

Chapter 1

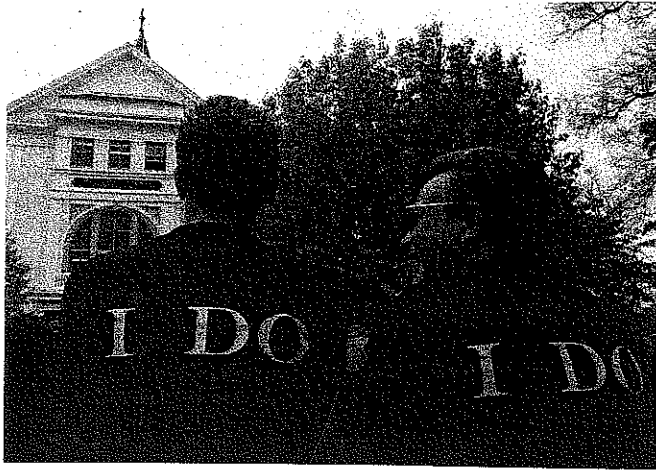
Natural law

'It's just not right.' 'It's not natural.' How many times have you heard these sorts of judgements invoked against a particular practice or act? What do they mean? When abortion is pronounced immoral, or same-sex marriages unacceptable, what is the basis of this censure? Is there an objectively ascertainable measure of right and wrong, good and bad? If so, by what means can we retrieve it?

Moral questions pervade our lives; they are the stuff of political, and hence legal, debate. Moreover, since the establishment of the United Nations, the ethical tenor of international relations, especially in the field of human rights, is embodied in an increasing variety of international declarations and conventions, many of which draw on the unspoken assumption of natural law that there is indeed a corpus of moral truths that, if we apply our reasoning minds, we can all discover.

Ethical problems have, of course, preoccupied moral philosophers since Aristotle. The revival of natural law theory may suggest that we have, over the centuries, come no closer to resolving them.

'The best description of natural law', according to one leading natural lawyer, 'is that it provides a name for the point of intersection between law and morals.' Its main claim, put simply, is that what naturally is, ought to be. In his widely acclaimed book,



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1. Homosexuality, same-sex 'marriages', and marital infidelity offend the principles of natural law.

Natural Law and Natural Rights, John Finnis asserts that when we attempt to explain what law is, we make assumptions, willy-nilly, about what is 'good':

It is often supposed that an evaluation of law as a type of social institution, if it is to be undertaken at all, must be preceded by a value-free description and analysis of that institution as it exists in fact. But the development of modern jurisprudence suggests, and reflection on the methodology of any social science confirms, that a theorist cannot give a theoretical description and analysis of social facts, unless he also participates in the work of evaluation, of understanding what is really good for human persons, and what is really required by practical reasonableness.

This is a trenchant foundation for an analysis of natural law. It proposes that when we are discerning what is *good*, we are using our intelligence differently from when we are determining what *exists*. In other words, if we are to understand the nature and impact of the

natural law project, we must recognize that it yields a different logic.

The Roman lawyer, Cicero, drawing on Stoic philosophy, usefully identified the three main components of any natural law philosophy:

True law is right reason in agreement with Nature; it is of universal application, unchanging and everlasting. . . . It is a sin to try to alter this law, nor is it allowable to attempt to repeal any part of it, and it is impossible to abolish it entirely. . . . [God] is the author of this law, its promulgator, and its enforcing judge.

This underlines natural law's universality and immutability, its standing as a 'higher' law, and its discoverability by reason (it is in this sense 'natural'). Classical natural law doctrine has been employed to justify both revolution and reaction. During the 6th century BC, the Greeks described human laws as owing their importance to the power of fate that controlled everything. This conservative view is easily deployed to justify even iniquitous aspects of the status quo. By the 5th century BC, however, it was acknowledged that there might be a conflict between the law of nature and the law of man.

Aristotle devoted less attention to natural law than to the distinction between natural and conventional justice. But it was the Greek Stoics, as mentioned above, who were particularly attracted to the notion of natural law, where 'natural' meant in accordance with reason. The Stoic view informed the approach adopted by the Romans (as expressed by Cicero) who recognized, at least in theory, that laws which did not conform to 'reason' might be regarded as invalid.

