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CICERO AND THE NATURAL LAW TRADITION IN AMERICA

In a famous letter to Henry Lee, written on May 8, 1825, almost fifty years after the signing of the American Declaration of Independence, Thomas Jefferson gave his most extensive and reflective account of his great handiwork. By way of response to a published remark of Timothy Pickering that the Declaration did not contain an idea "but what had been hackneyed in Congress two years before", Jefferson wrote:

"But with respect to our rights, and the acts of the British government contravening those rights, there was but one opinion on this side of the water. All American Whigs thought alike on these subjects. When forced, therefore, to resort to arms for redress, an appeal to the tribunal of the world was deemed proper for our justification. This was the object of the Declaration of Independence. Not to find out new principles, or new arguments, never before thought of, not merely to say things which had never been said before; but to place before mankind the common sense of the subject, in terms so plain and firm as to command their assent, and to justify ourselves in the independent stand we are compelled to take".

This common sense reflected, however, the political education that had been underway in America at least since the seeds of Revolution had been sown in the early 1760s. Jefferson explained further:

"Neither aiming at originality of principle or sentiment, nor yet copied from any particular and previous writing, it was intended to be an expression of the American mind, and to give to that expression the proper tone and spirit called for by the occasion. All its authority rests then on the harmonizing sentiments of the day, whether expressed in conversation, in letters, printed essays, or in the elementary books of public right, as Aristotle, Cicero, Locke, Sidney, etc" (1).

According to the principal author of the Declaration of Independence, then, its principles were neither wholly ancient nor wholly modern but a commonsensical combination of the two, prudently adapted to the circumstances of Revolutionary America. To Jefferson and the other

(1) Merrill D. Peterson, ed., *Thomas Jefferson: Writings*, New York: Library of America, 1984, 1501.

members of the Continental Congress, there was a broad area of reasonable agreement on the subject of "public right" among ancients and moderns, among "Aristotle, Cicero, Locke, Sidney" — to name a few. Whereas recent scholars have emphasized the differences between ancients and moderns, and tried to interpret the American Founding in that light, the Declaration's signers did not seem to think such distinctions relevant at the level of elementary political right. They did not read John Locke, for example, with the subtlety that certain contemporary scholars do; or perhaps they read him with a different purpose in mind, with a practical rather than a theoretical end in view, in the light of Sidney rather than of Hobbes (2).

If so, one would expect that the distinction between ancient natural law or natural right philosophy, on the one hand, and modern natural rights philosophy, on the other, would not have the commanding importance for the Declaration — and for America — that it has assumed in recent interpretations of both. In that case, Locke's frequent quotations from Richard Hooker would have a different bearing. Along with Sidney's glowing tributes to Plato, Aristotle, and Cicero, they would describe a road leading backwards to the ancients, fraught with hazards, obstacles, and detours, no doubt, but nonetheless connecting the practical politics of ancient and modern republicanism on certain fundamental points. Not that this is an argument that must lean for support on the thin reed of Locke's and Sidney's quotations. On the contrary, the overall connection between their politics and that of the ancients can be seen in the very idea of republicanism, which may in a latitudinarian sense be defined as government in which there is liberty (the people participate in rule, and the public good is the object of deliberations that are to some degree public) and the rule of law (3). In this sense, the term includes constitutional democracies as well as free, mixed regimes; but it definitely excludes absolute, hereditary, ecclesiastical monarchy or any tyrannical approximation thereto.

Another way to look at the connection between America and the ancients (including Cicero) is to begin from the rule of law as primarily a constitutional rather than a republican notion. In the United States the two are not frequently distinguished because our Constitution is republican; but there still exists a tension between the rule of law in the more

(2) See Charles R. Kesler, *The Founders and the Classics*, in James W. Muller, ed., *The Revival of Constitutionalism*, Lincoln: University of Nebraska Press 1988, 43-68.

(3) Cf. James Wilson, *Lectures on Law*, in *The Works of James Wilson*, Cambridge: Harvard University Press 1967, ed. Robert Green McCloskey, vol. 1, 69-72.

popular sense of ruling and being ruled in turn, that is, having to live under the same law that one makes, and the more formal sense of the law itself as the fundamental ruler which means, in the American case, acknowledging the authority of the Constitution as the fundamental law, or as the attempted embodiment of the "higher law". It is the latter interpretation that came to the fore in the school of thought deriving from the learned and influential writings of Edward S. Corwin. In his classic little book on *The "Higher Law" Background of American Constitutional Law*, Corwin traced the American people's respect for their Constitution not to the fact that it was they (i.e., their ancestors) who had ordained and established it, but primarily to the idea that the Constitution was an "embodiment of an essential and unchanging justice". As predicated of constitutions in general, but of the American Constitution in particular, this idea could be elaborated as follows. In Corwin's words:

"There are . . . certain principles of right and justice which are entitled to prevail of their own intrinsic excellence, altogether regardless of the attitude of those who wield the physical resources of the community. Such principles were made by no human hands; indeed, if they did not antedate deity itself, they still so express its nature as to bind and control it. They are external to all Will as such and interpenetrate all Reason as such. They are eternal and immutable. In relation to such principles, human laws are, when entitled to obedience save as to matters indifferent, merely a record or transcript, and their enactment an act not of will or power but one of discovery and declaration" (4).

