

Natural law assignment



NATURAL LAW ROBERT P. GEORGE* Oliver Wendell Holmes, the legal philosopher and Judge whom Richard Posner has, with admiration, dubbed “the American Nietzsche,” I established in the minds of many people a certain image of what natural law theories are theories of, and a certain set of reasons for supposing that such theories are misguided and even ridiculous. While I have my own reasons for admiring some of Holmes’s work?????” despite, rather than because of, the Nietzscheanism that endears him to Judge Posner?????” I think that everything Holmes thought and taught about natural law is wrong.

I have elsewhere set forth a detailed critique of Holmes’s thought, 2 which I will not repeat here. Rather, this Article offers a constructive account of what natural law theories are in fact theories of, explains why the idea of natural law and natural rights is far more plausible than people influenced by Holmes have supposed, and shows how natural law theories are similar to and different from leading compet* McCormick Professor of Jurisprudence; Director, James Madison Program in American Ideals and Institutions, Princeton University.

I originally presented this Article as the 2007 John Dewey Lecture in Philosophy of Law at Harvard Law School on April 9, 2007. I am deeply grateful to Dean Elena Kagan and the faculty of Harvard Law School for the honor of being invited to return to my alma mater for this occasion. I was introduced to the project of philosophical reflection on law and legal systems, and on the complex web of relationships between law and morality, by my teachers at Harvard: Lewis Sargentich, Charles Fried, Richard Parker, Henry Steiner, Harold Berman, Dan Coquillette, and Roberto Unger.

They launched me on what became my life's work. I owe them an enormous debt of gratitude, and it is a pleasure to be able to acknowledge it here.

Some material in this Article originally appeared in an interview I gave that was published as Natural Law and Human Rights: A Conversation, in DOES HUMAN RIGHTS NEED GOD? 135-44 (Elizabeth M. Bucar & Barbra Barnett eds. , 2005). 1 . Richard A. Posner, Introduction to THE ESSENTIAL HOLMES: SELECTIONS FROM THE LETTERS, SPEECHES, JUDICIAL OPINIONS, AND OTHER WRITINGS OF OLIVER WENDELL HOLMES, JR. , at xxviii (Richard A. Posner ed. , 1992) (citing his comparison of the two in RICHARD A. POSNER, THE PROBLEMS OF JURISPRUDENCE 239-42 (1990)). . see Robert P. George, Holmes on Natural Law, NATURE IN AMERICAN PHILOSOPHY 127 (Jean De Groot ed. , 2004). 172 Harvard Journal of Law & Public Policy [vol. 31 that provide the justificatory basis of positive law as well as standards for its critical evaluation. Theories of natural law are reflective critical accounts of the constitutive aspects of the well-being and fulfillment of human persons and the communities they form.

The propositions that pick out fundamental aspects of human flourishing are directive (that is, prescriptive) in our thinking about what to do and refrain from doing (our practical reason)????” they are, or provide, more than merely instrumental reasons for action and self-restraint. When these foundational principles of practical reflection are taken together (that is, integrally), they entail norms that may exclude certain options and require other options in situations of morally significant choosing.

Natural law theories, then, propose to identify principles of right action????” moral principles????” specifying the first and most general principle of morality, namely, that one should choose and act in ways that are compatible with a will towards integral human fulfillment. 3 Among these principles is a respect for rights people possess simply by virtue of their humanity????” rights which, as a matter of Justice, others are bound to respect and governments are bound not only to respect but, to the extent possible, also to protect.

Theorists of natural law understand human fulfillment????” the human good????” as variegated. There are many irreducible dimensions of human well-being. This is not to deny that human nature is determinate. It is to affirm that our nature, though determinate, is complex. We are animals, but rational. Our integral good includes our bodily well-being, but also our intellectual, moral, and spiritual well-being. We are individuals, but friendship and sociability are constitutive aspects of our flourishing.

We form bonds with others not only for instrumental purposes, but because of our grasp of the inherent fulfillments available in joining together in a wide variety of formal and informal types of association and community. In ways that are highly relevant to moral reflection and judgment, man truly is a social animal. 3. On the first principle of morality and its specifications, see JOHN FINN’S, JOBOYLE, JR. GERMAIN GRISEZ, NUCLEAR DETERRENCE, MORALITY AND 281-87 (1987). SEPH M. REALISM No.] Natural Law 173 By reflecting on the basic goods of human nature, especially those most immediately pertaining to social and political life, natural law theorists propose to arrive at a sound understanding of principles of Justice, including

those principles we call human rights. In light of what I have already said about how natural law theorists good, it should be no surprise that natural law theorists typically reject both strict individualism and collectivism.

