. How can it be established by objective evidence that principles are good or bad for society if we must accept them as immutably created before there was any society? Before society was formed there could have been no objective evidence as to the principles by which members of society were or should be controlled; nor could the mind have discovered, by logic or otherwise, principles which should be applied to facts then unknown. And after society was formed how could it then be determined that these principles were valid *before* society was formed? Furthermore, what would be the purpose in testing by objective evidence principles which are assumed to be universal and immutable before they are tested? By hypothesis, such principles are not subject to limitation or change even if experience showed that they should be limited or changed.

We can test a legal principle to determine whether it is *presently* good or bad. But there is no way of testing it to determine whether it was good or bad in the remote past before there was any society. Assuming that a principle has always been good and always will be good, how can that fact be proved presently by "objective evidence"? The only basis for a belief in the validity of a principle before or after the date of its verification by evidence is probability. If the principle is valid today it was probably valid yesterday, and will probably be valid tomorrow. However, as the period of time before or after the date of verification is lengthened, the probability of the validity of the rule gradually decreases to a point where it vanishes. To the extent that we project a principle forward or backward beyond this point of

<sup>13</sup> KENEALY, *Whose Natural Law?*, 1 CATHOLIC LAWYER 259, 260 (Oct. 1955).

<sup>14</sup> *Id.* at 264.

time, we rely solely on faith, and not on objective evidence. If it be objected that even science has no better method for determining principles than by use of objective evidence, the answer is, of course not, but science limits itself to stating its laws as probabilities or plausibilities, and not as absolutes, universals or immutables. If it be objected that legal empiricists have no better basis for their conclusions, the answer again is, of course not, but they do not claim that their generalizations are universal or immutable. Formerly science stated its conclusions, or at least some of them, in the form of absolutes. But so many of these have been proved fallacious that now science satisfies itself with more cautious statements.<sup>15</sup>

### III

The proposition that certain legal principles are "antecedent, both in logic and in nature, to the formation of civil societies" seems to assume that the mind can reason without experience—that it can by deductive logic reach conclusions about how men ought to conduct themselves in society, before society exists, and therefore before there are facts upon which reasoning can be based. Psychologists, I believe, would deny this. The mind cannot create knowledge. It cannot think in a vacuum. It can no more reason without facts than a mill can grind without grist.

Father Kenealy's primary principle is, "What is good, is to be done and what is

evil is to be avoided. . . ."<sup>16</sup> But this statement could have no meaning to the mind of a person who had had no social experience. A blank mind could not visualize a situation to which the principle applied. The principle could not be established by logic or by nature until experience gave the mind the stuff by which it could be determined what sort of acts were good acts and what sort were bad. If we define "good" in general terms, that is, without reference to particular acts, we would have to say something like this, "good is what one ought to do." But if we do that, the principle becomes tautological, *i.e.*, "one ought to do what one ought to do." This can hardly be said to be a principle at all.

Our knowledge of primitive languages indicates that man first thought in terms of specific things, and not in abstract or general terms. He had a word for a particular tree or spear before he had a word for trees or spears in general.<sup>17</sup> Likewise he thought in terms of specific acts before he began to put acts into classes or groups. It seems probable that primitive man very early learned by trial and error what specific acts promoted his well being, and what acts injured it. After he acquired the power of abstraction and generalization he put into one category the acts that promoted his well being and called them "good," and into another category, the acts that harmed him and called them "evil." Not until then was it meaningful to say "do what is good; avoid what is evil."

<sup>15</sup> See REICHENBACH, *THE RISE OF SCIENTIFIC PHILOSOPHY* (1951), especially Chapter 10 on the relativity of scientific knowledge and the theory of probabilities. This book shows the impact of modern science upon philosophy, a fact which, it seems to me, is largely ignored by advocates of natural law.

<sup>16</sup> KENEALY, *Whose Natural Law?*, 1 *CATHOLIC LAWYER* 259, 262 (Oct. 1955). As to the tautology or "emptiness" of such statements, see REICHENBACH, *supra* note 15.

