Natural Law in Jurisprudence and Politics

In *Natural Law in Jurisprudence and Politics*, Mark C. Murphy argues that the central thesis of natural law jurisprudence – that law is backed by decisive reasons for compliance – sets the agenda for natural law political philosophy, which demonstrates how law gains its binding force by way of the common good of the political community.

Murphy’s presentation in this book ranges over the central questions of natural law jurisprudence and political philosophy, including the formulation and defense of the natural law jurisprudential thesis, the nature of the common good, the connection between the promotion of the common good and requirement of obedience to law, and the justification of punishment.

Mark C. Murphy is Professor of Philosophy at Georgetown University. He is the author of *Natural Law and Practical Rationality, An Essay on Divine Authority*, and *Philosophy of Law* and is editor of *Alasdair MacIntyre*. 
CAMBRIDGE UNIVERSITY PRESS
Cambridge, New York, Melbourne, Madrid, Cape Town,
Singapore, São Paulo, Delhi, Mexico City

Cambridge University Press
The Edinburgh Building, Cambridge cb2 8ru, UK

Published in the United States of America by Cambridge University Press, New York

www.cambridge.org
Information on this title: www.cambridge.org/9780521859301

© Mark C. Murphy 2006

This publication is in copyright. Subject to statutory exception
and to the provisions of relevant collective licensing agreements,
no reproduction of any part may take place without the written
permission of Cambridge University Press.

First published 2006
Reprinted 2007

A catalogue record for this publication is available from the British Library

Library of Congress Cataloging in Publication Data
Murphy, Mark C.
Natural law in jurisprudence and politics / Mark C. Murphy.
p. cm. – (Cambridge studies in philosophy and law)
Includes bibliographical references and index.
ISBN 0-521-85930-1 (hardback)
1. Natural law. 2. Natural law – Political aspects. I. Title. II. Series.
K460.M87 2006
340’.112–dc22 2005015277

ISBN 978-0-521-85930-1 Hardback

Cambridge University Press has no responsibility for the persistence or
accuracy of URLs for external or third-party internet websites referred to in
this publication, and does not guarantee that any content on such websites is,
or will remain, accurate or appropriate. Information regarding prices, travel
timetables, and other factual information given in this work is correct at
the time of first printing but Cambridge University Press does not guarantee
the accuracy of such information thereafter.
for Cormac Alasdair
## Contents

**Acknowledgments**  page xiii

**Introduction: Natural Law Jurisprudence and Natural Law Political Philosophy**  1

0.1 THE CENTRAL CLAIMS OF NATURAL LAW JURISPRUDENCE AND NATURAL LAW POLITICAL PHILOSOPHY  1

0.2 NATURAL LAW AND PRACTICAL RATIONALITY  4

1 Natural Law Jurisprudence Formulated  8

1.1 THE FUNDAMENTAL CLAIM OF NATURAL LAW JURISPRUDENCE  8

1.2 NATURAL LAW THEORY AND LEGAL POSITIVISM  20

2 Natural Law Jurisprudence Defended  25

2.1 THREE ROUTES TO THE WEAK NATURAL LAW THESIS  25

2.2 THE LEGAL POINT OF VIEW AND THE WEAK NATURAL LAW THESIS  26

2.3 LAW’S FUNCTION AND THE WEAK NATURAL LAW THESIS  29

2.4 ILLOCUTIONARY ACTS AND THE WEAK NATURAL LAW THESIS  37

2.5 THE RELATION BETWEEN THE FUNCTION AND ILLOCUTIONARY ACTS ARGUMENTS  56

2.6 THE WEAK NATURAL LAW THESIS, THE STRONG NATURAL LAW THESIS, AND LEGAL POSITIVISM  57

2.7 THE AGENDA FOR NATURAL LAW POLITICAL PHILOSOPHY  59

3 The Common Good  61

3.1 THE COMMON GOOD IN NATURAL LAW POLITICAL PHILOSOPHY  61
3.2 THE ARGUMENT FOR THE AGGREGATIVE CONCEPTION OF THE COMMON GOOD 63
3.3 AGAINST THE INSTRUMENTALIST CONCEPTION OF THE COMMON GOOD 65
3.4 AGAINST THE DISTINCTIVE GOOD CONCEPTION OF THE COMMON GOOD 72
3.5 UTILITARIANISM AND THE AGGREGATIVE CONCEPTION OF THE COMMON GOOD 80
3.6 THE COMMON GOOD PRINCIPLE 85

