1-1-1956

Two Approaches to Natural Law;Note

Vernon J. Bourke

NOTES

TWO APPROACHES TO NATURAL LAW

All authors agree not concerning the definition of the natural law, *who notwithstanding do very often make use of this term in their writings.*

THIS SENTENCE from Thomas Hobbes[1] was true when he wrote it and it is still true. Natural law, as the term is used by moral, legal and social theorists, has a wide variety of meanings. It is not the purpose of this note to detail the extent and history of these ambiguities, though such a study would have practical value. Rather, I should like to describe two contrasting attitudes toward natural law to suggest that one is better than the other. In what follows, references to certain writers in the history of philosophy are used for illustrative purposes only, not to condemn or approve their theories, or to demonstrate my point by any appeal to their authority. As a matter of historical fact, some of them (Hobbes is a good example) use both approaches. For the sake of clarity, let us call these approaches A and B.

In approach A, natural law is considered to be a set of rules or precepts conveyed to man by immediate inspiration. This communication is frequently thought to have a divine origin. Natural law thinkers who take this approach usually offer a definite list of precepts. Hobbes does so.[2] Because it is brief, his third law of nature may be cited as an example: it is simply, "that men perform their covenants made." This is offered as the "fountain of justice" and is used as the basis for an attack on Coke's "specious reasoning" in the *Commentaries on Littleton*.[3]

Where does Hobbes, or any similar thinker, get such a precept of natural law? That the precept is not so simple and universally accepted as Hobbes thought, is evident to anyone who reads the ethical literature of Europe. From Kant and Bentham onward, the most hotly disputed moral question has been that of the obligation to keep promises. People who list these precepts usually make some effort to "deduce" them from one primary moral judgment. This judgment is considered to be naturally known. Early modern thinkers hasten to add that these rules are also promulgated in Holy Scripture, or by some other means of

1. HOBBES, *Philosophical Rudiments Concerning Government,* in SELECTIONS 283 (Woodbridge ed. 1930).
2. See the parallel chapters from *Leviathan* and *Philosophical Rudiments* in HOBBES, *op. cit. supra* note 1, at 268-329.
3. HOBBES, *op. cit. supra* note 1, at 298.

divine inspiration.[4] Some thinkers, then, with theistic convictions are quite frank in admitting the immediate sources of their lists of rules of natural law. Catholic writers often do this in much the same way that Hobbes does. Where religious inspiration is weak or absent, as in the case of some contemporary British moralists, resort is made to an intuitive origin of basic moral judgments. In such cases it becomes more and more difficult to justify any code of laws for man's behavior.

Another variant of approach A consists in the appeal to the condition of men in a "state of nature." Excellent examples of this procedure are found in some ancient and mediaeval writers but we do not lack illustrations in English literature. John Locke, for instance, in common with many men of his period, supposed the American Indians to be living in a state of nature.[5] It was generally imagined that these happy savages actually lived without the burden of positive laws, in peaceful obedience to the laws of nature. Rousseau's version of the theory is well known. Some thought that no contemporaries were actually living in this condition but that, at some idyllic period in the history of man, there had been people in a state of nature. All that is necessary, then, to discover the natural law is to divest ourselves of this hampering garment of man-made laws and to listen to the voice of nature. The implication is that natural law is instinctively and immediately evident.

For less romantic thinkers, approach A takes the form of innatism or aprioristic rationalism. In this version, the mind of man is thought to be endowed by nature with a sense of duty, or even with certain initial rules of conduct. All of this is prior to sense experience. These innate promptings to moral goodness need only be developed in order to secure natural justice. While Kantian legal thinking makes little use of the term, natural law, it appears closely related to the attitude of this approach.

Doubtless there are many other variations of this way of getting to the natural law. The significant thing is that no advocate of approach A pays much attention to the scientific study of nature, whether in man or in the world about him. The facts of human experience, the growth of human customs, the logic of competing moral and legal theories are but useless burdens to the man who already knows, or thinks he knows, the rules of life by virtue of a special communication. Some of the theocratic thinkers in the American colonies were thus impatient of man-made laws and legal theories, precisely because they claimed to find their precepts of civil justice in the Bible.

A quite different attitude toward natural law is characteristic of approach B. Here, there is no claim of direct inspiration from God, though one may be convinced that God is the ultimate source of order and justice. Nor is there any need for reference to an actual or imaginary "state of nature." Neither innate nor intuited moral precepts are required for this approach. The central notion is that certain types of activity are appropriate, or inappropriate, to certain types

4. Thus Hobbes ends chapter three of the *Philosophical Rudiments*: "the laws of nature . . . are not in propriety of speech laws, as they proceed from nature. Yet, as they are delivered by God in holy Scriptures, as we shall see in the chapter following, they are most properly called by the name of laws. For the sacred Scripture is the speech of God commanding over all things by greatest right." (*Op. cit. supra* note 1, at 329.)

5. LOCKE, *Treatise of Civil Government*, in SELECTIONS 62-80 (Lamprecht ed. 1928).

of agents under given circumstances. This approach is evident in the practical thinking of some of the classic Greek philosophers, though we are not required to think that they exhausted its possibilities. Socrates, Plato, and Aristotle figure in its history, as do the Stoics. They felt that man, as a reasoning animal, could act in ways not open to the irrational brute. They judged that some activities quite natural to brutes were not to be performed by men. They indicated the importance of the surrounding circumstances of human action and analyzed the conditions of voluntariness.