<sup>17</sup> FULLER, *Legal Fictions*, 25 *ILL. L. REV.* 877, 889-90 (1931).

## IV

According to Father Kenealy, the principles expressed in the *Decalogue* have the qualities of "certainty, universality and immutability." Suppose we consider the Commandment "Thou shalt not kill." Notwithstanding the literally clear, unqualified and unconditional statement of this injunction, one may justifiably kill another in self defense, in defense of his family, or even in defense of a stranger. A sheriff may legally execute one sentenced to death for the commission of a crime, and a policeman may kill an escaping felon. A soldier in the armed forces of his country may kill as many of the enemy as he can. The larger the number he kills the greater hero he is. These are generally recognized exceptions to the mandate "Thou shalt not kill." But these exceptions are in no sense "derived" from the rule, as Father Kenealy seems to suggest. An exception which permits killing cannot be "derived" from a rule which says the exact opposite. Rather these exceptions come from something outside the rule. They come from other rules of policy, justice or expediency. If that is true then the question immediately arises, if these exceptions are permissible, may not other exceptions also be permissible. The principle itself is completely silent on how exceptions shall be determined. Must not other exceptions depend upon experience and new ideas as to policy, justice or expediency?

Suppose our country declares an unjust war (as many thought the Mexican war to be) and a volunteer in the army kills as many of the enemy as he can, has he violated the mandate against killing? What about a soldier on the other side killing as many of our men as he can? Has he violated the injunction? Then there is the question as to whether there was a war at all. Our

pioneers fought the Indians in many undeclared wars. We were frequently the aggressors, the Indians the defenders. At any rate we now have the territory the Indians had, and they have little or nothing in its place. Were the pioneers justified under the biblical injunction in killing Indians? When the Japs attacked Pearl Harbor, war had not been officially declared. Were our men justified in shooting down the attackers? They could have deserted their posts and saved themselves. Were we justified in dropping the A-bomb on Hiroshima, killing and maiming thousands of non-fighting men, women and children?

We start with the mandate "Thou shalt not kill," and we wind up killing men, women and children right and left by the tens of thousands. If we justify all these killings, we have made exception after exception to the principle. How do we know that we have not made too many exceptions or that we have not made enough? The rule itself does not help us. Only experience, and considerations outside the rule can furnish the answer to these questions. If we are justified in killing a Russian spy for performing what he conceives to be his patriotic duty, why are we not justified in taking the life of a person who wants to die because of an incurable illness or of taking the life of an unborn infant to save the life of its mother?<sup>18</sup>

Primitive man had no compunction about taking human life. He killed those he loved—his wife, children or slaves—as sacrifices at seedtime or on festive occasions.<sup>19</sup> It

<sup>18</sup> See, on this problem, *REPOUILLE v. UNITED STATES*, 165 F. 2d 152 (2d Cir. 1947) and the discussion of this and other cases in CAHN, *THE MORAL DECISION* 300 (1955).

<sup>19</sup> WELLS, *THE OUTLINE OF HISTORY* 104-05 (1921).

was not self-evident to him that he should not kill. In the seventeenth century hanging was the penalty for robbery. Such a severe penalty is not now permissible. The hangman in the seventeenth century was not guilty of a crime for hanging a convicted robber. The hanging was an exception to the rule against killing. At the present time he would be guilty of a crime. The rule to not kill has been expanded to cover a situation not covered before. Then is the rule against killing universal as to time, as to place or as to situation? Is it immutable or does it change? If it changes, then are not the boundaries of the rule itself shifted by these variations in time, place or situation? If it be said that the principle "Thou shalt not kill" simply prohibits killing under *ordinary* circumstances, the question still remains by what standard is it to be determined that the circumstances are ordinary. The question is always present, does the particular case come under the general rule or should it be made an exception. The rule furnishes no standard for answering this question.

