CONTRA KOPPELMAN: WHAT *MERE NATURAL LAW* WAS ABOUT

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Andrew Koppelman and I have just missed connecting at different meetings over the last several months; I know he was eager to give me his reactions to *Mere Natural Law*, and now, I'm pleased enough to see, he has had his chance to unloose them. I appreciate, as ever, his willingness to engage an argument, and I feel especially complimented here by his willingness to draw passages from other books of mine, from years past. But I'm afraid that while he takes fragments of arguments here and there, he gives us, one might say, some notes without the music. What he does not convey is the perspective or argument that draws the pieces together. And in this case he does not really convey to the reader the central argument that marks the distinct character of this new book he was reviewing, making the case anew for Natural Law.

The telling mark comes when he notes that *Mere Natural Law* carries an allusion to C.S. Lewis's *Mere Christianity*. He took Lewis's central concern to "explain and defend the belief that has been common to nearly all Christians at all times," . . . "that there is one God and that Jesus Christ is His only Son." And "Arkes" he says, "aims to do the same for natural law." But there he takes a turn quite radically off the mark. The aim of this book, as he surely knows, is to draw on another part of Lewis's teaching: that arguments over right and wrong draw on the common sense understandings that can be found even in the arguments among children. And as Lewis pointed out, those arguments make no sense unless it is assumed on all sides that there are standards of judgment at hand, to judge the difference between the arguments that are plausible or implausible, true or false. Aquinas said that the divine law we know through revelation, but the natural law we know through that reasoning that is accessible distinctly to human beings; we might say the reasoning that is "natural" to human beings. And so in the arguments on abortion, as Koppelman surely knows, the Catholic Church has never appealed to "faith" or belief. It has appealed rather to the evidence of embryology, woven with the principled reasoning of the natural law. And the upshot is to show that there is no ground on which to rule out that nascent life in the womb as a human being that would not rule out many people walking about, well outside the womb.

What was distinct to *Mere Natural Law* is that I was following James Wilson, one of the premier minds among the American Founders as he drew, pervasively, in his writings and opinions, on Thomas Reid, the great Scot philosopher of "common sense": The natural law would find its ground in those precepts of common sense that the ordinary man would not only know as true, but have to take for granted in getting on with the business of life. It was the thing he had to know before he could start trafficking in "theories." And so, before the ordinary man would banter with David Hume about the meaning of "causation," he knew his own active powers to *cause his own acts to happen*. From that perspective, the first principle of moral and legal judgment

is emphatically not the one that Koppelman imputes to me as my "foundational claim": "the good should be promoted and the bad discouraged, forbidden, and at times punished." That is a version of Aquinas's first principle of moral judgment, but the problem is that that maxim would hold as well for the Mafia. Members of a criminal band know clearly the "goods" they share and the punishment that is due to those who break with the band and seek "witness protection."

James Wilson found the first principle of moral and legal judgment where Thomas Reid and Kant found it, in that line, as Reid had it: "[T]o call a person to account, to approve, or disapprove of his conduct, who had no power to do good or ill, is absurd. No axiom of Euclid appears more evident than this." If the average man were told that Jones, accused of a serious crime, was undergoing surgery at the time the crime was committed, he would wonder why Jones was being prosecuted. That anchoring "axiom," as Reid and Wilson had it, could be grasped at once as something true of necessity, and every functional person would readily grasp it. That simple axiom threads through our law in many radiations, not only in the "insanity defense" but also, as I try to argue, in explaining the wrong of racial discrimination.

James Wilson's recognition—echoed by John Marshall and Alexander Hamilton—was that everything we reliably know must find its anchor in axioms or necessary truths of this kind. As Hamilton put it in the Federalist #31, "in disquisitions of every kind there are certain primary truths or first principles upon which all subsequent reasonings must depend. These contain an internal evidence, which antecedent to all reflection or combination, command the assent of the mind." They are to be grasped *per se nota* as so evidently true in themselves, just as one grasps that anchoring axiom in the "laws of reason": that two contradictory propositions cannot both be true. Anyone denying it would find himself falling into self-contradiction and gibberish.

