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Haines: The Revival of Natural Law Concepts

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THE REVIVAL OF NATURAL LAW CONCEPTS. By *Charles Grove Haines*. New York: Russell & Russell, Inc. 1965. Pp. xiii, 388. $8.50.

Jurisprudence, that subdivision of legal thought relating to the problem of determining what constitutes "law," has attracted the attention of more people within the past two decades than ever before. Law professors, law students, and those engaged in the practice of law, as well as persons one would not ordinarily believe to be interested in the underlying concepts of state-prescribed norms of conduct, are seeking an understanding of the basic nature of our legal system.

Many factors have brought about this comparatively widespread interest in the underpinnings of our law. Part of this "fundamentals of law" orientation can be traced to the ever-expanding role played by law in American society during the second half of the twentieth century. Regulations prepared and administered by government are constantly touching more aspects of day-to-day life. The points of contact between individual action and legal mandates have been steadily increasing in number for several decades. In addition, the intensity of the clashes between individual actions and the commands of the law has tended to increase in magnitude. As more Americans have been subjected to legal restraints, their desire to learn more about the basic characteristics of the law has quite understandably been stimulated. The increased dissemination of knowledge resulting from an unprecedented quantum of formal education has triggered what might be viewed as a chain-reaction response in many Americans—the desire for more and more information about their own society and each of its component parts. For this reason, commentators are paying more and more attention to the basic factors which shape the principles of law expounded by the legislative, executive, and judicial branches of government.

Warranting special attention in this trend is the proliferation of material written by political scientists engaged in exploring the techniques and processes employed by judges in arriving at decisions.[1] These authors have stressed that in many instances the judge does not confine himself to the demands of precedent and the technical merits of the contentions urged by the litigants. Instead, he may pay attention, in varying degrees, to how the available alternatives would affect the relations between the branches of the government, as well as how those alternatives relate to national and

1. For an excellent discussion of the techniques employed by some Justices of the United States Supreme Court to gain support for their personal positions from their brethren on the Court, see MURPHY, ELEMENTS OF JUDICIAL STRATEGY (1964). The approach to law as a balancing of power positions between the different sectors of federal and state government is vigorously presented in SHAPIRO, LAW AND POLITICS IN THE SUPREME COURT (1964).

personal objectives and standards as understood and accepted by the judge. Economics, social organization, and political philosophy often not only influence a court's thinking but also may be the determinative factors in its ultimate decision.

The Revival of Natural Law Concepts, by Charles Grove Haines, probes the history, content, and application of natural-law concepts from ancient times through the 1920's. One who has been looking for a clear, succinct, and well considered examination of the various facets of natural-law philosophy will certainly regard this book as a "find." Many authors have struggled to present a clear description of the component elements of natural-law thought but have missed the mark. Mr. Haines has scored a direct hit. He successfully captures and conveys to the reader the chameleon nature of natural law, discussing its changing character since its initial appearance in early Greek thought. Carefully and with a strong hand, the author guides the reader through the shifts in emphasis, objectives, and manner of application expounded by the proponents of natural law. Haines thus contributes to the reader's appreciation of the fact that legal systems do more than simply adjust grievances among individuals. The norms of conduct administered by the law-makers reflect man's groping for a body of rules which he can use as a measuring rod to ascertain the propriety of his acts; this urge to seek out a body of basic standards is the crux of natural-law philosophy. By the time one completes his reading of this volume, he cannot contest the conclusion of the editors of the Harvard Studies in Jurisprudence that this work has well earned a place in that esteemed collection of writings devoted to the examination of legal philosophy.

What is natural law and where does it come from? What are its directives and how has it been applied? When compared with other legal philosophies, how has it fared? In what way has it been used to shape the development of American law and how much influence, if any, will natural-law concepts have on the future content of American law? Each of these questions is studied in *The Revival of Natural Law Concepts.*

Some Greek and some Roman philosophers placed "law" into two categories. One was man-made law—those norms established by human beings for use at a particular time and place. Not all of man's "laws," however, were to be treated in the same fashion. Some were to be respected while others were to be rejected. The second category was the frame of reference for determining the propriety or impropriety of mankind's prescribed standards of conduct; in other words, a superior body of rules determining right and wrong. This higher law, according to natural-law theory, circumscribes man's law-making power. It provides the guidelines which fallible mankind is obliged to observe. Under this concept, those norms formulated by

men which violate such superior mandates are not to be treated as law. State directives which fail to comply with basic standards of correctness are not "law" and need not be obeyed.

