Introduction

Natural Law Jurisprudence and Natural Law Political Philosophy

0.1 The Central Claims of Natural Law Jurisprudence and Natural Law Political Philosophy

The central claim of natural law jurisprudence is that there is a positive internal connection between law and decisive reasons for action: law is backed by decisive reasons for action. (For there to be a decisive reason to ϕ is for ϕ-ing to be a reasonable act for one to perform and not ϕ-ing an unreasonable act for one to perform, and so for a law to be backed by decisive reasons is for there to be decisive reasons to perform any act required by that law.) The central claim of natural law political philosophy is that law has this reason-giving force through the common good of the political community. Natural law jurisprudence most fundamentally asserts that it is of the essence of law to bind in reason; natural law political philosophy most fundamentally asserts that what makes law bind is its role with respect to the common good of the political community.

Why should we take the view that these are the central theses of natural law jurisprudence and political philosophy to be anything more than stipulation? As the term 'natural law theory' is now used, Aquinas is the paradigmatic natural law theorist. If one would like evidence for Aquinas's status as the paradigm, one can look at any anthology of moral, political, or legal philosophy that includes a section on natural law theory: any such anthology contains a selection from Aquinas or about Aquinas. His thinking in moral, political, and legal matters is the reference point by which later natural law theories (for example, Hobbes's, Locke's) are classified as such, and his thinking on these matters is the reference point by which earlier writers (for example, Aristotle, the Stoics) are assessed as proto-natural law philosophers. So we have reason to take Aquinas as the paradigmatic natural law theorist, and we thus have reason to hold that the theses that are central to Aquinas's natural law jurisprudence and politics – that is, those theses that structure and organize his thought on those topics – are the central theses of natural law jurisprudence and politics. What are those theses?

The first argumentative move in the section of Aquinas's *Summa Theologiae* that later commentators labeled the 'Treatise on Law' is the claim that law is "something pertaining to reason": as a law is something that rules and measures conduct, and rational beings' conduct is ruled and measured only by dictates with which there is reason to conform, law must be something with which agents have reason to conform (IaIIae 90, 1). Following on the heels of that article is an argument that this connection between law and reasons is realized through the common good: as the good is that by which individuals regulate their conduct, the common good is that by which members of a community regulate their conduct, and so the reasons for conformity with law arise from its relation to the common good (IaIIae 90, 2). These theses hold good of all law, divine and human alike (IaIIae 91, 1–4), and when Aquinas turns to the task of drawing more detailed conclusions concerning the range, scope, and source of the authority of human law (IaIIae 95–97), it is in terms of these theses that he makes his case. (For further discussion of the structure of Aquinas's arguments for natural law jurisprudence, see Murphy 2004.) So the fundamental theses of natural law jurisprudence and political philosophy that Aquinas affirms are that concerning the internal connection between law and reasons for action and that concerning the central role of the common good in the provision of law's reason-giving force. And since Aquinas is generally acknowledged as the paradigmatic natural law theorist, it is not at all arbitrary to frame the natural law view here in terms of these theses as well.

These theses, while clearly incompatible with a number of widely held political and jurisprudential views, are nevertheless rather vague, and the would-be defender of a politics and jurisprudence of natural law must make them more precise. But even in their present form, it is clear what sorts of questions the defender of this view would have to answer. We need to know more about why there exists such a connection between law and decisive reasons for action. We need some account of the nature of the common good, of its character and normative force, and how the law inherits its normative force from the common good thus conceived. We need to know what we should say about those enactments that we pretheoretically label 'law' but which seem not to be backed by adequate, let alone decisive, reasons for compliance.

The argument of this book attempts to meet these needs. In Chapter 1, we consider the natural law legal theorist's claim about the internal connection between law and reasons for action. Here I will consider three readings of the natural law thesis: the *strong* reading, on which a norm's legal validity is in part constituted by its being backed by decisive reasons for compliance; the *weak* reading, on which a norm's legal non-defectiveness is in part constituted by its being backed by decisive reasons for compliance; and the *moral* reading, on which a norm's moral authoritativeness is in part constituted by its being backed by decisive reasons for compliance. While I will reject the moral reading as a formulation of the natural law jurisprudential thesis because of its extreme

lack of interest, I will show that the strong reading can deflect the objections commonly leveled against it, and that the objections commonly raised against natural law jurisprudence do not raise even *prima facie* suspicions against the weak reading.