We might apply this admirable description to the American case by saying that the Constitution is, or used to be, thought to embody the principles of the Declaration of Independence — the "Laws of Nature and of nature's God" and the "unalienable Rights" claimed under those laws. Respect for the Constitution was therefore understood to be part of obedience to the natural law, to the fundamental rules of justice ordaining, moderating, and limiting majority rule. This view has been subject to more or less systematic intellectual attack for the past hundred years, but it remains the basis for most Americans' veneration of their Constitution. To judge whether it is defensible, we must reconsider not only the American political tradition but the natural law doctrine that is its heart. We have seen that Jefferson traced the intellectual provenance of the Declaration to (among others) Cicero; and a great scholar of the Constitution, Edward Corwin, has argued that the "rationalistic" or "Ciceronian"

(4) Edward S. Corwin, *The "Higher Law" Background of American Constitutional Law*, Ithaca: Cornell University Press 1955, 4-5. The book was originally published as an essay in the "Harvard Law Review" 42, 1928-29, 149-185 and 365-409.

definition of natural law formed the principal strand of the "higher law background" of American constitutionalism. To help clarify America's relation to the natural law tradition, then, let us return to the intellectual and moral "common sense of the subject" (to borrow Jefferson's language) in the books of Cicero.

Cicero was the first political philosopher to speak of the natural law in a sustained and thematic way, indeed to make it central to his philosophical writings on politics. Yet this fact is so far from being appreciated that its significance has hardly registered on contemporary scholars. On the one hand, those who try to study the history of political philosophy in a non-historicist way tend to concentrate on Plato and Aristotle (not without reason), and often to assimilate the two into a generic product called "classical political philosophy". Cicero figures in, if not as a base metal, then at least as the third and least precious metal composing this alloy. On the other hand, those researchers who proceed from historicist premises simply identify Cicero's thought with his times, with his Romanness, with the typical political and intellectual confusions of his age. In doing so, of course, they repeat the regnant intellectual confusion of our age, a thought that does not seem to trouble them, perhaps because it has not occurred to them.

In what follows I shall try to avoid these pitfalls by focusing squarely on the natural law teaching that is so prominent in Cicero's works and that is, on the surface, so different from Plato's and Aristotle's accounts of justice. More precisely, I focus on the public character of right in Cicero's political philosophy — the forthright enunciation of true or natural laws that every city ought to obey.

Why then does Cicero turn to the natural law doctrine? Knowing full well the natural right teachings of Plato and Aristotle, why does he depart from them to articulate the character of natural justice in this new way, or at least with this new emphasis? (Even if, as is often asserted, natural law were a Stoic commonplace, the vital question would remain, Why did Cicero choose to follow this purported Stoic tradition rather than the Academic or Peripatetic?) At least part of the answer centers on disagreements between Cicero and Plato and Aristotle on the status of politics, the self-sufficiency of moral virtue, and, more generally, the role that political philosophy ought to play in political life. These disagreements take place on the level of political philosophy, that is, within the tradition of the Socratic approach to politics; so there is not a radical break with Plato and Aristotle. In general, however, Cicero believes that political life needs more guidance from political philosophy, or at least more direct and visible guidance, than either Plato or Aristotle allowed.

In this paper I cannot present a thorough interpretation of the texts

on which I base my answer, but I can sketch briefly the arguments in Cicero's principal writings on the natural law as they bear on the question.

First, concerning his differences with Plato and Aristotle. To repeat, Cicero considered himself to be in broad agreement with the political philosophy of the Socratic schools. But Cicero more particularly considered himself to be an Academic Skeptic, that is to say, an adherent of the skeptical New Academy, which held that the truth of any perception was only more or less probable. The New Academy rejected what it considered the dogmatism of Stoicism, Epicureanism, and the Old Academy, i.e., Plato's Academy. The dogmatism of the Old Academy consisted in the doctrine of the ideas and of infallible perceptions (a notion considerably developed by the Stoics in their account of the Wise Man) based on the ideas. It should perhaps be noted that in opposing the dogmatism of the ideas, the New Academy may have been more faithful to Plato than were his students in the Old Academy, inasmuch as Plato makes clear in the image of the divided line that our perceptions of visible and intelligible things cannot escape relying on *pistis*, that is, faith or trust, which as such is always open to skeptical attack.

