NATURAL LAW AND MODERN MORAL PHILOSOPHY

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Edited by

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INTRODUCTION

Natural law has played an important role in ethics, political philosophy, and legal theory for at least twenty-five hundred years, starting perhaps with Heraclitus's observation that "all human laws are nourished by one divine law." The natural law tradition has included a wide array of philosophers: Plato, Aristotle, Aquinas, Grotius, Hobbes, Locke, Kant, and Hegel, among others. Although natural law beliefs informed the framers of the American Constitution, by the twentieth century interest in natural law had waned in the United States as well as in Western Europe. World War II and its aftermath, however, did much to rekindle interest in natural law, sparked by the desire of the victorious Allies to hold Nazi officials responsible for their crimes. The notion that there is a higher law to which all human laws and rulers must conform in order to be considered legitimate—the essential claim of natural law's adherents—provided the justification for the Nuremberg trials of Nazi war criminals.

In more recent years, lawyers, philosophers of law, and moral philosophers have continued a lively debate over both the coherence of natural law theory and its utility in analyzing policy issues ranging from abortion, to capital punishment, to just war theory. Interest in natural law's relationship to various moral theories, such as virtue ethics and moral realism, has also been hotly debated, as have the relationships between natural law and various theories of rights. The nine essays in this volume address some of the most intriguing questions raised by natural law theory and its implications for law, morality, and public policy. Some of the essays explore the implications that natural law theory has for jurisprudence, asking what natural law suggests about the use of legal devices such as constitutions and precedents. Other essays examine the connections between natural law and natural rights. Others discuss the interaction between natural law and various political concepts, such as citizens' rights and the obligation of citizens to obey their government. Still others analyze the natural law teachings of the tradition's great expositors.

An important general problem for natural law theories concerns the ability to link moral commitments to facts about the natural world; providing a convincing account of such a connection is a difficult task. One prominent way of attempting to link values and nature is presented in this volume's first essay, Larry Arnhart's "Thomistic Natural Law as Darwinian Natural Right." Canvasing the work of several important thinkers, beginning with Thomas Aquinas and ending with contemporary sociobiologist E. O. Wilson, Arnhart traces a lineage of Darwinian ethical naturalism that seems to provide support for a natural law ethics. Hundreds of years before Darwin, Aquinas, relying heavily on the work of

Aristotle before him, noted that man has a natural impulse toward marriage and familial bonding. From this insight, Aquinas was able to assess various forms of sexual mating practices with respect to their ability to serve these ends of human life. This use of natural impulses as a starting point for moral assessments gained favor from later philosophers and scientists. Adam Smith, for example, extended Aquinas's reasoning and showed how the human "moral sentiments" have an impact on economics as well as ethics; for Smith, the natural inclination of "sympathy" toward the interests of others is the touchstone for human moral development. Smith's own views had considerable influence over Charles Darwin, who saw how his own theory of natural selection could yield a scientific account of how a moral sense could arise as a component of human nature. The social theorist Edward Westermarck also played a prominent role in the Thomistic lineage by showing how anthropological and sociological accounts of marriage and family lend empirical support to many of the hypotheses suggested by earlier ethical naturalists. Today, Arnhart says, it is Wilson who is the most prominent advocate of this sort of ethical naturalism. Wilson advocates "consilience," the idea that a small number of natural laws provide the underpinning of all knowledge, scientific as well as philosophical. Drawing heavily on the same sort of discussions of marriage and family that provided support for other ethical naturalists, Wilson posits that human morality is linked to nature through the biologically based "epigenetic rules" of ethics. Like Aquinas, Smith, Darwin, and Westermarck before him, if Wilson is right in connecting morality and nature, then a significant hurdle for much of contemporary natural law theory has been overcome.

Though natural law may be compatible with modern evolutionary biology, it is still an open question how easily natural law can rest alongside various contemporary normative theories. Of particular interest here are theories of natural rights; since natural rights assume an important position in current political thought, any tensions between natural law and these rights may pose a problem for natural law theorists. Tensions of this sort are discussed by Douglas J. Den Uyl and Douglas B. Rasmussen in their essay, "Ethical Individualism, Natural Law, and the Primacy of Rights." Den Uyl and Rasmussen begin by considering the positions of various theorists who either assimilate natural rights into a natural law perspective (e.g., John Finnis and Henry Veatch) or assert that the natural rights perspective simply "accents" certain aspects of natural law thinking (e.g., A. P. d'Entrèves). Den Uyl and Rasmussen argue that both of these approaches are misguided, and that there are in fact significant issues that distinguish natural lawyers from natural rights advocates. In discussing both "new" and "traditional" natural law theories, Den Uyl and Rasmussen suggest that at its root the natural law perspective does not sufficiently take into account the fact that the human good is individualized and agent-relative. Specifically, the stress that the natural law