But then here was the further claim of Wilson's that has not been widely appreciated: It was not a mere "theory" that two contradictory propositions both cannot be true. No more was it a mere theory that people "may not be held blameworthy or responsible for acts they were powerless to affect." Wilson's claim was nothing less than this: that any system of jurisprudence must find its ground in these anchoring truths that we can reliably know, because they are true of necessity. They are the principles of reason that mark the natural law, the law that underlies our positive law. And any scheme of natural law built on these grounds then cannot be, as Andrew Koppelman labels it, a mere "theory" of the natural law. It would be the real thing.

To get clear on this point is to take the first step in dissolving Professor Koppelman's concerns for what Aquinas calls the "determinatio" of the positive law. We see the signs posting speed limits of 65 mph or 35 mph. But before we had those provisions of the positive law, as Kant would tell us, there is an underlying natural law that would tell us why we would be justified in having any law in the first place—a law, that is, to restrain the freedom of people to put innocent life at hazard by driving at reckless speeds. As ever, as Aquinas realized, there is the need to translate the underlying natural law into terms that apply that law in a practical way to the circumstances and terrain before us: 65 mph, perhaps on the open highway, 35 mph on the winding country road. But of course there may be other judgments on the speed that happens to be right for any road, and they may all be compatible with the natural law. In the same way, there may be different constitutional orders that may be compatible with the natural law. And the task as ever is to distinguish between what is arguable and what is truly essential. We may

still need all of our wit and imagination as we ponder the question of whether Jones was really so infirm after surgery, or so under hypnosis, that he could not have committed that crime. The possibilities here are maddeningly variable. But the one thing in this mix that will never be contingent or variable is the principle itself. If Jones was really "incapable of affecting the act, committing the crime," he is undeniably innocent and there are no circumstances under which that principle would fail to be true.

I did not take *Mere Natural Law* as the occasion for offering a thick book of commentaries, listing what I found persuasive or less than persuasive in other accounts of the natural law. I took it as the occasion to offer this crisper account of a natural law grounded in the laws or axioms of reason, the laws accessible to only one kind of creature. I was not offering a "theory" about the different ways in which people may or may not find themselves "flourishing" as they sought to live upright lives. I was offering an account of what may be distinctly good and commendable—and quite constitutive of a *common good*—in a jurisprudence based on moral truths that would hold enduringly for anyone who lived under them. In his encyclical "On the Nature of Human Liberty" (1888) Leo XIII argued that animals could not plausibly be the bearers of "property rights," for animals were incapable of imparting a moral purpose to inanimate matter. Rights of property, and other rights, flowed only to creatures of reason, those creatures who alone by nature had the capacity to engage in reasoning over the things that were right or wrong, just or unjust. It should not come as a surprise then to Professor Koppelman that James Wilson—and others of us—should hold an understanding of natural law that is built distinctively upon those anchoring axioms of reason.

Professor Koppelman wants to tag as my main, grievous fault, that I did not deal with what he takes as some of the strongest arguments against my positions. I spent most of *Mere Natural Law* dealing with arguments made by justices in the Supreme Court, including arguments made by friends such as Justices Scalia and Alito. I was also making arguments that put me at odds with other writers, arguing for an Originalism serenely detached from the moral ground of the natural law as James Wilson, John Marshall and Alexander Hamilton understood it. I will leave it to readers to judge whether I had spent enough time dealing with arguments at odds with my own. But on the other side I would register my own protest that Professor Koppelman has never dealt adequately, say, with the arguments that Robert George, John Finnis, Gerard Bradley and I have made on abortion. On that I will have more to say in a moment. But even now in the case at hand: has he really given, in his review, a clear account of my own central argument in *Mere Natural Law,* or anything close to the summary I've offered in these pages?