Individualism overlooks the intrinsic value of human sociability and tends to view human beings atomistically.

It reduces all forms of human association to the instrumental value they possess. To criticize this reductionism is not to deny that some forms of association are indeed purely instrumentally valuable or that virtually all forms of human association have instrumental value in addition to whatever intrinsic value they may have, but instead to remember that sociability is an intrinsic aspect of human well-being and fulfillment. Similarly, collectivism compromises the dignity of human beings by tending to instrumentalize and subordinate their well-being to the interests of larger social units.

It reduces the individual to the status of a cog in the wheel whose flourishing is merely a means rather than an end to which other things????” such as government, systems of public and private law, and other institutions created by members of human communities for the sake of their common good????” however noble and important (or, to use Aristotle’s description, “great and god-like” 4), are ultimately merely means. Individualists and collectivists both have theories of Justice and human rights, but they are highly unsatisfactory.

They are rooted in grave misunderstandings of human nature and the human good. Neither can do Justice to the concept of a human person????” that is, a rational animal who is a locus of intrinsic value (and, as such, an end-in-

himself who may never legitimately be treated as a mere means to others' ends), but whose well-being intrinsically includes relationships with others and membership in formal and informal communities in which he or she has, as a matter of Justice, both rights and responsibilities. 4. ARISTOTLE, NICOMACHEAN ETHICS 1094b10. 74 I am sometimes asked whether natural law theorists suppose that rights are “hard-wired into our nature.”

Unfortunately, this metaphor is more likely to mislead than to illuminate.

There are human rights if there are principles of practical reason directing us to act or abstain from acting in certain ways out of respect for the well-being and the dignity of persons whose legitimate interests may be affected by what we do. I certainly believe that there are such principles. They cannot be overridden by considerations of utility. So a complete defense of any account of natural law and or aggregative accounts of moral reasoning.)5 At a very general level, they direct us, in Kant's phrase, to treat human beings always as ends and never as means only. When we begin to specify this general norm, we identify important negative duties, such as the duty to refrain from enslaving people. Although we need not put the matter in terms of “rights,” it is perfectly reasonable, and I believe helpful, to speak of a right against being enslaved, and to speak of slavery as a violation of human rights.

It is a moral right that people have????” one that every community is morally obliged to protect by law????” not by virtue of being members of a certain race, sex, class, or ethnic group, but simply by virtue of our humanity. 6 In that sense, it is a human right. But there are, in addition to negative duties and their corresponding rights, certain positive duties. We can articulate

these too in the language of rights, though here it is especially important that we be clear about by whom and how a given right is to be honored.

Some say, for example, that education or health care is a human right. It is not unreasonable to speak this way, but much more needs to be said if it is

5. For such a critique by an eminent contemporary theorist of natural law, see JOHN FINN'S, *FUNDAMENTALS OF ETHICS* 0-108 (1983). 6. By the phrase "our humanity," I refer more precisely to the nature of humans as rational beings. The nature of human beings is a rational nature. So in virtue of our human nature, we human beings possess a profound and inherent dignity.

The same would be true, however, of beings other than humans whose nature is a rational nature, if indeed there are such beings. In the case of humans, even individuals who have not yet acquired the immediately exercisable capacities for conceptual thought and other rational acts, and even those who have temporarily or permanently lost them, and, indeed, even those who do not possess them, never possessed them, and (short of a miracle) never will possess them, possess a rational nature. 175 to be a meaningful statement. Who is supposed to provide education or health care to whom?

Why should those persons or institutions be the providers? What place should the provision of education or health care occupy on the list of social and political priorities? Is it better for education and health care to be provided by governments under socialized systems or by private providers in markets? These questions go beyond the application of moral principles. They require technical (for example, economic) and prudential judgments,

including circumstances people face in a given society at a given point in time. There is rarely a single, uniquely correct answer.