This is not to say that "Thou shalt not kill" is not a good general rule, or that it is not invaluable as a starting point in solving a problem involving a killing, or that it does not establish a probability. It is to say, that the statement is like any other general rule, in that the type and number of exceptions to it must be worked out by considerations outside the rule and that when they are worked out the rule itself is changed. It is a general rule that a promise to be binding must have consideration. But experience has shown the desirability of a number of exceptions. These exceptions are not derived from the rule but from other

factors. As a result of the exceptions the rule is modified.

So while the desirability of general rules is not here controverted, it is asserted that the framing of general rules that are universal and immutable and to which no exceptions are to be made is impossible. Certainly as a matter of semantics it cannot be contended that a rule to which an exception is made is not changed. Make enough exceptions to a rule and the rule disappears. This has frequently happened in the history of our law, *e.g.*, the rule that a person who is not a party to a contract cannot sue upon it, and the rule that impossibility is no excuse for the non-performance of a contractual promise.

## V

Father Kenealy's anticipatory answer to this argument is that:

It is a commonplace in classical natural law philosophy that human rights, even the most fundamental . . . are *limited*. They are limited in the sense that they are subject to specification, qualification, expansion and contraction, and even forfeiture of exercise. . . .<sup>20</sup>

But this argument is completely unsatisfactory. It is simply linguistic gymnastics to say in one breath that a principle is "certain, universal and immutable" or that a right is "absolute," and in the next that it is, nevertheless, subject to "qualification," "expansion," "contraction" or "forfeiture." "Qualification" and "contraction" include "exception," and an "exception" is an actual subtraction from the rule. Each exception reduces the scope of the rule by the amount of the exception, and therefore makes it apply to fewer situations. By any reasonable definition this is a *change* in the rule itself.

<sup>20</sup> KENEALY, *Whose Natural Law?*, 1 CATHOLIC LAWYER 259, 263-64 (Oct. 1955).

As I have tried to show, it is the qualifications, contractions, expansions and exceptions that determine the boundary lines of a rule and therefore determine the full scope and meaning of the rule itself. It seems to me that Father Kenealy has paid a terrific price in semantics to make it possible to say that his fundamental principles are "certain, universal and immutable."

#### • VI

Father Kenealy objects to my argument that the inconsistencies between natural law systems make it impossible to make a reasonable choice between them. He states that my argument proves too much, that "its probative value, if any, militates against *any and all* philosophies." This point however is not well taken. My argument is based on the premise that the qualities of "universality" and "immutability" of rules cannot be proved by objective evidence. The existence of these properties can be based only upon faith. This is not the situation with respect to philosophies not claiming these infallible attributes. This issue is pointed up by Father Kenealy's assertion that all true "natural law philosophers agree on the fundamental principles of the natural law. . . ." <sup>21</sup> What this means is that only those philosophers who agree with Father Kenealy are true natural-law lawyers. The philosophies of all others are spurious. Advocates of the seventeenth-century natural law made the same claim to authenticity. So we have two claimants to a universal and immutable set of principles. Which is true? Neither can be proved by objective evidence, and their inconsistencies militate against either of them

<sup>21</sup> *Id.* at 265.

being accepted on faith. To an objective observer there would be no more reason for accepting one system than the other. The universality and immutability of principles of law can either be determined by objective evidence or they cannot. If they can be so determined, the whole body of natural law becomes a system of empirical law. If they cannot be so determined, then objective evidence cannot be used to show the validity of one system over another claiming the same attributes. This is the dilemma of the natural law.

#### VII

Father Kenealy also takes exception to my statement that the natural law is assumed to have "attained perfection." <sup>22</sup> But to say that certain principles are "universal and immutable," as Father Kenealy does, with his fundamentals, is to say, it seems to me, that those principles do not need changing and that they are therefore perfect.