The Catholic Church gave expression to the full-blown philosophy of natural law, as we understand it today. As early as the 5th century, St Augustine asked, 'What are States without justice, but robber

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bands enlarged?' But the leading exposition of natural law is to be found in the writings of the Dominican, St Thomas Aquinas (1225–74), whose principal work *Summa Theologiae* contains the most comprehensive statement of Christian doctrine on the subject. He distinguishes between four categories of law: the eternal law (divine reason known only to God), natural law (the participation of the eternal law in rational creatures, discoverable by reason), divine law (revealed in the scriptures), and human law (supported by reason, and enacted for the common good).

One aspect of Aquinas's theory has attracted particular attention and controversy. He states that a 'law' that fails to conform to natural or divine law is not a law at all. This is usually expressed as *lex iniusta non est lex* (an unjust law is not law). But modern scholars maintain that Aquinas himself never made this assertion, but merely quoted St Augustine. Plato, Aristotle, and Cicero also uttered comparable sentiments, yet it is a proposition that is most closely associated with Aquinas who seems to have meant that laws which conflict with the requirements of natural law lose their power to bind morally. A government, in other words, that abuses its authority by enacting laws which are unjust (unreasonable or against the common good) forfeits its right to be obeyed because it lacks moral authority. Such a law Aquinas calls a 'corruption of law'. But he does not appear to support the view that one is always justified in disobeying an unjust law, for though he does declare that if a ruler enacts unjust laws 'their subjects are not obliged to obey them', he adds guardedly, 'except, perhaps, in certain special cases when it is a matter of avoiding scandal' (i.e. a corrupting example to others) or civil disorder. This is a far cry from the radical claims sometimes made in the name of Aquinas, which seek to justify disobedience to law.

By the 17th century in Europe, the exposition of entire branches of the law, notably public international law, purported to be founded on natural law. Hugo de Groot (1583–1645), or Grotius as he is generally called, is normally associated with the secularization of

natural law. In his influential work, *De Jure Belli ac Pacis*, he asserts that, even if God did not exist, natural law would have the same content. This proved to be an important basis for the developing discipline of public international law. Presumably Grotius meant that certain things were 'intrinsically' wrong – whether or not God decrees them; for, to use Grotius's own analogy, even God cannot cause two times two not to equal four!

Natural law received a stamp of approval in England in the 18th century in Sir William Blackstone's *Commentaries on the Laws of England*. Blackstone (1723–80) begins his great work by declaring that English law derives its authority from natural law. But, although he invokes this divine source of positive law, and even regards it as capable of nullifying enacted laws in conflict with natural law, his account of the law is not actually informed by natural law theory. Nevertheless, Blackstone's attempt to clothe the positive law with a legitimacy derived from natural law drew the fire of Jeremy Bentham who described natural law as, amongst other things, 'a mere work of the fancy' (see Chapter 2).

Aquinas is associated with a fairly conservative view of natural law. But the principles of natural law have been used to justify revolutions – especially the American and the French – on the ground that the law infringed individuals' natural rights. Thus in America the revolution against British colonial rule was based on an appeal to the natural rights of all Americans, in the lofty words of the Declaration of Independence of 1776, to 'life, liberty and the pursuit of happiness'. As the Declaration puts it, 'We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable rights.' Similarly inspiring sentiments were included in the French *Déclaration des droits de l'homme et du citoyen* of 26 August 1789 which refers to certain 'natural rights' of mankind.

Natural law was applied in the form of a number of contractarian theories that conceive of political rights and obligations in terms of

a social contract. It is not a contract in a strict legal sense, but expresses the idea that only with his consent can a person be subjected to the political power of another. This approach remains influential in liberal thought, notably John Rawls's theory of justice (see Chapter 4).