During the Greek and Roman period, the natural-law theory was invoked as a rationale by those who were dissatisfied with the existing order. Indeed, throughout subsequent history it has been used repeatedly by the malcontents, the proponents of change, the alienated—to employ the current nomenclature used by the existentialist thinkers and their progeny to depict those who reject what society has to offer. "Out-groups" have insisted time after time that there is a higher body of law than that laid down by mankind and that higher law entitles them to gain entrance to, or replace, the "in-groups." However, this is just one aspect of the manner in which natural-law thinking may be utilized. It has also been employed to inject into existing law the kind of elasticity essential to the efficient and acceptable functioning of a nation's legal system. It has served as an escape tube through which legal concepts can be eliminated when they become unsatisfactory. Conversely, it has been invoked to establish or retain certain economic, political, and social concepts which, although favored by the law-makers, are in need of a philosophical foundation upon which they can be sustained.

Advocates of the natural-law theory do not always agree with one another as to the source of natural-law principles. Some take the position that there are certain divinely created directives which govern human conduct and which are immutable as well as universal. Others approach natural law by de-emphasizing, or even omitting all reference to, a supreme being. They stress man's power to reason logically and to observe his environment. All of these concepts converge on the premise that one need only look about him to discern the basic standards of proper human conduct. Some natural-law theorists rely upon theological literature, some concern themselves with the manner in which events take place, and others find the basic standards of propriety in the presumed desiderata of mankind.[2] The common characteristic of each of these branches of natural-law philosophy is the subjective manner of determining the content of natural law. This subjectivity has permitted the supporters of natural-law philosophy to urge different results simultaneously. For instance, some advocates of individual liberty have urged that individuals should be permitted to pursue their personal goals with a minimum of governmental intervention. Others have insisted that only by the government's playing an active part in the functioning of society will individuals be able to enjoy the freedom

2. A well reasoned argument for support of this philosophy of law is the underlying theme of FULLER, THE MORALITY OF LAW (1964).

essential to the pursuit of their aspirations. Both of these theories have been supported on the basis of natural law.

The chapters in this book which will probably have the greatest attraction for the constitutional-law enthusiast are those which explore the role that natural law has played in the development of the doctrine of judicial review. The author finds an application of natural-law theory in the principle that the judiciary possesses the power to oversee, within certain self-imposed limits, the activities of the legislative and executive branches of the government with a view to determining whether their acts violate a constitutional mandate. Haines exposes the reader to a fascinating exposition of the history of constitutionalism—the doctrine that there is a higher law in reference to which the judiciary can competently and rightfully determine the enforceability of laws devised by men. The *Magna Carta,* Lord Coke's opinion in *Doctor Bonham's Case,*[3] in which that jurist insisted that the standards of conduct ordained by the king as well as by Parliament were subject to a higher law, and Blackstone's assertion that there was a superior law are each, in the author's opinion, illustrative of the natural-law approach to man-made law.

Supporters of the American Revolution boldly asserted that it was correct, by the tenets of a higher, unwritten law, for the colonists to seek their freedom from the mother country. These men were influenced by the concept of natural law; they insisted that a higher law granted individuals certain rights which no human being (even a king), or any collective body of human beings, such as Parliament, could deny. It is not surprising that Mr. Chief Justice Marshall, having been exposed to this philosophy, grasped the opportunity in *Marbury v. Madison*[4] to assert that the Constitution vested in the judiciary the power to determine the validity of congressional legislation. That assertion was clearly consistent with the belief of the leaders of the Revolution that the Constitution of the new republic acknowledged the concept of a higher law. In the place of a higher *unwritten* law, Marshall concluded, the Constitution itself had been selected as the basic frame of reference which the judiciary was obligated to use in determining whether governmental action was lawful.

During the course of the nineteenth century, the breadth of acceptance of natural-law thinking waxed and waned. The concept of inalienable rights, which had played such a prominent role in

3. 8 Co. Rep. 114, 77 Eng. Rep. 646 (C.P. 1610). Coke's insistence on the supremacy of a higher law, which was to be applied by the judiciary to invalidate certain acts of the king and parliament, did not become a part of the English constitutional system. Instead, under English law, the parliament is supreme. See generally Mortensen v. Peters, 8 Sess. Cas. (5th Ser.) 93 (Scot. Ct. Justiciary 1906).

4. 5 U.S. (1 Cranch) 137 (1803).

rallying the people to storm the Bastille and reject the French monarchy, all but disappeared in France after the revolution had run its course. As the battle lines slowly formed in the United States between the antagonists representing the conflicting attitudes of the North and the South, there was a resurgence of concern with natural law and inalienable rights. Those who urged that the southern states had a right to secede from the Union appealed to "states' rights," a doctrine based upon a "higher law." Abolitionists insisted that the institution of slavery was wrong in the very nature of things and had to be extinguished. The assertion that the Union was supreme indicates strongly a rejection of the higher-law philosophy so vehemently asserted in the 1770's as a rationale for the American Revolution.