In Chapter 2, I defend the weak reading of the natural law thesis. I begin by considering John Finnis's 'legal point of view' argument for the natural law jurisprudential thesis. While I reject that argument, I think that there are two more promising arguments – an argument from the function of law, and an argument from the status of legal norms as illocutionary acts – that establish the truth of the weak reading. But these arguments not only give reason to believe the weak natural law jurisprudential thesis; they give reason to reject the strong reading. So the natural law legal theorist should affirm the weak reading. This thesis – that law that is not backed by decisive reasons for action is defective as law – sets the agenda for natural law political philosophy, which is to describe the conditions under which non-defective law is in place.

In Chapter 3, we consider the natural law political philosopher's central political concept – that of the *common good*. The concept of the common good has this central place in virtue of its carrying out the agenda set by natural law jurisprudence: the common good is supposed to underwrite law's reason-giving force, so that a law that is non-defective with respect to its reason-giving force has that virtue through its connection to the common good. The aim of this chapter is to clarify the understanding of the common good to which the natural law view should appeal. In this chapter, I defend an aggregative conception of the common good, on which the common good consists in the state of affairs in which every individual in that community is fully flourishing, on the basis that it is able to fill the reason-giving role that the common good must fill and that other extant conceptions gain their plausibility only by way of the aggregative conception.

In Chapters 4 and 5, I consider how the common good should be held to underwrite the reason-giving force of law on a natural law conception. In Chapter 4, I consider whether the natural law theorist needs to appeal to consent to explain how the common good provides the law with normative force. Natural law theorists, like most contemporary political philosophers, have been deeply suspicious of consent theories: they have argued not only that such theories are generally philosophically objectionable, but also that consent theories are at odds with the basic thrust of the natural law position, and at any rate are not needed by the natural law theorist to explain how the common good provides law with its normative force. I show in this chapter that, although the criticisms of standard consent theory are extremely damaging, contemporary natural law theorists have drastically underestimated the extent to which they need help from something like a consent view. In Chapter 5, I give the details of a non-standard consent account that offers the help that the natural law theorist needs in explaining how the common good provides the law with its reason-giving

force while evading (most of) the difficulties that have been pressed against more typical consent views.

Natural law jurisprudence and political philosophy have traditionally treated punishment as a secondary question: it is no part of the definition of law that law involve threat of sanctions, and there could be an authoritative legal order that did not make use of punishment. But it would be a mistake to think that legal punishment is not to be justified in terms of the common good and its demands: for, as I argue in Chapter 6, legal punishment is to be understood first and foremost in terms of its authoritative character, and since the natural law view holds that all authoritative dictates are to be justified in terms of the demands of the common good, the justification of punishment must be in terms of the common good as well. Rejecting both the quasi-utilitarianism and appeals to equal distributions of benefits and burdens that have characterized much natural law thought on punishment, I defend a view of punishment that is both retributivist and expressivist.

In Chapter 7, I consider the limits of natural law political philosophy. The most pressing challenge that the natural law view – indeed, *any* view of the authority of law – faces concerns the accommodation of superpolitical and subpolitical concerns. I discuss these challenges, and the natural law view's inability to respond fully to them, in this chapter.

0.2 Natural Law and Practical Rationality

'Natural law theory' names not only theories of political philosophy and jurisprudence; it also is a name for a theory of morality, or, better, a theory of practical rationality. According to the natural law account of practical rationality, the fundamental reasons for action are certain basic goods, whose status as goods is grounded in human nature, and, further, there are correct principles of practical reasonableness that govern how one ought to pursue these goods, which principles have their warrant from the features exhibited by the basic goods. (See Murphy 2001a, pp. 2–3, and Murphy 2002b.)