Natural rights: Hobbes, Locke, and Rousseau

Although Thomas Hobbes (1588–1679) is usually remembered for his dictum that life is 'solitary, poor, nasty, brutish and short', he actually said, in his famous work, *Leviathan*, that this was the condition of man before the social contract, i.e. in his natural state. Natural law, he contends, teaches us the necessity of self-preservation: law and government are required if we are to protect order and security. Under the social contract, we must therefore surrender our natural freedom in order to create an orderly society. Hobbes's philosophy is thus somewhat authoritarian, placing order above justice. In particular, his theory (indeed, his self-confessed objective) is to undermine the legitimacy of revolutions against (even malevolent) government.

For Hobbes every act we perform, though ostensibly kind or altruistic, is actually self-serving. Thus my donation to charity is actually a means of enjoying my power. An accurate account of human action, including morality, must, he argues, acknowledge our essential selfishness. In *Leviathan* he wonders how we might behave in a state of nature, before the formation of any government. He recognizes that we are essentially equal, mentally and physically: even the weakest – suitably armed – has the strength to kill the strongest. This equality, he suggests, generates discord. We tend to wrangle, he argues, for three main reasons: competition (for limited supplies of material possessions), distrust, and glory (we remain hostile in order to preserve our powerful reputations). As a consequence of our propensity toward disagreement, Hobbes concludes that we are in a natural state of perpetual war of all against all, where no morality exists, and all live in constant fear.

Until this state of war comes to an end, all have a right to everything, including another person's life. Hobbes argues that, from human self-interest and social agreement alone, one can derive the same kinds of laws that natural lawyers regard as immutably fixed in nature. In order to escape the horror of the state of nature, Hobbes concludes, peace is the first law of nature.

The second law of nature is that we mutually divest ourselves of certain rights (such as the right to take another person's life) so as to achieve peace. This mutual transferring of rights is a contract and is the basis of moral duty. He is under no illusion that merely concluding this contract can secure peace. Such agreements need to be honoured. This is Hobbes's third law of nature.

He acknowledges that since we are selfish we are likely, out of self-interest, to breach contracts. I may break my agreement not to steal from you when I think I can evade detection. And you are aware of this. The only certain means of avoiding this breakdown in our mutual obligations, he argues, is to grant unlimited power to a political sovereign to punish us if we violate our contracts. And again it is a purely selfish reason (ending the state of nature) that motivates us to agree to the establishment of an authority with the power of sanction. But he insists that only when such a sovereign exists can we arrive at any objective determination of right and wrong.

Hobbes supplements his first three laws of nature with several other substantive ones such as the fourth law (to show gratitude toward those who comply with contracts). He concludes that morality consists entirely of these laws of nature, which are arrived at through the social contract. This is a rather different interpretation of natural rights from that championed by classical natural law. But his account might be styled a modern view of natural rights, one that is premised on the basic right of every person to preserve his own life.

John Locke (1632–1704) portrays life before the social contract as anything but the nightmare described by Hobbes. Locke claims that, before the social contract, life was paradise – save for one important shortcoming: in this state of nature, property was inadequately protected. For Locke, therefore (especially in *Two Treatises of Civil Government*), it was in order to rectify this flaw in an otherwise idyllic natural state that man forfeited, under a social contract, some of his freedom. Suggestive of Aquinas's fundamental postulates, Locke's theory rests on an account of man's rights and obligations under God. It is an intricate attempt to explain the operation of the social contract and its terms. It is revolutionary (Locke accepts the right of the people to overthrow tyranny), and it famously emphasizes the right to own property: God owns the earth and has given it to us to enjoy; there can therefore be no right of property, but by 'mixing' his labour with material objects, the labourer acquires the right to the thing he has created.

Locke's perception of private property strongly influenced the framers of the American constitution. He has therefore been both celebrated and reviled as the progenitor of modern capitalism.

The social contract, in his view, preserved the natural rights to life, liberty, and property, and the enjoyment of private rights: the pursuit of happiness – engendered, in civil society, the common good. Whereas for Hobbes natural rights come first, and natural law is derived from them, Locke derives natural rights from natural law – i.e. from reason. Hobbes discerns a natural right of every person to every thing, Locke argues that our natural right to freedom is constrained by the law of nature and its directive that we should not harm each other in 'life, health, liberty, or possessions'. Locke advocates a limited form of government: the checks and balances among branches of government and the genuine representation in the legislature would, in his view, minimize government and maximize individual liberty.