I am asked by Father Kenealy to name a "representative natural law philosopher . . . [who] held to the principle that 'by natural law, freedom of contract could not be interfered with by legislation?'" <sup>23</sup> This is a loaded question, because if I name such a person, all Father Kenealy need do is to say that my selection is not a "*representative* natural-law philosopher" and he will not be representative because he takes that view. There were certainly a number of judges who claimed to be natural-law lawyers who held to the theory of the inviolability of freedom of contract. Justices

<sup>22</sup> *Ibid.*

<sup>23</sup> *Id.* at 263.



Chase, Field, Miller, and Brewer may be mentioned as among those who at various times took this view.<sup>24</sup> These judges were representatives of the natural law of the nineteenth century, if not of the natural law of Father Kenealy.

Father Kenealy further questions, "what principle held to be certain, universal and immutable has been relinquished at any time by devotees of the classical natural law?"<sup>25</sup> This question is also impossible to answer to Father Kenealy's satisfaction, because any person I might name as having relinquished a fundamental principle of natural law would by such relinquishment disqualify himself as a "devotee" of Father Kenealy's classical natural law. If my answer to the first question is accepted, then my answer to this inquiry would be that there has been a recession from the principle of the inviolability of the freedom of contract.

In relation to this question I would like to propose the name of Judge Robert N. Wilkin as one who meets all of Father Kenealy's requirements for a classical

<sup>24</sup> See *e.g.*, Chase, J., in *CALDER v. BULL*, 3 Dall. 386, 388 (U.S. 1798); Field, J., in *BUTCHERS' UNION v. CRESCENT*, 111 U.S. 746, 756 (1884). Other cases such as *ADAIR v. UNITED STATES*, 208 U.S. 161 (1908); *COPPAGE v. KANSAS*, 236 U.S. 1 (1914), are illustrative of the type of argument used by the courts in reading into the Constitution the "freedom of contract" idea, which it would seem is based on the theory that the Constitution incorporated by implication the natural law concepts of the eighteenth century. In support of this interpretation of the cases, see HAINES, *THE REVIVAL OF NATURAL LAW CONCEPTS* 210-32 (1930), and also REUSCHLEIN, *JURISPRUDENCE* 23-28 (1951).

<sup>25</sup> KENEALY, *Whose Natural Law?*, 1 *CATHOLIC LAWYER* 259, 262 (Oct. 1955).

natural-law lawyer. He has been classified as a neo-scholastic and has written extensively upon the subject.<sup>26</sup> In 1952, Judge Wilkin wrote a judicial opinion in which he stated that since it is contrary to nature for black birds, white birds, red birds and blue birds to roost on the same limb of a tree, it is contrary to natural law for colored persons to have a right to the use of a public golf course which by city ordinance was limited to white persons. "It seems" said the judge, "that segregation is not only recognized in constitutional law and judicial decision, but that it is also supported by general principles of natural law."<sup>27</sup> Now, according to Father Kenealy, "natural law philosophers agree on the fundamental principles of natural law." Since, then, it may be assumed that Judge Wilkin and Father Kenealy are in accord on those principles, it is pertinent to ask (1) What fundamental principle of natural law supports segregation and (2) what is the "objective evidence" that proves this principle. The United States Supreme Court, unhampered by the natural law concepts of Judge Wilkin, has now unanimously held an ordinance invalid, which denied colored persons the use of a public golf course.<sup>28</sup> If a segregation case now comes before Judge Wilkin, will he hold the Supreme Court's decision a nullity, because it violates the immutable natural law which is paramount to the Constitution, or will he wave a magical wand and hold that the changeless law has changed?

<sup>26</sup> See REUSCHLEIN, *JURISPRUDENCE* 391 (1951), where Judge Wilkin is listed as a neo-scholastic.

<sup>27</sup> *HAYES v. CRUTCHER*, 108 F. Supp. 582, 585 (M. D. Tenn. 1952).

<sup>28</sup> *HOLMES v. ATLANTA*, 350 U.S. 879 (1955) (*per curiam*).