The answer to each question, moreover, can lead to further questions, and the problems can be extremely complex, far more complex than, for example, the issue of slavery, in which once a right has been identified its universality and the basic terms of its application are fairly clear. Everybody has a moral right not to be enslaved, and everybody an obligation as a matter of strict justice to refrain from enslaving others; governments have a moral obligation to respect and protect the right and, correspondingly, to enforce the obligation. The discussion thus far provides an idea of how we ought to go about identifying human rights. The argument must be made with regard to each putative right, however, and in many cases complexities arise. For example, one basic human right that almost all natural law theorists would recognize is the right of an innocent person not to be directly killed or maimed (including by torture). This is a right that is violated when someone makes the death or injury of another person the

7.

Having said this, I do not want to suggest a sharper difference than can be justified between positive and negative rights. Even in the case of negative rights, it is sometimes relevant to ask how a right should be honored and who, if anyone, has particular responsibility for protecting it. Moreover, it can be the case that there is not a uniquely correct answer to questions about what place the protection of the right should occupy on the list of social priorities. Consider, for example, the right not to be subjected to assault or battery.

Although it is obvious that individuals have an obligation to respect this right, and equally obvious that governments have an obligation to protect persons within their jurisdiction from those who would violate it, different communities reasonably differ not only as to the means or mix of means that are used to protect persons from assault and battery, but also as to the level of resources they allocate to protect people against violations of the right. I am grateful to Allen Buchanan for this point. 176 precise object of his action.

It is the right that grounds the norm against targeting non-combatants, even in justified wars, and against abortion, euthanasia, the killing of hostages, and the torturing of prisoners, even for the sake of preventing disasters. When we examine these norms individually, however, complexities emerge. In the case of abortion, some argue that human beings in the embryonic or fetal stages of development do not yet qualify as persons and so do not possess human rights. Similarly, in the case of euthanasia, some argue that permanently comatose or severely retarded or demented people do not (or no longer) qualify as rights-bearers.

I think that these claims are mistaken, 8 but for present purposes I will say only that development and in severely debilitated conditions are rights-bearers may nevertheless agree that whoever qualifies as a person is protected by the norm against direct killing of the innocent. This natural law understanding of human rights is connected with a particular account of human dignity. Under this account, the natural human capacities for reason and freedom are fundamental to the dignity of human beings????” the dignity that is protected by human rights.

The basic goods of human nature are the goods of a rational creature????” a creature who, unless impaired or prevented from doing so, naturally develops and exercises capacities for deliberation, judgment, and choice. These capacities are God-like (albeit, of course, in a limited way). In fact, from the theological vantage point they constitute a certain sharing????” limited, to be sure, but real????” in divine power. This is what is meant, I believe, by the otherwise extraordinarily puzzling Biblical teaching that man is made in the very image and likeness of God. Whether or not one recognizes Biblical authority or believes in a personal God, however, human beings possess a power traditionally ascribed to divinity????” namely, the quite literally 8. For a more detailed explanation of the reasons for holding that the moral status of a human being does not depend on his age, size, stage of development, or condition of dependency, see ROBERT P. GEORGE & CHRISTOPHER TOLLEFSEN, EMBRYO: A DEFENSE OF HUMAN LIFE (forthcoming 2008). 9. See Genesis 1 (New International Version) (“ Then God said, ‘ Let us make man in our image, in our likeness . 177 awe-inspiring power to be an uncaused causing.

This is the power to envisage a possible state of affairs, to grasp the value of bringing it into being, and then to act by choice (not merely by impulse or instinct) to bring it into being. That state of affairs may be anything from the development of an intellectual skill or the attainment of an item of knowledge, to the creation or critical appreciation of a work of art, to the establishment of marital communion. Its moral or cultural significance may be great or????” as is far more common????” quite minor. What matters is

that it is a product of human reason and freedom. It is the fruit of deliberation, judgment, and choice.

We may, if we like, consider as a further matter whether beings capable of such powers could exist apart from a divine source and ground of their being. I do not, however, think it makes sense to say that beings whose nature is to develop and exercise such powers instruments, or property. On this point, I share common ground with my atheist colleague and friend Jeffrey Stout, who argues on something closely akin to this basis that unbelievers, too, can affirm human dignity and fundamental human rights. 10 Now, what about the authority for this view of human nature, the human good, human dignity, and human rights?

