

Justice. An Historical and Philosophical Essay. By Giorgio Del Vecchio. Edited with additional notes by A. H. Campbell. New York: Philosophical Library, 1953. Pp. xxi, 236. \$6.00.

Natural Right and History. By Leo Strauss. Chicago: University of Chicago Press, 1953. Pp. x, 327. \$5.00.

Plato's Modern Enemies and the Theory of Natural Law. By John Wild. Chicago: University of Chicago Press, 1953. Pp. 259. \$5.50.

These are three recent books on natural law. The first is a translation from an Italian philosopher of law; the other two are American books, the one by a social, the other by a general philosopher.

Del Vecchio's *Justice* is the first English translation of this work, published in the United Kingdom by the Edinburgh University Press. Del Vecchio's "Formal Bases of Law" were published in English in the *Ten Modern Legal Philosophies Series* in 1914. An article by him appeared in English in the *Roscoe Pound Festschrift*, and his "Truth and Untruth in Morals and Law" was recently published in the *Iowa Law Review*.¹

The text of this small book occupies only eighty pages; the bulk of the book consists of notes. The author poses the problem of justice in its relation to law; the essence of justice is a certain proportionality (Leibniz) between men, Dante's *hominis ad hominem proportio*.

Del Vecchio presents a historical survey of the ideas on justice, from the Greeks via the Patristic to Scholastic philosophy. The principal emphasis is put on Plato, Aristotle, St. Thomas, Leibniz and Kant. The logical elements of justice: bilaterality, "alteritas," parity, and reciprocity are brought forth. The author distinguishes between justice as a purely formal concept and as a concept having content. The logical and deontological points of view are developed; the relations between justice and legality are discussed. Appendix I treats the basis of penal justice; Appendix II—the only part of the book containing proposals *de lege ferenda*—is rather weak.

Del Vecchio has achieved many honors in the field of philosophy of law by his writings and as the founder of the *Rivista Internazionale di Filosofia di Diritto*. He is the foremost representative of the Italian "scuola neo-critica," founded by Ignacio Petrone, a school which constitutes, so to speak, the Italian continuation of the German Marburg Neo-Kantian philosophy of law. Del Vecchio is, thus, the Italian counterpart of Rudolf Stammler. He has exercised great influence in Spain and Latin America. He is congenial to the Spaniards by his excursions into poetry, and by the clarity, elegance and literary quality of his style which, of course, should be enjoyed in the Italian original. He has an enormous knowledge of the philosophies of all nations, at all times, and in all languages. He is Neo-Kantian in method, distinguishing, as does Stammler, the concept and the idea of law; he is, however, rather Platonistic as to content and is not

¹ Del Vecchio, Truth and Untruth in Morals and Law, 39 *Iowa L. Rev.* 16 (1953).

uninfluenced by the "philosophia perennis" of St. Thomas Aquinas. But Del Vecchio had been until 1938 a prominent adherent of Mussolini's fascism, and he had absorbed a great many ideas of Hegel. He re-affirms the old belief in natural law—the Platonic-Catholic version. But he correctly holds that justice is a part of ethics. For this reviewer the sole merit of the book is not in the text, which contains few original ideas, but in the truly fascinating notes.

Leo Strauss, who had given us a valuable work on the political philosophy of Hobbes, writes in the book under review on "natural right," which he considers "the most controversial and most significant issue in contemporary political or social philosophy." He undertakes a frontal attack upon the positivist, historicist contemporary social science. He wishes to demonstrate that the modern rejection of natural right is untenable. He seeks to prove the existence of natural right, which must not be interpreted, in the modern way, as a mere ideal, let alone as an ideology. Instead, Strauss conceives of natural right as an objective standard, independent of and higher than positive right. It is a standard with reference to which we are able to judge positive right, as well as a standard by which to judge ideals—our own or those of any other society. For him, the modern rejection of natural right is nihilism.

The first chapters of the book are dedicated to refuting modern arguments for the rejection of natural right. He attacks first the rejection in the name of history. The reasoning that everything is historical cannot be maintained; there are fundamental problems which persist in all historical change. Philosophy is meant to replace opinions about the whole by knowledge about the whole. He attacks secondly the rejections of natural right in the name of Max Weber's fact-value dichotomy, in the name of an ethically neutral, "value-free" social science, and in the name of the Neo-Kantian dichotomy between the Is and the Ought.