Following the Civil War, the natural-law concept merged with the economic theory of laissez-faire to give rise to an approach to constitutional law which dominated the American scene for many decades. This was the political-economic concept that the due process clauses contained in the Constitution severely restricted the power of the federal and state legislatures to regulate contract and property rights. Mr. Haines expounds at great length upon the period he refers to as "conservative"—the period when the Supreme Court struck down statutes directed at curbing individual activity viewed by many as deleterious to the best interests of the nation. Laws subjecting private action to public regulation were considered by "conservative" members of the Court to be violative of the liberty guaranteed to individuals by the Constitution.

In the latter half of the nineteenth century, many of those who concerned themselves with the meaning of law and the obligations of the members of society to observe the commands of the state turned away from natural law and looked to other bases of law which appeared to them to be more consistent with the milieu of the age. Those who espoused the "positivist" approach rejected the idea of a higher unwritten law, and instead defined law narrowly to embrace only those mandates proclaimed by the state. What the state commanded was law; what the state did not command, insisted the positivists, was not law. The content of the law was clear-cut and easily discernible. The state was the sole and final arbiter of right and wrong.[5] Like the positivists, the followers of the "historical" school of law denied the existence of universally appropriate rules of human conduct. They insisted that the content of the law of each nation was unique to that entity, being predicated upon the

5. Mr. Haines presents the positions of Kant and Hegel with regard to the supremacy of the state at pp. 237-38. For a critique of the positivist school, as well as an argument that natural law is essential if excesses of power are to be avoided, see SHUMAN, LEGAL POSITIVISM (1963).

characteristics of its people, such as their collective past experiences and their aspirations.[6]

Positivism, rather than natural law, took hold in many areas of the law in the early part of the twentieth century. The author places the objectives of those who fought for the revival of natural law in the twentieth century into four categories: (1) to infuse into the law ethical concepts which law-makers might otherwise omit; (2) to provide law-givers with a sense of direction toward the attainment of sought-after ideals; (3) to have judges and legislators acknowledge the existence of a body of laws superior to any which they might personally select; and (4) to place some outermost limits on state action.

Natural law has attracted many ardent followers since the 1930's. Following World War II, the victorious powers revolted from "positivism run rampant," which characterized the Hitler regime, and invoked natural-law concepts in their decision to conduct the Nuremberg and Tokyo trials. An examination of the judicial opinions pertaining to these proceedings quite clearly indicates that an idea of a "higher law" set the tone for the trial and conviction of those who had led the Axis cause.[7] The Universal Declaration of Human Rights, adopted by the General Assembly of the United Nations on December 10, 1948, clearly embraces natural-law attitudes.[8] The decisions of our own Supreme Court since the early 1950's in such matters as civil rights,[9] the rights of those accused of crimes,[10] and representation of the electorate in the federal and state legislatures[11] illustrate an attitude that law is based on some standards of propriety beyond any specific precedents or mandates of carefully drawn statutes; these standards may even be contrary to some of the wishes of many members of the community.

One cannot help coming away from reading *The Revival of Natural Law Concepts* with a feeling that he has substantially benefited from an excellent exposure to one of the basic components of current legal philosophy. The materials contained in this book assist one to become quickly attuned to judicial decision-making in the 1960's. It has long been recognized that even the most primitive

6. A discussion of the basic precepts of the historical school appears at pp. 68-70. In Haines' opinion "the historical school of jurisprudence set about to destroy all vestiges of the ideas of natural law or natural rights." *Id.* at 70. Historical jurisprudence is dealt with at length in NORTHROP, THE COMPLEXITY OF LEGAL AND ETHICAL EXPERIENCE (1959).

7. See The Nürnberg Trial 1946, 6 F.R.D. 69 (1946); *In re* Yamashita, 327 U.S. 1 (1946).

8. U.N. GEN. ASS. OFF. REC. 3d Sess., Resolutions 71(A/810) (1948).

9. *E.g.*, Brown v. Board of Educ., 347 U.S. 483 (1954).

10. *E.g.*, Malloy v. Hogan, 378 U.S. 1 (1964).

11. *E.g.*, Reynolds v. Sims, 377 U.S. 533 (1964) (state apportionment); Wesberry v. Sanders, 376 U.S. 1 (1964) (congressional districting).

social organizations utilize law as a tool to mold the kind of social organization that the members of the group—at least those who possess the power to make policy—desire. However, of more recent vintage is the widespread willingness of many people to use the law as a technique of formulating new norms of conduct rather than simply as an instrument to reinforce pre-existing doctrines. When analyzed at some distant time in the future, the present epoch may very well be referred to as the "Age of Law." Students, professors, lawyers, and laymen alike can gain an excellent insight into one of the guiding forces of this era by reading Mr. Haines' volume. For those who tend to shy away from books devoted to an examination of legal philosophy, I am happy to report that the undesirable characteristics frequently found in books dealing with this sector of the law are entirely lacking in this well-documented and readily comprehensible work. Those who plan to read this volume have an enjoyable and enlightening adventure ahead of them. I suggest that the attractive and well-marked journey through *The Revival of Natural Law Concepts* be started at once.

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