Natural law plays a less important role than the social contract in the theory of Jean-Jacques Rousseau (1712–78). More metaphysical than Hobbes and Locke, Rousseau's social contract (in his *Social Contract*) is an agreement between the individual and the community by which he becomes part of what Rousseau calls the 'general will'. There are, in Rousseau's view, certain natural rights that cannot be removed, but, by investing the 'general will' with total legislative authority, the law may legitimately infringe upon these rights. Indeed, if government represents the 'general will', it may do almost anything. Rousseau, while dedicated to participatory democracy, is also willing to invest the legislature with virtually untrammelled power by virtue of its reflecting the 'general will'. He is thus a paradox: a democratic totalitarian.

The fall and rise of natural law

The waning influence of natural law theory, especially in the 19th century, resulted from the emergence of two formidable foes. First, as we shall see in the next chapter, the ideas associated with legal positivism constitute resilient opposition to natural law thinking. Secondly, the idea that in moral reasoning there can be no rational solutions (so-called non-cognitivism in ethics) spawned a profound scepticism about natural law: If we cannot objectively know what is right or wrong, natural law principles are little more than subjective opinion: they could, therefore, be neither right nor wrong.

David Hume (1711–76) in his *Treatise of Human Nature* first observed that moralists seek to derive an 'ought' from an 'is': we cannot conclude that the law should assume a particular form merely because a certain state of affairs exists in nature. Thus the following syllogism, according to this argument, is invalid:

All animals procreate (major premise)
 Human beings are animals (minor premise)
 Therefore humans *ought* to procreate (conclusion).

Hume sought to show that facts about the world or human nature cannot be used to determine what *ought* to be done or not done. Some contemporary natural lawyers, while admitting that the above syllogism is indeed false, deny that classical natural law attempted to derive an 'ought' from an 'is' in this manner, as we shall see below.

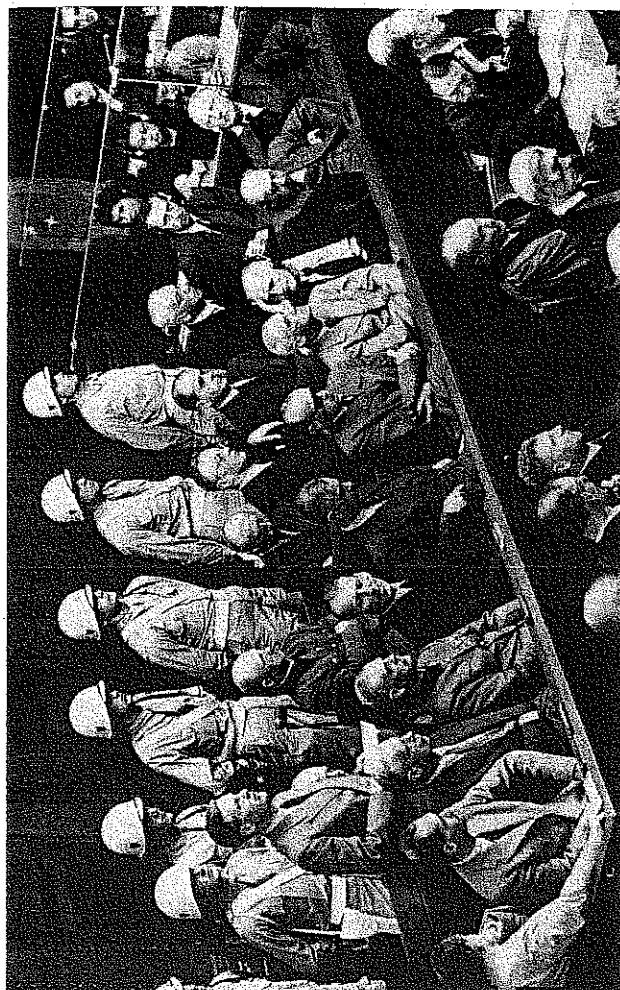
The 20th century witnessed a renaissance in natural law theory. This is evident in the post-war recognition of human rights and their expression in declarations such as the Charter of the United Nations, and the Universal Declaration of Human Rights, the European Convention on Human Rights, and the Declaration of Delhi on the Rule of Law of 1959 (see Chapter 4). Natural law is conceived of not as a 'higher law' in the constitutional sense of invalidating ordinary law but as a benchmark against which to measure positive law.