## VIII

I did list Judge Wilkin under the neo-scholastics in my book. I did this before *Hayes v. Crutcher* came down. I see inconsistencies in Judge Wilkin's opinion in the *Hayes* case. For example, at one point he says, "It seems that segregation is not only recognized in constitutional law and judicial decision, but that it is also supported by general principles of natural law." Later in the same opinion, he says, "This Court therefore concludes that segregation itself (where legal rights are unaffected) is not unconstitutional or unlawful; that it is a natural tendency which in the progress of man's political, social and spiritual evolution may change or disappear." Well, what does he really mean? Does he mean that segregation is — something "supported by general principles of natural law" or merely that segregation is "a natural tendency — which — may change or disappear"?

It may be that even a neo-scholastic may err and fall from grace. Or maybe, I was wrong. Maybe Judge Wilkin was and is not a neo-scholastic—but something more akin to the "state of Nature" kind of natural law man.

Even I am capable of making a mistake but I do not think I did when I wrote in 1951 — and that is when I wrote. I do not, however, believe that Judge Wilkin can qualify as a neo-scholastic if he really means *everything* he wrote in *Hayes v. Crutcher*.

Harold G. Reuschlein

Basic to much that has been advanced in this discussion is the view that a rule has no objective existence in any other form than as a group of spoken or written words, that is, as a symbol. The idea or judgment which the words symbolize is the important thing, and it has no existence except in the mind. The rule is therefore subjective and not objective.<sup>29</sup> The idea forming the rule may be conceived as the result of one's actual observation of facts or of hearing the facts related by others, or it may be conceived by one's hearing or reading it after it has been arranged into the form of words by someone else. In the former case the stimulus for the idea has been the facts concerning which the rule is made. In the latter the stimulus has been the spoken or written group of words, which symbolize the rule. In either case the rule is subjective. Of course, conduct which results from knowledge of the rule is objective, but conduct in compliance with a rule, can hardly be said to be the rule itself.

It seems probable that the mind would not have the power to make a perfect formulation of a rule upon the basis of a

<sup>29</sup> One cannot be certain that even as to physical laws, one's mental image corresponds to reality. "Our scientific laws are always *a posteriori*, and governed by the facts to which they must submit. . . . They are therefore essentially relative and subjective, and their validity is strictly limited to man and depends on the identity of the other individuals to the same external stimuli. . . . It is clear therefore that expressions such as 'scientific truth' should only be taken in a very limited sense and not literally. . . . There is no scientific truth in the absolute sense. . . . We know less about our material world than is generally believed, and that our knowledge is subjective, and conditioned by the structure of our brain." LECOMTE DU NOUY, *HUMAN DESTINY* 15, 38 (New York 1947).

first experience with a particular group of facts. The first attempt would be more like a trial run. The rule may turn out to be good or bad. However, even if the rule turned out to be good, it is likely that it would need modification, revision or re-statement as the result of the impact upon the mind of new situations, or as the result of new knowledge or insights. In the course of hundreds of years it seems probable that a rule would be changed, modified or restated many times, or even completely abandoned. This is the method of growth—the process of evolution. In the early history of man, rules no doubt were arbitrary, unreasonable, and even immoral, at least according to modern standards. With the development of memory, knowledge increased and experience in applying rules gradually stimulated the development of ideas of policy, justice and morality. Conscience was born, and the element of “ought” was introduced into rule making. But the “ought” would have no meaning unassociated with acts, to which it could be made to apply. However, as man acquired wisdom he became able to integrate the acts and the “ought” into the form of a rule. As he continued to mature and to acquire greater stature through increased knowledge, the more able he became to make long range plans, to select more distant goals and to devise more adequate rules for attaining them.<sup>30</sup> It appears that Father Kenealy believes that fundamental principles should not yield to man’s broader knowledge or deeper insights, because he is sure that the fundamental principles man now has are “certain, universal and immutable” and therefore

<sup>30</sup> See CAHN, *THE MORAL DECISION*, 312-15 (1955).

perfect, and incapable of improvement.<sup>31</sup> This proposition I find myself unable to accept.