Stated in their abstract forms, the central theses of natural law political philosophy and jurisprudence are independent of the central theses of the natural law account of practical rationality. For while the central theses of natural law political philosophy and jurisprudence make claims about the connections between law and reasons, and law and the common good, they make no claims about the specific character of those reasons or the common good; but it is the business of the natural law account of practical rationality to make specific claims about the nature of the good and of reasons for action. So one could affirm a natural law jurisprudence or a natural law political philosophy while rejecting a natural law account of practical rationality.[1]

[1] One might wonder why this jurisprudential thesis about the connection between law and reasons for action has been labeled 'natural law theory.' The reason is, as far as I can see,

So even if one thinks, as I do (Murphy 2001a), that the natural law theory of practical rationality is the best theory of practical rationality on offer, it may well be possible for one to offer a defense of natural law jurisprudence and political philosophy without appealing to any premises from a natural law account of practical rationality. Indeed, Chapters 1 and 2 rely on no such premises, and the argument of these chapters for an internal connection between law and decisive reasons for action is compatible with a variety of theories of practical rationality. But the chapters that follow, chapters that are more political philosophy than jurisprudence, employ several key theses of the natural law account of practical rationality that I endorse, though (as is obvious) these claims are by no means unique to the natural law account. The claims that I employ are as follows.

First, that there is a correct, formally objectivist notion of an individual's good. By 'an individual's good' I mean that individual's overall well-being, what makes him or her well off. It is the fundamental concept of the theory of prudential value. To say that there is a correct formally objectivist notion of an individual's good is to claim that those states of affairs that make an agent well-off do not have their status as such in virtue of that agent's desires, preferences, pro-attitudes, and so on, whether actual or in some way improved by idealized information. (This is not to say that those states of affairs that make an agent well-off might not include states of affairs that involve that agent's subjective states.)

That a formally objectivist account of well-being is correct is a controversial thesis, but it is not one that is held only by those that are classified as natural law theorists. Aristotle held such a view, as do a number of neo-Aristotelians, but Aristotelians are not as such natural law theorists. Griffin, a utilitarian of sorts, affirms this view (1996), as does Scanlon, a Kantian (1998). Nor are the particular goods that tend to be recognized by defenders of such a view distinctive of the natural law position. All of these views tend to recognize physical integrity, knowledge, friendship, rational agency, accomplishment, play, and aesthetic experience as human goods. There are some disagreements – for example, whether pleasure, or religion, should be included in the list – but in appealing to goods as examples I will stick to those that are by and large uncontroversial among those who affirm objectivist conceptions of well-being.

Second, that the content of this formally objectivist notion of an individual's good is knowable, at least in broad outline, by mature adults. This is simply

simply historical. The jurisprudential thesis bears this label because its most historically important defender is Aquinas, and Aquinas identified the principles of rational conduct for human beings as the principles of the natural law. Thus, given Aquinas's particular theory of reasons for action, the fundamental thesis of natural law jurisprudence can be equivalently formulated as asserting a connection between human law and natural law. A danger with this label, of course, is that one might confuse theses of Aquinas's theory of practical rationality with theses of his theory of law, and take objections to one of these theories to constitute objections to the other.

the view that the contours of well-being are not the province of philosophers alone – or, indeed, any class of experts – but is available to the rational reflection of adult humans generally. Again, this is not at all a view distinctive of a natural law position, but one that is widely held.

Third, that any two distinct individuals' goods are incommensurable with each other, and, indeed, the value of the goods of any two disjoint classes of persons are incommensurable with each other. These are strong claims. The idea is that if one is asked to assess the intrinsic value of the goods of any disjoint classes of persons, one should deny that the value of one is greater than, lesser than, or equal to the other. In making this claim, I do not mean to equate 'A's being more valuable than B' with 'there being sufficient or even decisive reason to prefer A over B.' The value of the states of affairs is here understood as part of what supports claims about what there is reason, or most reason, to do or want. So if it is true that there is sufficient or even decisive reason to save five trapped miners by going left rather than to save one trapped miner by going right, what the incommensurability thesis that I affirm rules out is that the *basis* for holding that there is sufficient or decisive reason to go left is that the good of the five miners to the left is *simply more valuable* than the good of the one miner to the right.

The argument for incommensurability is as follows. Imagine a choice in which one has a source that can be used to promote A's good or B's good. This choice is always *practically significant*: one cannot realize all of the value through one choice as one does through the other, and vice versa. Evidence for this is that one can recognize the sense of regret in not having taken the other option in any such case; no matter what one chooses, one will have missed out on some value that could have been realized in the choice. But for one option to be more valuable than another is for one option to include all of the value that the other includes, and more as well; for two options to be of equal value is for each to include all of the good that the other includes. Since neither of these is the case in practically significant choice, all distinct individuals' goods are incommensurable (Grisez 1978; also Murphy 2001a, pp. 182–187).[2]