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The Nuremberg war trials of senior Nazi officials regenerated natural law ideals. They applied the principle that certain acts constitute 'crimes against humanity' even if they do not violate provisions of positive law. The judges in these trials did not appeal explicitly to natural law theory, but their judgments represent an important recognition of the principle that the law is not necessarily the sole determinant of what is right.

Another significant development was the enactment of constitutional safeguards for human or civil rights in various jurisdictions (e.g. the American Bill of Rights and its interpretation by the United States Supreme Court).

Legal theory has also advanced the cause of natural law theory. Lon Fuller's 'inner morality of law' (see below), H. L. A. Hart's 'minimum content of natural law' (see Chapter 2), and most importantly, the writings of contemporary natural lawyers such as John Finnis (see below) have played a major role in this revival.



2. The Nuremberg trials of Nazi war criminals applied the principle that certain acts constitute 'crimes against humanity' even though they do not offend against specific provisions of positive law.

Lon Fuller: the 'inner morality of law'

The American jurist, Lon L. Fuller (1902-78) famously developed a secular natural law approach that regards law as having an 'inner morality'. By this he means that a legal system has the specific purpose of 'subjecting human conduct to the governance of rules'. It follows that in this purposive enterprise there is a necessary connection between law and morality.

Fuller recounts the 'moral' tale of a fictional King Rex and the eight ways in which he fails to make law. He goes wrong because (1) he fails to achieve rules at all, so that every issue must be decided on an ad hoc basis; (2) he does not publicize the rules that his subjects are expected to observe; (3) he abuses his legislative powers by enacting retroactive legislation (i.e. on Tuesday making unlawful those acts that were lawful on Monday); (4) his rules are incomprehensible; (5) he enacts contradictory rules or (6) rules that require conduct beyond the powers of the affected party; (7) he introduces such frequent changes in the rules that his subjects cannot adjust their action; and (8) he fails to achieve congruence between the rules as announced and their actual administration.

Ill-fated King Rex bites the dust because he disregards Fuller's eight principles:

1. Generality
2. Promulgation
3. Non-retroactivity
4. Clarity
5. Non-contradiction
6. Possibility of compliance
7. Constancy
8. Congruence between declared rule and official action.

Fuller concludes that where a system does not conform to any one of these principles, or fails substantially in respect of several, it

could not be said that 'law' existed in that community. But, though he insists that these eight principles are *moral*, they appear to be essentially procedural guides to effective lawmaking. Some, however, would argue that they implicitly establish fairness between the government and the governed and therefore exclude evil regimes.

The general view, however, is that compliance with Fuller's eight 'desiderata' certifies only that the legal system functions effectively, and hence, since this cannot be a moral criterion, an evil regime might just as easily satisfy the test. Indeed, it is arguable that, in pursuit of efficacy, a wicked legal system might actually *seek* to fulfil Fuller's principles. Certainly, the rulers of apartheid South Africa



3. The legal enforcement of racial segregation and discrimination reached its high-water mark in apartheid South Africa.

sought to comply with procedural niceties when enacting and implementing its obnoxious laws.

Contemporary natural law theory: John Finnis

The Aquinian tenets of natural law have been revived and meticulously explored by the Oxford legal theorist, John Finnis (b. 1940), most accessibly and comprehensively in his book, *Natural Law and Natural Rights*. It represents a significant restatement of classical natural law doctrine, especially its application of analytical jurisprudence to a theory that, as we shall see, is normally regarded as its opposite.