Father Kenealy asserts that “subjectivism is sheer intellectual defeatism” and that no philosophy based upon ideological “subjectivism” offers an “intellectually adequate reply to the destructive philosophy of totalitarianism.” The implication of this assertion is that only natural law, *i.e.*, only a philos-

<sup>31</sup> DEAN MIRIAM THERESA ROONEY in an informative and scholarly article, *Natural Law and Legal Justice*, 2 CATHOLIC LAWYER 22 (Jan. 1956) states that in my article, *Nature, Man and Law*, 41 A.B.A.J. 403 (1955), I was beating a “straw man” of my own creation. But Miss Rooney can hardly be unaware of the tremendous movement in our law described by Dean Pound and quoted near the beginning of this article. The impact of this natural law philosophy, continued for three centuries, was still very much in vogue in 1930 and even as late as 1952. William Gilligan in his letter [41 A.B.A.J. 680 (1955)] seems to bring the theory down to 1955. Note in his comment the use of “certain absolutes” and the suggestion that the best way to maintain the natural law doctrine in all its pristine glory is to close the columns of the press to those who criticize it. The phenomenon was and still is a very vigorous “straw man,” and was of course quite beyond my power to create. The fact that this is not the natural law of Thomas Aquinas does not disprove the movement.

Miss Rooney further says that after pointing out “the limits of human reason” I “lapsed into a *non sequitur* by attributing absolutism to adherents of the natural law school.” But Miss Rooney has misunderstood my article. What I said was (1) that experience shows that the mind of man is limited in its ability to understand nature; (2) that because of this, in both the physical and social sciences, we have frequently over-generalized and stated propositions to be absolute and universal which were later found to be limited or relative; (3) that the particular school of natural law which I described in the article had stated its principles in absolute and universal form, and (4) that this experience indicates that, in the law as in the sciences, we should be more cautious in our generalizations and avoid stating propositions as absolutes or universals simply because we believe them to be true.

ophy that accepts the attributes of certainty, universality and immutability of its fundamental principles can provide an effective rebuttal to totalitarianism. This position in my judgment is indefensible. It ignores the fact that men can believe and vigorously uphold principles based upon the accumulated wisdom of the ages, and that they can learn from experience what kind of a government is good and what kind is bad. It ignores the fact that standards of reference need not be eternally fixed. One of the most important procedures in science is to conduct experiments upon the basis of unproved postulates and to judge its results with reference to unproved values. Though the pole star moves, it is a reliable guide to the mariner. Though a raft is drifting it can be the means of saving the life of a drowning man. The strongest opposition to totalitarianism is found not in natural law, but in the accumulated wisdom of mankind.

### IX

At this juncture I would like to point out with emphasis, that because I reject the natural law theory of Father Kenealy, I am not asserting that there are no basic principles of enduring quality in our law. On the contrary, it is my belief that our composite wisdom has created a strong probability in

favor of the great worth of many principles, and these we should uphold and defend, and should use as criteria for the determination of good and bad, until experience convinces us of the desirability of change. Differing from Father Kenealy, I recognize that new experience, new insights or new knowledge may show the need for modification, of these fundamental principles and when they do, the indicated modifications should be made. It is my belief that in the search for truth the mind should not be shackled by unverifiable rules.

In closing I wish to say that I appreciate the fine spirit in which Father Kenealy has set forth his criticisms of my article. The whole tenor of his argument is such as to indicate that he is a man of great sincerity and goodwill, and that he is a seeker after truth. Moreover, he is a master dialectician. It is a pleasure to discuss these issues with one so dispassionate, so reasonable and so fair. In this article I have tried, I hope with success, to maintain the high level of disputation that he has set.

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[Father Kenealy and Dean Rooney have expressed the intention of responding to Mr. Goble's present article in a subsequent issue. *Ed.*]

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