Natural law theorists are interested in the intelligible reasons people have for their choices and actions. We are particularly interested in reasons that can be identified without appeal to any authority apart from the authority of reason itself. This is not to deny that it is often reasonable to recognize and submit to religious or secular (for example, legal) authority in deciding what to do and not do. Indeed, natural law theorists such as Yves Simon have made important contributions to understanding why and how people can sometimes be morally bound to submit to, and be guided in their actions by, authority of vari- 10.

Professor Stout made this point most clearly at a conference at Princeton University in 2003. See Jeffrey Stout, Comment on Secularism, Law and Public Policy at the James Madison Program in American Ideals and Institutions Conference on Faith and the Challenges of Secularism (Oct. 11,

2003), available at [http:// web. princeton.](http://web.princeton.edu/sites/jmadison/calendar/video/Faith%20&%20Challenges.html)

[edu/sites/jmadison/calendar/video/Faith%20&%20Challenges. html](http://web.princeton.edu/sites/jmadison/calendar/video/Faith%20&%20Challenges.html); see also Jeffrey Stout, Truth, Natural Law, and Ethical Theory, in NATURAL LAW THEORY: CONTEMPORARY ESSAYS 71 (Robert P. George ed. , 1992). 178 ous types. I Even here, however, the special concern of natural law theorists is with the reasons people have for recognizing and honoring claims to authority. We do not simply appeal to authority to justify authority. One might then ask whether human beings are in fact rational. Can we discern any intelligible reasons for human choices and actions? Everyone recognizes that some ends or purposes pursued through human action are intelligible at least insofar as they provide means to other ends. For example, people work to earn money, and their doing so is perfectly rational. Money is a valuable means to a great many important ends.

No one doubts its instrumental value. Even skeptics do not deny that there are instrumental goods. The question, ather, is whether some ends or purposes are intelligible as providing more than merely instrumental reasons for acting. Are there intrinsic, as well as instrumental, goods? Skeptics deny that there are intelligible ends or purposes that make possible rationally motivated action. Natural law theorists, by contrast, hold that friendship, intrinsically valuable. 12 They are intelligibly “ choice worthy,” not simply as means to other ends, but as ends-in-themselves.

They cannot be reduced to????” nor can their intelligible appeal be accounted for exclusively in terms of????” emotion, feeling, desire, r other subrational motivating factors. These basic human goods are constitutive aspects of the well-being and fulfillment of human persons and the

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communities they form, and they thereby provide the foundations of moral judgments, including our judgments pertaining to justice and human rights. Of course, there are many today who embrace philosophical or ideological doctrines that deny the human capacities I maintain are at the core of human dignity.

They adopt a purely instrumental and essentially non-cognitivist view of practical reason????” for example, Hume’s view that reason is nothing more than “the love of the argument that the human 11. YVES R. SIMON, A GENERAL THEORY OF AUTHORITY (1962). 12. see, e. g. , JOHN FINN’S, NATURAL LAW AND NATURAL RIGHTS 59-127 (2d prtg. 1982). 13. DAVID HUME, A TREATISE OF HUMAN NATURE, bk. II, pt. III, S III, at 415 (Clarendon press 1888) (1739). 179 experience of deliberation, judgment, and choice is illusory.

The ends people pursue, they insist, are ultimately given by nonrational motivating factors, such as feeling, emotion, or desire. “[T]he thoughts are to the desires,” Hobbes has taught them to suppose, “as scouts and spies, to range abroad and find the way to the things desired.” 14 Truly rationally motivated action is impossible for creatures like us. There are no more-than-merely-instrumental reasons for action????” no basic human goods. If proponents of this non-cognitivist and subjectivist view of human action are right, then the entire business of ethics is a charade and human dignity is a myth.

But I do not think they are right. Indeed, they cannot give any account of the norms of rationality to which they must appeal in attempting to make a case against reason and freedom that is consistent with the denial that people are

capable of more-than-erely-instrumental rationality and true freedom of choice. Germain Grisez and Joseph Boyle, together with the late Olaf Tollefsen, make a powerful argument along these lines against skepticism and the denial of free will in a book entitled *Free Choice: A Self-Referential Argument*.⁵ They, and I, do not deny that emotion figures in human action; it does, and on many occasions it (or other subrational factors) does the main work of motivation. We hold that people can have, and often do have, basic reasons for their actions????” reasons provided by ends they understand as humanly fulfilling and desire precisely as such. These ends, too, figure in motivation. 16 co. 1994) (1651). 15. JOSEPH M. BOYLE, JR. , GERMAIN GRISEZ & OLAF TOLLEFSEN, *FREE CHOICE: A SELF-REFERENTIAL ARGUMENT* (1976). 16. See, e. g. , Christine M.

