Nature and Reason in Law

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NATURE AND REASON IN LAW.

JOHN DEWEY.

IN Pollock's "Expansion of the Common Law," there is found the following interesting passage from St. German, written early in the sixteenth century: "It is not used among them that be learned in the laws of England, to reason what thing is commanded or prohibited by the Law of Nature and what not, but all the reasoning in that behalf is under this manner. As when anything is grounded upon the Law of Nature, they say that Reason will that such a thing be done; and if it be prohibited by the Law of Nature they say it is against Reason, or that Reason will not suffer that to be done."[1] It is a commonplace to the student of the history of law that this identification of natural and rational, and the equating of both with the morally right, has been at various times a source of great improvements in law. Professor Pound has recently designated the stage in the development of law that follows upon and corrects many of the abuses of the stage of strict law as that of equity or natural law. He says: "The capital ideas of the stage of equity or natural law are the identification of law with morals; the conception of duty and the attempt to make moral duties into legal duties, and reliance upon reason rather than upon arbitrary rule to keep down caprice and eliminate the personal element in the administration of justice."[2] Aside from the introduction of equity, the abolition of technicalities which obstructed rather than furthered justice, the adoption by the courts of usages that were more reasonable than those perpetuated in older law, the idea of the subordination of government to social ends, and the furtherance of humane international relations are a few of the many services rendered by the identification

[1] Pollock, "The Expansion of the Common Law," p. 109.
[2] 27 Harvard Law Review, p. 213.

of the natural with the reasonable. Looking back and taking the intellectual temper and equipment of the times into account, it is hard to see what other intellectual instrumentality could have done the work effected by the concept of natural reason in the seventeenth and eighteenth centuries. In the view of such facts the title given by Pollock to the Law of Nature, "a living embodiment of the collective reason of civilized mankind,"[3] is not so much out of the way as it seems to the philosopher who has been trained to look with suspicion upon any reference to Nature as a norm; and who is conscious of the seemingly individualistic, if not anti-social connotation of the term in political philosophy. But even in Locke, careful analysis shows that the limitation of governmental action to the protection of pre-existent natural rights is much more an assertion of the subordination of governmental action to ends that are reasonable, or moral, than appears from a hasty reading. Restricting the action of government by moral considerations, that is to say considerations of reason, is what Locke is chiefly concerned with.

But, unfortunately, nature and reason are ambiguous terms; hence their use as equivalents of what is morally desirable is subject to diverse interpretations. Nature also means the existent, the given, the antecedent state of things; or the present state of things so far as that is connected with the antecedent condition by casual laws. Appeal to nature may, therefore, signify the reverse of an appeal to what is desirable in the way of consequences; it may denote an attempt to settle what is desirable among consequences by reference to an antecedent and hence fixed and immutable rule.

Accordingly, while at one time or with some people, or with some persons part of the time, natural justice meant that which commends itself to the best judgment of the most experienced or to the collective common sense of the race, as over against the conventional and technical jus-

[3] *Op. cit.*, p. 128.

tice of inherited legal rules; at other times it meant acceptance of the given state of distribution of advantages and disadvantages. Such a view of natural justice finds, for example, a typical representative in Herbert Spencer. It is, so to speak, purely accidental that such philosophies have been what we lately call individualistic as against collective or socialistic. The essential thing in them is the subordination of the human, whether several or conjoint, to the given, to the physical. The central feature of the *laissez faire* doctrine is that human reason is confined to discovering what antecedently exists, the pre-existent system of advantages and disadvantages, resources and obstacles, and then to conforming action strictly to the given scheme. It is the abnegation of human intelligence save as a bare reporter of things as they are and as a power conforming to them. It is a kind of epistemological realism in politics. That such a doctrine should work out, no matter how personally benevolent its holders, in the direction of *Beati possidentes*, is inevitable.