framework places on the common good prevents that framework from adequately dealing with the important interconnection between individual choice and human flourishing. Natural rights, in contrast, do take this interconnection seriously, and as such, Den Uyl and Rasmussen argue, the natural rights perspective is preferable to that offered by natural law. This is not to say that the natural law tradition is entirely wrongheaded; Den Uyl and Rasmussen take pains to point out that this tradition is far more conducive to the natural rights approach than are most other contemporary ethical theories. In particular, the teleological eudaimonism that is generally adopted by natural lawyers is also the ethical position favored by many natural rights advocates. Yet while this similarity has made proponents of natural law and natural rights valued allies in the face of various philosophical challenges, when one is forced to select a normative political philosophy, the two erstwhile allies become distinct rivals.

The next two essays in this volume discuss the roles that consent and natural law play with respect to political obligation. Mark C. Murphy begins his essay, "Natural Law, Consent, and Political Obligation," by noting that contemporary natural law theorists provide accounts of political obligation that consciously avoid giving any important role to the consent of the governed. Under the usual natural law approach to political obligation, the central normative idea is that of the common good; the law, says the natural lawyer, provides a partial specification of what one must do if the common good is to be promoted. Yet this raises a question: why is the law's particular specification of the common good, or of how one should act to promote it, of any special value? Given that there are numerous different reasonable specifications of the common good, which are each better and worse than others in various respects, it is not clear why even those individuals who are committed to promoting the common good should necessarily follow the specifications of it set forth in the law. Murphy notes John Finnis's attempt to respond to this concern. Finnis says that because effective pursuit of the common good in a community of practically reasonable agents requires authority, law is society's best candidate as a tool for this pursuit. On this account, law is seen as a "salient coordinator," and because it is the best possible salient coordinator, it is authoritative. Yet Murphy argues that Finnis has moved a step too far; at best, Murphy claims, Finnis has shown that those who disobey the law are being *unreasonable*. To truly express the idea that law is obligatory, however, one has to show that it is *wrong* not to obey the law. Getting this result from a natural law account of political obligation, Murphy argues, requires that natural law accounts of obligation invoke consent. Law can be obligatory if one is willing, for the sake of practical reasoning, to consent to accepting the law's judgments regarding the common good. If one does this, then choosing not to obey the law would effectively be a violation of one's duty to promote the common good, and would thus be

an immoral action. Therefore, once this "acceptance sense" of consent is incorporated into the natural law account of political obligation, one can meaningfully say that it is wrong for someone to break the law: natural law needs consent in order to generate an adequate theory of obligation.

One reason that natural law theorists have tended to avoid using consent when presenting accounts of political obligation is that consent-based obligations have been increasingly under attack. In his "The Natural Basis of Political Obligation," George Klosko mounts just such an attack; he begins by criticizing contemporary conceptions of the individual. Whereas many political theorists seem to view the individual in isolation, Klosko argues that any accurate portrayal of an individual must take into account the fact that he or she receives indispensable benefits from the state. When one considers this in light of the principle of fairness, which states that the receipt of benefits from a system of provision generates obligations to that system, it becomes clear that individuals in fact have political obligations to their government whether or not they have consented to it. Various theorists argue against this conclusion by noting that indispensable public goods can be provided by private provision mechanisms. If this is the case, then it would seem that the state cannot generate obligations to itself merely by providing individuals with benefits. However, Klosko claims that before arguments from alternative provision can be used to reject one's existing obligations, one must present a plausible system of alternative provision. When this requirement is fully appreciated, it seems that truly adequate alternative provision mechanisms will be difficult to find; it is tough to see, for example, how public defense could be provided by a collective scheme other than the state. Yet the problems with alternative supply are not simply practical. Game-theoretic analysis of the provision of public goods has long shown that there are theoretical problems involved in trying to provide such goods in the absence of a strong central authority. Political philosopher Michael Taylor has argued, however, that once we take into account the fact that politics is a continuous process that can yield cooperative outcomes, alternative provision mechanisms seem feasible. Klosko rejects this argument. For public-goods provision to be effective in a society without a central authority, he argues, we need conditions in which it is easy to tell whether others in the society are cooperating with the provision scheme. In large modern states, however, this information requirement simply cannot be met. Given this, the theoretical problems faced by alternative provision mechanisms are not eliminated by the continuous nature of politics. Because alternative supply seems both practically and theoretically implausible, Klosko concludes, it seems clear that citizens will have a difficult time finding a provision mechanism that will allow them to obviate their political obligations to the state.