It is important to grasp the purpose of Finnis's enterprise. He rejects David Hume's conception of practical reason, which maintains that my reason for undertaking an action is merely ancillary to my desire to attain a certain objective. Reason informs me only how best to achieve my desires; it cannot tell me what I ought to desire. Finnis prefers an Aristotelian foundation: what constitutes a worthwhile, valuable, desirable life? And his menu contains what he calls the seven 'basic forms of human flourishing':

1. Life
2. Knowledge
3. Play
4. Aesthetic experience
5. Sociability (friendship)
6. Practical reasonableness
7. 'Religion'

These are the essential features that contribute to a fulfilling life. Each is universal in that it governs all human societies at all times, and each has intrinsic value in that it should be valued for its own sake and not merely to achieve some other good. The purpose of moral beliefs is to provide an ethical structure to the pursuit of these basic goods. These principles facilitate our choosing among

competing goods and enable us to define what we are permitted to do in pursuing a basic good.

To flourish as human beings, we require these basic goods, though one could easily add to this list. Note that by 'religion', Finnis does not mean organized religion, but the need for spiritual experience. These seven basic goods are combined by Finnis with the following nine 'basic requirements of practical reasonableness':

1. The active pursuit of goods
2. A coherent plan of life
3. No arbitrary preference among values
4. No arbitrary preference among persons
5. Detachment and commitment
6. The (limited) relevance of consequences: efficiency within reason
7. Respect for every basic value in every act
8. The requirements of the common good
9. Following one's conscience.

These two inventories together comprise the universal and immutable 'principles of natural law'. Finnis demonstrates that this position accords with the general conception of natural law espoused by Thomas Aquinas. Nor, he claims, does it fall victim to non-cognitivist attack by Hume (see above) – for these objective goods are *self-evident*; they are not deduced from any account of human nature. So, for example, 'knowledge' is self-evidently preferable to ignorance. And even if I refute this view, and claim that 'ignorance is bliss', I would willy-nilly be acknowledging that my argument is a valuable one, and hence that knowledge is indeed good, thereby slipping into the trap of self-refutation!

The overriding rationale of natural law theory thus seems to be, as Finnis says, to establish 'what is really good for human persons'. We cannot pursue human goods until we have a community. And the authority of a leader derives from his serving the best interests of that community. Hence, should he enact unjust laws, because they

militate against the common good, they would lack the direct moral authority to bind.

Appealing to the concept of the common good, Finnis develops also his conception of justice. Principles of justice, he contends, are no more than the implications of the general requirement that one ought to foster the common good in one's community. The basic goods and methodological requirements ought to thwart most forms of injustice; they generate several absolute obligations with correlative absolute natural rights:

There is, I think, no alternative but to hold in one's mind's eye some pattern, or range of patterns, of human character, conduct, and interaction in community, and then to choose such specification of rights as tends to favour the pattern, or range of patterns. In other words, *one needs some conception of human good, of individual flourishing in a form (or range of forms) of communal life that fosters rather than hinders such flourishing.* One attends not merely to character types desirable in the abstract or in isolation, but also to the quality of interaction among persons; and one should not seek to realize some patterned 'end-state' imagined in abstraction from the processes of individual initiative and interaction, processes which are integral to human good and which make the future, let alone its evaluation, incalculable.

This passage captures the spirit of Finnis's conception of natural rights. It includes the right not to be tortured, not to have one's life taken as a means to any further end, not to be lied to, not to be condemned on knowingly false charges, not to be deprived of one's capacity to procreate, and the right 'to be taken into respectful consideration in any assessment of what the common good requires'. The concept of justice is further examined in Chapter 4.

Finnis insists that the first principles of natural law are *not* deductively inferred from anything at all, including facts, speculative principles, metaphysical propositions about human

nature or about the nature of good and evil, or from a teleological conception of nature. Aquinas, according to Finnis, makes it clear that each of us 'by experiencing one's nature, so to speak, from the inside' grasps 'by a simple act of non-inferential understanding' that 'the object of the inclination which one experiences is an instance of a general form of good, for oneself (and others like one)'. For Aquinas, to discover what is morally right is to ask, not what is in accordance with human nature, but what is *reasonable*.

The central claims of natural law are rejected by legal positivists who deny that the legal validity of a norm *necessarily* depends on its substantive moral qualities. This standpoint is considered in the next chapter.