This mode of interpretation affected the idea of Reason as well as of Nature, not merely because of the historic equating of Reason and Nature in judicial philosophy, but for special reasons. To the century that felt the influence of Newtonian science, Nature was more Reason than human reason itself. Human reason was reason only as a faculty of retracing the wisdom, harmony, the uniform and comprehensive laws, embodied in Nature—that is, in the physically given world. The Lockean and Deistic identification of Reason with God, the benevolent ordainer and arranger of things, flavored even the most free-thinking speculation of the times. Those who prided themselves that they had no fear of God attributed to Nature the same optimistic benevolence that had characterized the God of natural religion. In order to be really reasonable and moral in action, that is, to act in behalf of good consequences, one had but to get his own interfering intelligence out of the way, and permit Nature, true Reason, to execute her own harmonious and benevolent designs. With respect to

Reason as to Nature, the emphasis upon individualism was extraneous and secondary; the intrinsic and primary thing was the denial of a characteristic, a unique function, to human intelligence. Nature, not human thought, determined the formation of true purposes.

If I trace an analogous movement in the decisions of the courts relative to due diligence and undue negligence, it is not for the sake of demonstrating the influence of this type of philosophy upon the minds of judges; that would be somewhat absurd. But there *is* demonstrable, in my opinion, a parity of logic; and in addition there was probably some indirect influence in so far as this mode of thought was in the air. Reason is appealed to as a standard of action. A man's liability depends upon whether he uses the proper degree of reasonable care and prudence. But what measures this? Obviously ordinary prudence is a vague and relative matter—relative in the sense of varying with the circumstances of the situations, as the courts have pointed out. But this very vagueness and variability make the more necessary some principle for detecting the meaning of reasonable in special cases. It is obvious at a glance that the reference to what reasonable and prudent men do or would do in similar cases, has exactly the ambiguity we have been dealing with. It may mean reasonable in the sense of involving the kind of foresight that *would*, in similar situations, conduce to desirable consequences; or it may mean the amount and kind of foresight that, as a matter of fact, are customary among men in like pursuits, even though it be demonstrable that, upon the whole, the customs involve deplorable consequences.

That this ambiguity is not merely a theoretical possibility is evidenced by the course of court decisions in the matter of the due diligence of employers in the last half century. While, in some cases, the courts have taken the position which identifies reason with foresight of specific consequences, the general tendency for a long time was to identify reasonable prudence with the ruling customs of the trade, no matter how unreasonable those customs themselves

were when looked at from the standpoint of the sort of consequences they tend to produce. For a long time the Supreme Court was almost alone in saying: "Ordinary care on the part of a railway company implies, as between it and its employees, not simply that degree of diligence which is *customary* among those intrusted with the management of railroad property, but such as having respect to the exigencies of the particular service, *ought* reasonably to be observed . . . such watchfulness, caution, and foresight as, under all the circumstances of the particular service, a corporation controlled by careful, prudent men *ought* to exercise." . . . The court "cannot give their assent to the doctrine that ordinary care in such cases means only the degree of diligence which is customary, or is sanctioned by the general practice and usage which obtains."[4] Such a quotation, on the contrary side, as the following, from a federal court, shows well the different interpretations of reasonable care put upon the obligations of the corporation to the general public it served and to those for whose services it paid: "As respects travel on steam railways many of the courts of this country hold the carrier bound to keep pace with new inventions in the direction of safety. But this rule is an exceptional one, established upon grounds of public policy, and for the safety of human life. It has never been applied to the relation of master and servant."[5]

When we consider the implications of the contract from the side of the employee, as these have been developed through court decisions with respect to the assumption of risks, we find yet another aspect of the same matter. No Kantian philosopher ever went further in ascribing a ready-made antecedent faculty of reason to man than the courts, in endowing the laborers of this country with unbounded foresight of the consequences implied in taking a job; and no transcendentalist ever went further in assuming that this

[4] *Wabash Ry. Co.* v. *McDaniels*, 107 U. S. 454.; italics are mine.
[5] 40 Fed. 784

antecedently possessed reason was in a position to make itself effective in action. As far as the workmen were concerned the courts were committed to the idealistic assumption: *Mens agitat molem.* In its application, this meant, that risks which the laborer ran as matter of fact in the performance of his habitual duties were assumed to have been deliberately or intentionally undertaken by him. The whole doctrine of the assumption of risk was, in pragmatic effect, a rendering of brute physical situations in terms of purpose or reason.