It is certainly not necessary to this approach to say, with Plato, that human nature is a really existing and unchanging essence. Such extreme realism was rejected by Aristotle. Indeed, if such a human nature were actually present in each man, it would be difficult to explain why men do not always act in conformity with it. And if they did, there would seem to be little need to legislate or to theorize on the nature of laws. The laws of such a human "nature" would be obeyed as automatically as the laws of physics. Greek necessitarianism is foreign to approach B.

On the other hand, I do not think it possible to develop a theory of natural law on a purely nominalistic basis. It is true that individual things are the only existents; universal essences do not exist. Men differ as individuals but they resemble each other more than they do dogs or trees or stones. There are observable types of beings. It is possible to distinguish different types of actions. This is what makes it possible to formulate laws, for a law always has some generality to it. It is a statement that a certain type of action is suitable, or unsuitable, to a certain type of agent, under certain typical conditions.

Again, in approach B, *nature* refers not merely to the nature of man but also to the natures of other things with which, and in regard to which, men may act freely. One of the features common to individual men (and not to dogs, trees or stones) is an ability to understand a general rule and to conform to it in certain situations only. Such conformity is not automatic, wholly predetermined by antecedent conditions, as it appears to be in subhuman agents. Certain of men's actions, such as the natural processes of digestion, are naturally and physically predetermined, as they are in other animals. It is nonsense to enact human legislation to govern such events. Other actions of men, such as walking, may be voluntary. They are not wholly predetermined. These voluntary actions are governable by general precepts or laws. Yet the striking thing about such laws of voluntary activity is not that they *must* be obeyed but that they *may* be disobeyed.

Approach B endeavors to discover such laws by studying the specific type of agent that man is, and by attending to the circumstances under which men perform voluntary actions. The more general the expression of such law, the less attention does it pay to circumstances. In its maximum generalization all circumstantial conditions would be omitted. The old formula, *good should be done, evil avoided,* is a rule devoid of special conditions. Such a rule is not immediately practical: no one can go out and just do good. More practical precepts are reached by observing and stating the actual conditions of voluntary action. Such a process is not an analytical deduction from the formula stated above. Only experience can lead to the discovery of what is good action in the concrete. How-

ever, crude experience is not enough to suggest immediately the patterns of right conduct in voluntary activity. Some hard thinking must be done. There is no substitute for practical reasoning, either in moralizing or in legislating.

Hence, this approach to law is both empirical and rational. Without experience, we know nothing of the nature of human agents, human actions and their circumstances. Experience covers not only ordinary sense perceptions but also the findings of the various sciences. Of course the social sciences are important sources of information for the legal thinker and the moralist.[6] But, since man may perform voluntary actions modifiable by any parts of the universe, all the special sciences (biology, physics, chemistry, mathematics, and so on) are sources of significant and practical information. Whatever can be discovered about the nature of things is pertinent to the regulation of human conduct.

This is not to say that everything said by scientists is to be accepted at face value. Some scientific reports convey actual information about observed things or events. These are something like the "first-order facts" mentioned by Professor Northrop.[7] Such information is very useful to one who is concerned with the laws of human conduct. Other things said by scientists are generalizations and interpretations of certain data. These are also of practical utility. Still other things said by scientists are highly personal conclusions, even guesses, hypothetical constructs and deliberate overemphases of partial data. These statements of the third type (which appear to me to abound in some of the social sciences) have not the same practical status as the hard facts of experience.

Thus, if a scientist reports that in studying a hundred cases of disrupted personality he has found evidence of sexual aberration in each and all, this is morally and legally significant. If he further reports that all psychological abnormality is due to sexual peculiarity, this opinion is not of the same practical value. It is not easy to distinguish what is sound and what is unsound in a scientific report. This simply underlines the point made earlier: there is no easy substitute, in jurisprudence or in morals, for hard thinking. Science does not absolve practical thinkers from their obligation to make a rational appraisal of the relation of projected patterns of activity to the nature of the human agent and to the surrounding conditions of that activity. Any method or theory which suggests that it will give ready-made answers, without much need for practical thinking, is suspect.

It is evident that my preference is for approach B. I do not reject A because it appeals to divine law. My criticism of it centers on its claim to short-cut experience and reasoning by appealing to some sort of direct and immediate grasp of natural law. This appears to be but a travesty on natural law thinking. It is with some hesitation that I conclude by suggesting that approach B is Thomistic. My hesitation is solely due to my fear that I may be misunderstood by non-Thomists. I do not mean to say that one must call himself a Thomist in order to develop a legal theory along the lines of approach B. At least I should like to go on record as thinking that Thomism is not to be identified with approach A. True, St. Thomas speaks of natural law as a "participation" in the divine law.

6. See the interesting and, I think, tenable exposition of the relation of sociological jurisprudence to natural law jurisprudence in Northrop, *Ethical Relativism in the Light of Recent Legal Science*, 52 JOURNAL OF PHILOSOPHY 651-662 (1955).
7. Northrop, *supra* note 6, at 657.

Yet I have the strong conviction that this participation does not mean a privileged communication, coming directly by divine inspiration, but rather the process of working out rules of human behavior from the data of human experience, using the ordinary rules of logic and scientific method. Such procedure is a natural approach to law, moral or civil, because its data are the presentations of natural experience, its method is as natural as any other type of practical reasoning, and its results are as good as the admittedly imperfect nature of the human mind permits.

VERNON J. BOURKE