[2] To repeat: the claim of the incommensurability of distinct individuals' goods does not entail that there cannot be decisive reason to promote one individual's good over another: that would follow only if we add the further premise that we never have decisive reason to promote one individual's good over another's except when one individual's good is more valuable than another's. That is false, on my view. For one thing, if one could promote A's good by giving A a dollar and B's good only by cutting the throat of the innocent C, then one has decisive reason to promote A's good over B's. One way to choose between options to promote incommensurable goods, then, is to rule out one of those options on independent grounds. Another way to choose between such options is by employing norms of impartiality, for example, original position type of thinking: if I did not know whether I was A or B, which would I prefer to have helped – A or B? For more on rational choice in the face of incommensurability, see Murphy 2001a, pp. 198–209 as well as 3.5 of this book; see also Chappell 2005.

Fourth, that there are a number of modes of reasonable response to the good. Here the important contrast is with straightforwardly consequentialist understandings of practical rationality. All such views are *promotionist*: they understand the only rational response to the good to be that of promoting it, of bringing it into being (cf. Murphy 2001a, pp. 147–156). But there appear to be other modes of rational response to the good. One can respect it, or honor it, and the reasonableness of respecting or honoring the good cannot be plausibly captured in terms of promoting it. (I will make further arguments for this view in 6.6.)

None of the argument of the first two chapters of this book relies on these four natural law premises, and most of the argument of the remaining chapters of the book could be carried out without appeal to them. But at important points, the argument would have to proceed at such a level of abstraction that it would be both difficult to follow and evaluate, and nearly incapable of holding anyone's interest. With them in place, though, I can proceed to a somewhat more substantive account of political matters, and the increase in interest is I think sufficient to justify my taking on argumentative promissory notes that have to be satisfied elsewhere (for example, in Murphy 2001a).

1

Natural Law Jurisprudence Formulated

1.1 The Fundamental Claim of Natural Law Jurisprudence

Natural law political philosophy takes its lead from natural law jurisprudence. For natural law jurisprudence most fundamentally claims that law is backed by decisive[1] reasons for compliance, whereas natural law political philosophy attempts to describe the conditions in which law, in this sense, is present.

The immediate challenge faced by defenders of the thesis that law is backed by decisive reasons for compliance is that it seems open to obvious and devastating objection by counterexample. For that thesis appears to entail that if one does not have decisive reason to comply with a dictate, then that dictate is not law. But it seems that we readily acknowledge as law dictates for which we do not, or would not have had, decisive reasons for compliance. The Fugitive Slave Act of 1850 required citizens not to hinder, and even to aid, federal marshals who sought to return runaway slaves to bondage. This act was passed in order to enforce a Constitutional provision and was enacted in due form by the federal legislature. It was socially acknowledged and judicially enforced. It seems that, as a matter of social practice, the Fugitive Slave Act *was* law – regardless of the fact that those under it did not have decisive reason to comply with it. It thus serves nothing but obfuscation to deny that the Fugitive Slave Act was law. And if we refuse to deny that the Fugitive Slave Act was law, are we not, therefore, refusing to affirm the fundamental thesis of natural law jurisprudence?

Here is another way of putting the point. However we properly understand law, we should recognize that the referent of 'law' is fixed by social practice. Regardless of whether we think that some people (for example, judges) count as privileged with respect to the way that their use of 'law' fixes its referent, we should allow that there are cases in which there is general agreement that a deeply immoral rule is a law. With respect to the fixing of the reference of 'law,'

[1] Recall from 0.1 that a reason (or set of reasons) to ϕ is decisive if and only if that reason (or set of reasons) renders ϕ-ing reasonable and failure to ϕ unreasonable.

social practice is bedrock, and so any analysis of 'law' that entails that there is error on a matter with respect to which the social practice seems to speak with one voice must be in error. As Bix writes,

> The basic point is that the concept of 'legal validity' is closely tied to what is recognized as binding in a given society and what the state enforces, and it seems fairly clear that there are plenty of societies where immoral laws are recognized as binding and enforced. Someone might answer that these immoral laws are not *really* legally valid, and the officials are making a mistake when they treat the rules as if they were legally valid. However, this is just to play games with words, and confusing games at that. 'Legal validity' is the term we use to refer to *whatever* is conventionally recognized as binding; to say that all the officials could be wrong about what is legally valid is close to nonsense. (Bix 2002, pp. 72–73)