The author then proceeds to a historical investigation of the idea of natural right. Originally the good was identified with the ancestral; right was to be divine law, authority. The emergence of the idea of natural right presupposes the doubt of authority; for by submitting to authority, philosophy would degenerate into theology, or legal learning, or mere ideology. The author rejects the Epicurean, materialistic identification of the good with the pleasant; he rejects the pre-socratic, égalitarian natural law.

Strauss categorizes the history of the idea of natural right as "classic" and "modern." There are three epochs of the classic idea. First, the theory of Socrates and Plato; its basis is the critique of hedonism, the insight that the good is essentially different from and much more fundamental than the pleasant. The "good life" is the preservation of man's nature. Man is by nature a social being; the best society is Plato's "Politeia." Virtue is knowledge; the best should rule; the rule of wisdom should be absolute, hence the anti-égalitarian trend. But the author is not blind in his critique of Plato. He recognizes that Plato's "Politeia" presupposes slavery; he sees that it is formed too much according to the ideal of

the philosopher. The second epoch of classic natural right is characterized by Aristotle, the third by St. Thomas. In the latter we see the immutability of fundamental propositions. But the entrance of biblical revelation and of divine law leads here—so the author holds—to an absorption of natural right by theology. Richard Hooker stands on the same foundation as St. Thomas.

Modern natural right, represented by Hobbes and Locke, is, according to Strauss, basically inferior to the classic thought. Hence the crisis of natural right, starting in the later eighteenth century (Rousseau, Burke) and leading to its rejection in the nineteenth and twentieth centuries. Hobbes, in contrast with Hooker, is the creator of political hedonism, a philosophical line which runs from Democritus via Epicurus to Macchiavelli. Hobbes combined the two opposed traditions of Platonism and Epicureanism. Hobbes's man is by nature asocial. Hobbes's natural philosophy is atheistic; his view is mechanistic, not theological; his fundamental moral fact is right, not duty. His "state of nature," "social contract," authority and doctrine of sovereignty then follow. He is the creator of the modern natural right doctrine.

Locke, Strauss believes, knows no real natural right because the unassisted reason is unable to discover the natural right in its entirety without revelation; he knows no natural duty. He stands for limited government, democracy, power of majority, but, first of all, for private property, for individual acquisitiveness and infinite accumulation. The end of civil society is for him the preservation of property (capitalism); he is, therefore, a hedonist.

Critically, we may ask why Strauss always speaks of "natural right"; what he means is "natural law." By "natural law" he understands fundamental principles which the unassisted reason is capable of grasping as objective norms; hence his remoteness from St. Thomas. But the author clearly states that "natural law," so called, is ethics.

As we have seen, Del Vecchio and Strauss devote much attention to Plato. John Wild's book is wholly concerned with Plato. The starting point is a defense of Plato against his "modern enemies" (Niebuhr, Toynbee, Cornford, Fite, Crossman, Popper, Winspear), who describe Plato as an enemy of freedom, anti-democratic, authoritarian, totalitarian, fascist. It could be added that similar attacks are also frequently made by writers in non-English languages. Thus, Gentile praised Plato as the forerunner of fascism. But Kelsen often attacked Plato's "lying propaganda" and stated recently that the "Politeia" is the "prototype of a totalitarian state." That is why Alfred Verdross found it necessary, in the second edition of his book on Plato, to defend Plato against these attacks.²

Wild begins by considering Plato, correctly, as a moralist who has exercised deep influence on western thought. The author feels that prevailing emphasis on epistemology since Descartes has led to an idealistic interpretation of Plato, to a priority given to Plato's theory of ideas, and to a neglect of his moral philosophy,

² Verdross, *Grundlinien der antiken Rechts- und Staatsphilosophie* 112-24 (2d ed., 1948).

of his realistic ethics. Wild attempts to defend Plato against all these accusations, relying on Plato's own writings. He is not always fully successful in this defense.

Wild himself says that he is "not prepared to defend Plato's concept of the noble life in all respects." He admits that there is a wide difference between Plato and our modern ideas of democracy; he admits that there is only cold reason in Plato, no love. But, contrary to Verdross, he does not admit that Plato (and also Aristotle) take slavery for granted; nor does he see, contrary to Verdross, that Plato, like the Cardinal Grand-Inquisitor, wants to force men into their salvation and, hence, does not know the idea of true liberty of men.