4 The Natural Law Rejection of Consent Theory 91
4.1 CONSENT AND NATURAL LAW THEORIES, CLASSICAL AND CONTEMPORARY 91
4.2 THE ARGUMENT FROM CONSENT 93
4.3 AGAINST CONSENT THEORIES: IMPLAUSIBLE AB INITIO 95
4.4 AGAINST CONSENT THEORIES: THE PAUCITY OF CONSENT 97
4.5 AGAINST CONSENT THEORIES: INCOMPATIBLE WITH THE NATURAL LAW VIEW 101
4.6 AGAINST CONSENT THEORIES: UNNECESSARY (THE SALIENT COORDINATOR ACCOUNT) 102
4.7 THE REFUTATION OF THE SALIENT COORDINATOR ACCOUNT 109

5 A Consent Theory of the Authority of Law 112
5.1 A NON-STANDARD CONSENT ACCOUNT 112
5.2 LAW AND THE COMMON GOOD PRINCIPLE 114
5.3 HOW CAN DETERMINATIONS BIND? 114
5.4 OPEN-ENDED DETERMINATIONS 118
5.5 THE NATURAL LAW/CONSENT ACCOUNT OF POLITICAL AUTHORITY 120
5.6 THE UNIQUE APPROPRIATENESS OF CONSENT IN THE ACCEPTANCE SENSE 123
5.7 HOW FAR DOES THIS CONSENT VIEW ESTABLISH THE LAW’S AUTHORITY? 125

6 The Authority of Law and Legal Punishment 133
6.1 THE PLACE OF PUNISHMENT WITHIN A NATURAL LAW ACCOUNT OF POLITICS 133
6.2 THE QUASI-UTILITARIAN NATURAL LAW ACCOUNT OF PUNISHMENT REJECTED 136
6.3 THE EQUALITY NATURAL LAW ACCOUNT OF PUNISHMENT REJECTED 139
6.4 NATURAL LAW RETRIBUTIVISM 142
6.5 DIFFICULTIES WITH RETRIBUTIVIST THEORIES 143
## Contents

6.6 ACTING IN LIGHT OF THE GOOD: PROMOTION AND EXPRESSION 152  
6.7 DIFFICULTIES WITH EXPRESSIVE VIEWS OF PUNISHMENT 159  
6.8 AUTHORITY, COERCION, AND PUNISHMENT 162  

7 Beneath and Beyond the Common Good 168  
7.1 TWO CHALLENGES TO THE COMMON GOOD PRINCIPLE 168  
7.2 WHY THE CHALLENGES ARE ESPECIALLY DIFFICULT TO MEET 171  
7.3 THE ARISTOTELIAN REPLY TO THE CHALLENGES TO THE COMMON GOOD PRINCIPLE 172  
7.4 DOUBTS ABOUT THE ARISTOTELIAN REPLY 175  

**Works Cited** 177  
**Index** 185
I placed myself in the debt of a number of good and generous people while writing this book. Henry Richardson, Brian Bix, and two referees at Cambridge University Press offered helpful criticism of the manuscript as a whole. I also received comments on various portions of the argument from Nick Aroney, Terence Cuneo, David Dyzenhaus, Bill Edmundson, John Hare, Chris Kaczor, Pat Kain, Matthew Kramer, Brian Leiter, Larry May, Bob Roberts, David Schmidtz, and Paul Weithman.

I am grateful for invitations from the Social Philosophy and Policy Center at Bowling Green State University, the University of Toronto Law School, the University of Texas Law and Philosophy Program, and the University of Virginia philosophy department, all of which gave me the opportunity to present and get feedback on some of the material that appears here.

The arguments of Chapter 3 and Chapter 6 were developed during two summers spent in Grand Rapids at Calvin College Summer Seminars in Christian Scholarship, one of which was led by Nick Wolterstorff, the other by Jay Budziszewski. I am grateful to Nick, Jay, and my fellow seminar participants for their help, and to Calvin College, the Pew Charitable Trusts, and Fieldstead and Company for supporting these seminars.

I began work on this book in 1998, when I had the good fortune to be in residence as an Erasmus Fellow at the University of Notre Dame. The book that I promised to work on at the Erasmus Institute – a book on natural law theory in the theory of practical rationality, political philosophy, and theistic ethics – expanded in the usual fashion and had to be split into three books (*Natural Law and Practical Rationality* (2001), *An Essay on Divine Authority* (2002), and this one); I am grateful to Erasmus for its support for a year of research to think more carefully about what shape natural law accounts of politics and theistic ethics should take. I finished this book in 2005 at my home institution, Georgetown University, which generously supported my research with a senior faculty fellowship and several summer grants.

I am grateful to Ronald Cohen for the great care with which he edited the manuscript and for making many valuable suggestions. I thank him for his work.

The final debt I must record is to my wife, Jeanette. I cannot state adequately how much I owe to her. It will have to suffice to say that in everything I do I am sustained by her love and friendship.
Natural Law in Jurisprudence and Politics