Marmor offers a similar basis for rejecting the natural law thesis:

> Take a certain legal system, say Roman law in the first century AD; let us presume that a certain norm, P, was recognized by the Roman lawyers at the time as part and parcel of their legal system. Does it make sense to say that this community of lawyers has made a mistake, since according to the 'real nature' of law, P did not lie within the extension of their legal system even then, despite their inability to recognize this?
>
> I presume that a negative answer to this question is almost self-evident; such an extensive misidentification in law would be profoundly mysterious.
>
> (Marmor 1992, pp. 9 6–97)

A recent response to this perennial criticism of natural law jurisprudence is that natural law theory has really never been concerned to deny the obvious fact that there can be deeply immoral laws, laws with which those subject to them lack adequate, let alone decisive, reason to comply (cf. Soper 1983, p. 1181, George 1996c, p. viii, and Bix 2002, p. 63). According to one line of response along these lines – what I will call the 'moral' reading of the natural law thesis – all that the natural law theorist wants to do in affirming a connection between law and reasons is to issue a dramatic reminder that adherence to some laws would constitute such a departure from reasonableness that there could not be adequate reason to obey them; the only law that merits our obedience is law that meets a certain minimum standard of reasonableness. Thus Robert George writes that "what is being asserted by natural law theorists [is] . . . that the moral obligatoriness which may attach to positive law is *conditional* in nature" (George 1996c, p. viii).

There are two reasons to reject George's suggested reading of the natural law thesis. The first is that this reading transforms that thesis from a claim belonging to analytical jurisprudence into a claim belonging to moral philosophy. The natural law view is, so understood, not at all about the defining conditions of law, but only about how agents ought to respond to the law's demands. That the natural law theorist is concerned to make not a claim about the nature of law but only a claim about the morality of obedience to law is implausible in

itself – remember that the paradigmatic natural law theorist is Aquinas, and that in presenting this natural law thesis he does so in the context of a discussion of the nature of law generally, much of which is irrelevant to practical concerns (0.1) – and, further, requires us to believe that centuries of debate between natural law jurists and their rivals have involved into no more than a misunderstanding, both by the natural law theorists and by their opponents, about what the natural law theorist affirms.[2] The second reason to reject George's suggestion is that the natural law claim, understood as a moral thesis, is excruciatingly uninteresting, a claim that almost everyone in the history of moral and political philosophy has accepted, and thus is not much worth discussing.

What we are looking for is an understanding of the natural law thesis that preserves its status as a contentious claim of analytical jurisprudence while pointing toward the resources to answer the obvious objection – reasons to think either that the natural law thesis does not imply that the Fugitive Slave Act was not a law or that, while the natural law thesis does imply that the Fugitive Slave Act was not a law, we can nevertheless see why that implication is not so deeply counterintuitive that natural law theory can be dismissed out of hand.

Consider the following two jurisprudential readings of the natural law thesis, which I will call simply the *stronger* and the *weaker* natural law theses. According to the stronger reading, *law is backed by decisive reasons for compliance* is the same sort of proposition as *triangles have three sides*. There is a class of propositions of the form 'S's are P' or 'The S is P' from which we may deduce, in conjunction with the premise of the form 'x is not P,' a conclusion of the form 'x is not an S.' *Triangles have three sides* belongs to this class: from *triangles have three sides* and *this figure does not have three sides*, we may deduce *this figure is not a triangle*. According to the stronger reading of the natural law thesis, from *law is backed by decisive reasons for compliance* and *this dictate is not backed by decisive reasons for compliance* we may deduce *this dictate is not a law*. It is this stronger reading of the natural law thesis that underwrites the common natural law dictum, '*lex iniusta non est lex*.' Given the plausible further premise that a law that requires the doing of injustice is a law that one cannot have decisive reason to comply with, the strong natural law thesis entails that an unjust law is no law at all.

By contrast, according to the weaker reading, *law is backed by decisive reasons for compliance* is not the same sort of proposition as *triangles have three sides*. Rather, on this reading, *law is backed by decisive reasons for compliance* is a proposition like *the duck is a skillful swimmer*. There is a class of

[2] I am, of course, willing to allow that sometimes arguments are at cross-purposes, and that this can remain unrecognized over lengthy stretches of time. But it defies imagination to hold that such a debate could persist between one party forwarding an exclusively ethical thesis and another person forwarding a strictly jurisprudential one.