At any rate, Cicero's *Republic* is, so to speak, conspicuously lacking in ideas. But it does present us with the striking story of two suns having been seen in the sky. Plato in his *Republic* had also discussed two suns, the visible sun, the cause of seeing, and the sun as an image of the idea of the good, which is the cause of intellection and hence of being. Cicero does not, however, call one of his suns an image; the second sun is an unexplained celestial phenomenon. In Cicero, the two suns are a cause of confusion or doubt, not certain understanding. If there are two suns in the sky, other things being equal, how can we know which one of them is real, or whether either one of them is real (5)?

We could know the answer only if it were possible to distinguish true from false perceptions exactly, and if we were able to rule out the possibility of miracles, of unexplained and unexplainable phenomena. But this is precisely what Cicero, as an adherent of the New Academy, denies to be possible. Without an infallible way to ascertain which is the true perception, we are left to use probability as our only guide (6). The determination of probabilities is, however, an essential part of prudential reasoning, and therefore belongs as much — if not more — to the work of the statesman as to the activity of the philosopher. The superiority of the philosophic life, which in Plato's *Republic* seems to depend finally on the intel-

(5) Consider *Academica* II, 80, 82, 123, and esp. 127-128.

(6) See *Academica* II, 40-42, 77-78, 80-90, 99-104.

ligibility of the ideas and the majesty of the idea of the good, is called into question in Cicero's *Republic* by the fact that our access to the things that are is in every case only more or less probable.

Whatever the answer, it is clear that Cicero is intent on elevating the dignity of politics as much as possible. Thus the characters in his dialogues are eminent men of Rome — consuls, generals, senators, lawyers — not the sort of demimondaine crowd that surrounds Socrates in Plato's dialogues. In particular, his depiction of the circle around the great Scipio Africanus shows the possibility of philosophically-inclined statesmanship in a way that neither Plato nor Aristotle had done, despite their efforts to educate sympathetic gentlemen and even a tyrant or two. In fact, the learned statesmen of Cicero provide a kind of model of educated public men: an example that made intelligible and brought to life the kind of human excellence to which Renaissance gentlemen later aspired, and with which the American Founding was notably graced.

To be sure, Cicero does not promise that evils will cease in the cities of men when cultivated gentlemen rule. What he argues is that political life will be better if gentlemen rule who are steeped in the natural law doctrine. Why is gentlemanship per se not sufficient? This had been Aristotle's basic solution to the political problem, after all. Aristotle had tried to show that the realm of moral virtue or gentlemanship was self-sufficient; he separated moral from intellectual virtue in part to preserve the gentleman's prejudices against the philosopher's radical questioning. But Aristotle was aware that moral virtue, the gentleman's virtue, could not be made completely self-sufficient: it depended on prudence for its proper exercise and guidance, and prudence is an intellectual virtue; and it depended on praise and blame, on the honor conferred by gentlemen and the people, both for the training of young gentlemen and for the glory and renown of mature ones. At top and at bottom, then, moral virtue was exposed to certain dangers: to appropriation or misdirection by false philosophy at the top, to the debased honors of a corrupt country at the bottom. These are the dangers Cicero attempts to meet by supplementing and correcting gentlemanship with the natural law doctrine.

In one respect, then, Cicero's use of the natural law is eminently Platonic, for the natural law is a philosophical correction to the habitual virtue of the gentleman; it restores, to some extent, the equation of virtue with knowledge. In another respect, however, it is not Platonic, at least if we confine our concern to the Plato of the *Republic*, for as a supplement to moral virtue it denies that philosophers must rule directly to bring about justice in the city. Instead, philosophers can rule indirectly through the promulgation, as it were, of the natural law. This quasi-Platonic emendation of Aristotle thus recognizes that Aristotle was basically right

in distinguishing gentlemanly virtue, based on habit, from philosophical virtue, characterized by continual questioning. But Cicero insists that to the habits of soul forming the virtues (as Aristotle described them) has to be added a *habitus* of practical principles. Neither rule by philosophers nor rule by gentlemen was a sufficiently reliable solution to political problems.

If one were to compare Cicero's *Republic* to Plato's, perhaps the most striking difference is how keen Cicero is to convince his readers of the dignity and urgency of politics. To be sure, he does not disagree with Plato about the tediousness, distastefulness, and danger of much of political life; and in part he wishes to moderate political ambition and passion for sound Platonic reasons. But he is impressed perhaps more than was Plato with the dangers that philosophy itself poses to decent politics. Philosophy in Cicero's day was increasing unpolitical and even antipolitical. Epicureanism threatened to discredit politics as unpleasant and hence foolish, Stoicism to belittle it as beneath the icy dignity of the Wise Man. Both had Platonic affinities and even roots in the notion of the superiority of the philosophical to the practical life. Worse still, by forgetting or despising politics, philosophy itself was in danger of decaying. Both Epicureanism and Stoicism held that the quest for wisdom had been transformed into Wisdom, that philosophy was essentially complete in their respective systems. Cicero devoted many of his philosophical works to disabusing these schools of their pretensions to Wisdom. But his political works serve the same purpose: philosophy will be revived when it returns to its roots in the opinions of men, when it reminds itself of what it does not know about the human and divine things, when it becomes political philosophy.