As I've said, he had many of the notes, but the music was missing. He cited fragments of what I was saying, but offered only truncated accounts of the argument I was making. And so he says, curtly, that in my view "Minimum wage laws are invalid because they 'seriously abridge personal freedom.'" But any law works by restricting freedom. It would take a more strenuous argument to show why a law is invalid by showing why it cannot be justified. That fuller account is what he leaves out in the case of the laws of minimum wages and others. He obviously has in mind my defense of Justice Sutherland striking down the law on minimum wages for women in *Adkins v. Children's Hospital* (1923). Sutherland had been a leader in the cause of votes for women, and he did not hold back in supporting laws protective of women. What Sutherland sought to show in this was that these policies of minimum wages or price controls were simply wrong in

principle, that they would be wrong even if it were claimed on occasion that they "worked." For these laws were grounded of theories of "determinism": e.g., that if a man fell into a class called "employer," we knew what he was capable of paying any employee, regardless of whether the employer headed a large corporation or a small family business. Or, that if we knew someone was a woman, we knew the level of income she needed to preserve her morality. And somehow the drafters of the law knew that a woman who worked as a beginner in a laundry could preserve her morality with an income far more modest than a woman who worked in a large department store.

It surely cannot offer an account of my understanding to say, as Koppelman does, that I hold that a "legislature has no power to prohibit discrimination on the basis of sexual orientation." No one doubts the power of a legislature to pass a positive law of that kind. The question is whether a law of that kind is coherent and means what it says. In all strictness, "sexual orientation" could encompass bestiality, or the passion for sex with animals. These laws just do not say precisely where they find the wrong they would forbid. If the drafters sought to become more precise—if they tried to explain where it was plausible or indefensible to draw adverse inferences about people based of their styles of sexuality—the scheme becomes far more problematic, with conversations people would rather not have.

But finally on the matter of abortion. Koppleman takes it as a striking fault that, in my arguments on abortion, I've not dealt with the kinds of argument offered by Lynne Rudder Baker: that a human being has the standing of a person, and the protection of the law, only when it has "the capacity for a first-person perspective – to become, in Aristotle's terms, a rational animal":

> In the early stages of pregnancy, the person does not yet exist. "It makes no sense to suppose that a nonexisting person has a right to be brought into existence. Baker observes that her view is consistent with that of Aquinas, who thought that the fetus was not a human individual until it possessed a rational soul, a point that he placed about twelve weeks into gestation.

But surely Koppelman must know that there is nothing the least novel in this argument--or nothing that was not countered by the arguments put forth, say, by Robert George in his *Embryo: A Defense of Human Life* (2011) or my own *First Things* (1986). There was Alan Gewirth's curious claim that a fetus could not be a "purposive agent" if it did not have a "physically separate existence" (which of course it has had from its very first moments).[1] But even closer, this is a replay of Bruce Ackerman's argument that a fetus cannot be a person within the protection of the law because it cannot be "a citizen of a liberal state." And to be a citizen "it must be able to play a part in the dialogic and behavioral transactions that constitute a liberal polity."[2] It is one thing to note the capacity for moral reasoning that distinguishes human beings; and yet it is quite another to say that the right of any person to live must depend on his "articulateness." But all of this has been encompassed now by Justice Alito in the Dobbs case. He noted there the contention of some writers that the fetus should not be entitled to legal protection until it has attributes such as "sentience, self-awareness, the ability to reason, or some combination thereof." But with that reasoning, as he said, "it would be an open question whether even born individuals, including

[1] *See* ALAN GEWIRTH, REASON AND MORALITY 142-43, 159-60 (1978).

[2] BRUCE A. ACKERMAN, SOCIAL JUSTICE AND THE LIBERAL STATE 127 (1980).

young children or those afflicted with certain developmental or medical conditions, merit protection as 'persons.'"

The fallacies here are old; they do not become more venerable as they are repeated anew. It takes a heavy dose of theory to talk us out of James Wilson's understanding that our natural rights begin *as soon as we begin to be*, which is why, as he said, the common law casts its protection "when the infant is first able to stir in the womb." It was once unthinkable to say that a woman becomes unfree when she is restrained from destroying this innocent life she is bearing. And yet, as I recall, Professor Koppelman was once willing to argue that it would be nothing less than a violation of the 13th Amendment, that a woman would be consigned to servitude, if she were barred from destroying that small life in the womb. I hope that he has long put that argument aside, but if not, there is another old argument that has not departed the scene and may need to be countered yet again.

There are many more arguments that Andrew Koppelman, in his wide interest, cast up, more than I can possibly deal with here. But in his large nature, he is always open to getting together for that fuller conversation, and so I'll look forward to that lunch in Chicago or Washington.