Korsgaard, *The Normativity of Instrumental Reason*, in *ETHICS AND PRACTICAL REASON* 215 (Garrett cullity & aerys Gaut eds. , 1997). Although she identifies herself with the Kantian (rather than the Aristotelian) tradition in ethics, the distinguished Harvard moral philosopher Christine Korsgaard makes a similar point when she argues that there can be no true practical rationality ??” not even an instrumentalist one composed of hypothetical imperatives????” unless there are “ some rational principles determining which ends are worthy of preference or pursuit,” id. at 230, some “ normative principles directing us to the adoption of certain ends,” id. t 220, and “ something which gives normative status to our ends,” id. at 250, by providing (what she describes as) “ unconditional reasons for having certain ends, and, it seems, unconditional principles from which those reasons are derived,” id. at 252. 180 Now, if I am correct in affirming that human reason

can identify human rights as genuine grounds of obligation to others, rights which people possess as a matter of natural law (what have been termed “natural rights”), how can we explain or understand widespread failures to recognize and respect human rights and other moral principles?

As human beings, we are rational animals, but we are imperfectly rational. We are prone to making intellectual and moral mistakes and capable of behaving grossly unreasonably, especially when deflected by powerful emotions that run contrary to the demands of reasonableness. Even when following our consciences, as we are morally bound to do, we can go wrong. A conscientious judgment may nevertheless be erroneous. Some of the greatest thinkers who ever lived failed to recognize the human right to religious liberty. Their failure, I believe, was rooted in a set of intellectual errors about what such a right presupposes and entails.

The people who made these errors were neither fools nor knaves. The errors were not obvious, and it was only with a great deal of reflection and debate that the matter was clarified. Of course, sometimes people fail to recognize and respect human rights because they have self-interested motives for doing so. In most cases of exploitation, for example, the fundamental failing is moral, not intellectual. In some cases, though, intellectual and moral failures are closely connected. Selfishness, prejudice, partisanship, vanity, avarice, lust, ill-will, and other moral delinquencies can, in ways that are sometimes

human rights.

Whole cultures or subcultures can be infected with moral failings that blind large numbers of people to truths about justice and human rights, and

ideologies hostile to these truths will almost always be both causes and effects of these failings. Consider, for example, the case of slavery in the antebellum American South. The ideology of white supremacy was both a cause of many people's blindness to the wickedness of slavery, and an effect of the exploitation and degradation of its victims. Let us now turn in a more focused way to the question of God and religious faith in natural law theory.

Most, but not all, natural law theorists are theists. They believe that the moral order, like every other order in human experience, is what it is because God creates and sustains it as such. In accounting for the intelligibility of the created order, they infer the existence of a free and creative intelligence—a personal God. Indeed, they typically argue that God's creative free choice ultimately provides the only satisfactory account of the existence of the intelligibilities humans grasp in every domain of inquiry.

Natural law theorists do not deny that God can reveal moral truths, and most believe that God has chosen to reveal many such truths. Natural law theorists, however, also affirm that many moral truths, including some that are revealed, can also be grasped by ethical reflection apart from revelation. They assert, with St. Paul, that there is a law “written [on the] hearts” even for the Gentiles who did not know the law of Moses—a law the knowledge of which is sufficient for moral accountability.

So the basic norms against murder and theft, for example, though revealed in the Decalogue, are accessible and knowable even apart from God's special revelation. The natural law can be known by us, and we can

conform our conduct to its terms, by virtue of our natural human capacities for deliberation, judgment, and choice. The absence of a divine source of the natural law would be a puzzling thing, just as the absence of a divine source of any and every other intelligible order in human experience would be a puzzling thing.

An atheist's puzzlement might well cause him to reconsider the idea that there is no divine source of the order we perceive and understand in the universe. Such a reconsideration figures in the accounts given by some eminent modern thinkers of their conversions from one or another form of secularism to religious faith; examples among Anglophone philosophers include Elizabeth Anscombe, Michael Dummett, John Finnis, Alasdair MacIntyre, Peter Geach, and Nicholas Rescher. It is far less likely to cause someone to conclude that our perception is