The reason for the modern misunderstanding of Plato is, according to Wild, the predominant subjectivistic trend of modern thought. Thus, Germans confuse Plato with Kant; the English confuse his ideas with utilitarianism. But Plato's ethic is a realistic ethic of natural law. This is, for Wild, a distinctive type of ethical theory: a universal pattern of action, applicable to all men everywhere, required by human nature itself for its completion. Value and existence are closely intertwined with one another. The general ontological sense of such terms as goodness and value is completion of being: being has an active or tendential character; the author is equally opposed to a Kantian, utilitarian or emotive theory of ethics. Wild stands on a realistic ontology. Existence is distinct from essence. Goodness is not a single essence, but an existential category, the completion of existence. Natural law is not an imaginary picture of an ideal society; it is a system of objective norms, timeless and universal, binding on all men everywhere.

The author proceeds to the history of natural law, as moral realism, in the West. He treats, first, classic natural law: the early Stoics, Marcus Aurelius, St. Thomas, Grotius, Richard Hooker. In the same way as Leo Strauss, he depicts the philosophies of Hobbes and Locke as "two modern deviations." And then the author proceeds to prove that Plato, not the Stoics, is the founder of moral realism and natural law philosophy. An investigation of the natural law of Aristotle follows. While much that Wild has to say about Plato will be recognized as correct, yet the author stands always, as Verdross has said critically of Wild's earlier book,³ in danger of presenting us with a "romantic" picture of Plato. For Plato is certainly not the creator of the idea of "human rights."

Wild correctly holds that "natural law" is ethics. But when it comes to law, we cannot accept all that he says. This reviewer feels that Wild enormously overvalues the United Nations Declaration of Human Rights. I agree with Wild that a revival of natural law, of what the author calls "an authentic, realistic philosophy," is not possible without a revival of metaphysics. For Wild, as for Strauss, natural law does not depend upon revealed theology; it is a philosophic ethics. It seems contradictory, therefore, when Wild writes that "natural law does not agree with positivistic legal theory in holding that the term *law* must

³ Wild, *Plato's Theory of Man* (1946).

be restricted to the factual decrees actually made by some sovereign power and enforced by established sanctions" (p. 96). Otherwise, he writes, we must accept Hitler's decrees as valid law and have no standard, founded on human nature and its essential tendencies, by which such decrees may be judged as sound or unsound. The "positivistic" view, he states, leads to the chaos of relativism and, finally, to the view that might makes right. Here we are suddenly back in the old confusion between law and ethics, between legal positivism and philosophical positivism.

The three books under review are symptomatic of the strong revival everywhere of the idea of natural law, a very understandable consequence of the total crisis of our culture. They show also the differences not only between "classic" and "modern" natural law, but also *within* classic thought between Catholic and non-Catholic natural law. Plato arrived at the idea of monotheism, and the Stoics lead toward Christianity. Del Vecchio stands close to St. Thomas; the other two authors insist that natural law is independent of divine law and revelation; hence their reserve—especially that of Strauss—toward St. Thomas. In St. Augustine natural law is not only anchored in nature, but also in "nature's God." It must be asked whether a natural law which is anchored only in human nature, as stated in Grotius, does not, in the last analysis, hang in the air; for where does the human nature come from?

The second critical remark concerns the relation between natural law and positive law. All three authors recognize correctly that natural law, so called, is ethics, but we have seen how Wild occasionally falls back into the old confusion. There is only one law, and that is positive law. A complex of norms called "natural law" exists; but, in spite of the misleading name, it is not law but ethics, a standard, composed of a system of norms, different from law, a standard by which to judge the law not as law or non-law but as good or bad law. Ethics stands hierarchically higher than law. In consequence attacks against "legal positivism" are untenable; the attacks must be directed against *philosophical* positivism which pretends that positive law constitutes the highest values. The legal positivist must not be, at the same time, a philosophical positivist. This seems to this reviewer to be the solution of a two-and-a-half-thousand-year-old debate on the relation of natural law and positive law. And this insight gains happily every day; it can be found, among adherents of natural law, in the German Coing, in the Spaniard Legaz y Lacambra, in the Mexican Rafael Preciado Hernandez. The Belgian Jean Dabin, an orthodox adherent of the philosophy of St. Thomas, has recently formulated this insight in the clearest terms: "The dichotomy: natural law—positive law must be replaced by the dichotomy: ethics—law."

JOSEF L. KUNZ*

* Professor of Law, University of Toledo.