Having compared Cicero's position to Plato's and Aristotle's in general terms, let me say something more specific about Cicero's doctrine of natural law.

In its broadest rather than highest significance, the effect of the natural law on the gentleman, its relevance to everyday moral life, becomes visible most clearly in the *De Officiis*, meant to be the most popular or accessible of Cicero's political books. It is here that Cicero speaks of the 'natural law' in his own name. The theme of the book, of course, is the seeming conflict between the noble (*honestum*) and the useful (*utilis*), or between virtue and expediency. In its extreme form — its most interesting form — that conflict is over the magnanimous man's attitude towards glory. For from magnanimity may spring "all too easily the excessive and pertinacious lust for pre-eminence (*cupiditas principatus*)". Cicero makes clear that he speaks popularly and somewhat loosely in this book, so the magnanimity of which he warns is not the highest or true magnan-

imity; it is the magnanimity that is the close companion of physical courage and of glory in war — the virtue at which the entire Roman people, he says, excel (7). In the grip of such magnanimity, the ambitious gentleman lusts to be the first man (*princeps*) of the regime, even to be the sole ruler. On fire with this desire for a certain kind of excellence, he finds it more and more difficult to preserve that equity or equality (*aequitatem*) which is appropriate in the highest sense to justice: he strives to be superior through force rather than equal through justice (8).

The problem with the Aristotelian reliance on gentlemanly virtues, especially the singular virtue of magnanimity, is that it makes gentlemen too prideful, too vain. Cicero does not dispute the existence, the worth, or the importance of genuine magnanimity; indeed, he lauds it in the character of Scipio. But he finds that too many who are unfit aspire to be magnanimous, or rather aspire to enjoy the honors that are due the magnanimous man. To put it bluntly, this desire for glory is too easily perverted into Caesarism. And so Cicero tries to redefine gentlemanship or the public understanding of gentlemanship in terms of duty. To help the many imperfect gentlemen who are torn between the expediency of quick and unjust glory and the nobility of virtue that is sought for its own sake, Cicero proposes to lay down some 'formula' to decide hard cases: magnanimity enriched with doctrines (*magnanimitas uberior doctrina*). This *formula* or rule is natural law, which assimilates the magnanimity of the gentleman to the true magnanimity of the Wise Man. As a result, the traditional account of morality in terms of virtues is given a new twist, in which justice may be said to impose a law on magnanimity and the other virtues. These virtues are now seen not simply or primarily as completions or excellences of the human soul, but also as obligations or duties commanded by nature.

It is to Cicero that we owe the first, or at any rate the most enduring, treatment of duties (*officia*) as a major and compelling theme of political philosophy. From the point of view of the natural law, the moral virtues are not simply good for their own sake but are also duties authorized and commanded by something higher. Virtuous actions are done for the sake of the noble, but the noble is a kind of participation in the eternal, in the things that are. Through the natural law, morality becomes a duty to nature and, in a way, to the quest for knowledge of nature, to philosophy. Consequently, morality becomes more philosophical, and philosophy becomes more moral. Political science ceases to be particularly addressed to founders or to potential founders and legislators, and becomes more

(7) *De Officiis* 1, 61.

(8) *De Officiis* 1, 64.

open to the instruction of the young (contra Aristotle) and of men generally in their duties as human beings and citizens (not in the problematics of virtue, contra Plato). With the elaboration of the idea of conscience, already present in Cicero, gentlemanship becomes in some sense democratized; and the idea of the equality of men under the law of nature receives its first glimmerings of significance. At the same time, Cicero's invocations of the Stoic idea of the Wise Man tend to democratize everyone, including philosophers (who are only seekers of wisdom); for measured against the Wise Man's perfect wisdom, everyone falls short and is in need of external moral guidance — the sort provided, at least in part, by natural law.

It was left to America to realize the promise of this inchoate appreciation of equality by becoming the first nation in history explicitly to base itself on natural law — to dedicate itself to the proposition “that all men are created equal”. This is Cicero's great and enduring legacy to America, a legacy whose moral significance is rediscovered whenever, in moments of national crisis, from the Civil War to the civil rights struggle of the 20th century, Americans listen again to the better angels of their nature.