In short, in substance although not in form, the reasonable or "natural" was identified with the antecedently given, with the state of affairs that customarily obtained, not with the exercise of intelligence to correct defects and to bring about better consequences. From the side of the employer, it meant *Beati possidentes,* To him that hath shall be given; from the side of the employee, *Væ victis,* From him that hath not shall be taken away even that which he seemeth to have.

It would not be difficult to trace the same logic in the denial of the principle of liability without fault. Under certain conditions, the doctrine is doubtless reasonable, in the sense in which reasonable means due foresight of consequences. Under other conditions, where industrial pursuits bring about different consequences, the doctrine that in pure accident of misadventure it is reasonable for the loss to lie where it falls, is, when laid down as a dogma, the deliberate identification of the reasonable with the physically existent, and wilful refusal to use intelligence in such a way as to ameliorate the impact of disadvantages.

Fortunately, many of the specific things dealt with in this paper are now by way of becoming historic reminiscences. But for this very reason they may the better illustrate the main thesis of this paper. The principle of natural law and justice in the sense that technical and official legal rules need to be adapted to secure desirable results in practice, may well be accepted. But we also find that one of the chief offices of the idea of nature in political and

judicial practice has been to consecrate the existent state of affairs, whatever its distribution of advantages and disadvantages, of benefits and losses; and to idealize, rationalize, moralize, the physically given—for customs from a philosophical point of view are part of the physical state of affairs. By reading between the lines, moreover, we find that the chief working difference between moral philosophies in their application to law is that some of them seek for an antecedent principle by which to decide; while others recommend the consideration of the specific consequences that flow from treating a specific situation this way or that, using the antecedent material and rules as guides of intellectual analysis but not as norms of decision.

My point is practically made. But, in concluding, I will say that I see nothing new in principle in the recent attempt to rehabilitate the principle of natural rights by connecting it with the nature of consciousness.[6] The problem is the same whether we use the older word "reason" or the newer word "consciousness." Is consciousness taken as a possessed fact, something given in some men, and relatively lacking in others? Then we have still a physical morals—a worship of consciousness or intelligence in name; a denial, an abdication of it in fact, since what already exists is taken as the norm of action, in spite of the fact that intelligence is concerned with what the given may lead to. But if by "consciousness" we mean interest in desirable consequences and if we include in its attribution to a person the perception that similar intelligence is desirable in others (a man being stupid or unconscious so far as he does not effectively recognize this fact), then we have a situation where reference to individualism is irrelevant and misleading,[7] and where the significant thing

[6] *Individualism.* Warner Fite. Longmans. 1912.

[7] What would one think of a physiologist who today in describing the digestion of food lugged in the "individual," or the fact that all circulation is "individual" as an enlightening and explanatory fact? To dwell upon a conception of consciousness that identifies it with impartial and comprehensive foresight, and then to insist that "consciousness is individual" in a way that qualifies or denies the natural implications of the prior conceptions, seems to

is the need of the exercise of intelligence to bring about conditions that will develop more intelligence—a version of natural law to which I heartily subscribe.

I would suggest that the question of the moral right of the employer to exploit (as by means of the doctrine of the assumption of risk) the inferior intelligence of the employee affords an admirable opportunity for removing the ambiguity that still, to my own mind, affects the doctrine of natural rights as developed in chapter four of Fite's "Individualism." The author seems, especially in his criticism of other views, to be falling back upon intelligence as a physical fact, that is, as a given thing. But when he is as anxious to show that his theory is "generous" as another school is to show that its views are "social," he appears to shift to the view that identifies intelligence with effective foresight of impartially and comprehensively distributed consequences. If he means the latter, the difference between it and what other people call a social view of intelligence is verbal; if he means the former, the difference is, pragmatically, fundamental and insurmountable. And, I repeat, while we hear much about intelligence, the effect of any theory that identifies intelligence with the given, instead of with the foresight of better and worse, is denial of the function of intelligence.

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be on a par with the procedure of the physiologist, who, after telling us that circulation is a matter of specific fact, thinks to add or change something by hitching the facts on to an "individual." Either Professor Fite's individual *is* the intelligence over again, or it is something assumed ready-made, never analyzed or described, and yet used to negate the essential traits of intelligence.