In legal philosophy, natural law arguments posit that external rules influence what types of laws can be considered legitimate. In this vein,

Michael S. Moore, in "Law as Justice," shows how moral truths are part of the calculus by which one determines whether given propositions of law are true. Natural lawyers, Moore states, argue that because something is legal only if it obligates, and because something obligates only if it is not unjust, then something is legal only if it is not unjust. Natural lawyers use a functionalist approach to establish the first step of this argument. Under this approach, one argues that law has a particular function and that this function can only be realized if law is obligating. One might find it appealing here to suggest that this functionalism argument is all that is needed to establish the natural law conclusion that something can be legal only if it is just. Moore argues, however, that this direct functionalist argument is false; functionalism alone cannot support the natural lawyer's desired conclusion. Moore illustrates this by looking at various things one may categorize as "legal." With respect to the laws of individual cases, for example, it seems clear that the judge's role in deciding a case is not simply to follow the plain meaning of the statute at issue or to simply act in accordance with that statute's purpose; rather, his obligation is to balance the values inherent in following those procedures against all other values that might be implicated by his decision. The judge's obligation to make such all-things-considered judgments cannot be established, however, by mere appeal to the functions of the laws of cases. This means that the natural law view of the laws of cases cannot be established by functionalism alone; some form of independent argumentation is needed to reach the natural lawyer's conclusion. While functionalism does allow for a limited connection between the laws of cases and values, it does so in too weak a way to make sense of judicial obligation. Moore applies similar analysis to common law rules and concludes that the functionalist account of these rules is likewise too weak to generate obligation on the part of individuals. Substantive justice cannot be ensured by a functionalist natural law account, and must seek its substantiation elsewhere, perhaps in some conception of the common good or the good *tout court*.

In his essay, "The 'Laws of Reason' and the Surprise of the Natural Law," Hadley Arkes examines the role of reason in assessing the legitimacy of positive law. The leading minds and jurists among the American Founders often found it necessary to trace their judgments back to the "axioms" or "first principles" of the law. Men like Alexander Hamilton, John Marshall, and James Wilson saw nothing odd then in writing about "the law of nature and reason." But what seems to have vanished from the recognition of lawyers, and even conservative jurists, in our own time, is that the understanding of "natural law" was indeed bound up with "the laws of reason." There is still a disposition to regard natural law as bound up with systems of belief, with no anchor in propositions that are knowably true or even necessary. Even writers friendly to natural law may slip into discussions about "theories" of natural law. But that stance

must presuppose that the discussants will finally choose among the theories that seem more or less persuasive, more or less true. What seems to be lost in this perspective, Arkes argues, is that natural law is not to be found anywhere in that inventory of "theories." It is to be found, rather, in those deeper principles of judgment, the principles to which one must finally appeal in making judgments about the validity of those contending theories. Arkes seeks to recall how an earlier generation understood the natural law as bound up with the laws of reason, and he develops the argument through a series of notable cases: Lincoln's opposition to the decision in the *Dred Scott* case; the classic arguments made by James Wilson and John Jay in *Chisholm v. Georgia*; and the attempts by the Supreme Court in recent years to revive the Eleventh Amendment. That project in revival by the Court faces the prospect of being stymied at its foundation by a possibility that seems to run beyond the imagination of the judges: namely, that the Eleventh Amendment is unworkable precisely for the reasons that Wilson and Jay explained in the *Chisholm* case: not only did those first jurists get the matter right, but they were right of necessity, because their judgment was anchored in the axioms of the law.

Our next essayist focuses on the morality of the lawmaker. In his contribution to this volume, "Natural Law as Professional Ethics: A Reading of Fuller," David Luban argues that the work of legal philosopher Lon Fuller can be seen as an example of natural law theory applicable not so much to laws themselves as to lawmakers. A consistent strand in Fuller's work is his claim that 'lawmaker' is a *purposive concept*: labeling someone a lawmaker automatically implies that this person can be judged in reference to his ability to engage in the duties of that occupation. The duties—or, to use Fuller's term, the "role-morality"—of the lawmaker emerge from the choice of law as a tool for governing others. Unlike other methods of governing, such as managerial direction, using law to govern others implies a respect for the autonomy and moral powers of the governed. To fulfill his role-morality, then, a lawmaker must acknowledge these moral characteristics and be successful at managing the resultant relationship between those who govern and those who are governed. On this reading, Luban notes, Fuller is a not a "natural lawyer" in the sense that he asserts a necessary link between legal and moral terms. Rather, Fuller links morality and law by conceiving of law as a discipline whose practitioners can be morally judged on the merits of their performance in their role. Luban argues that seeing Fuller in this way gives Fuller's account of the link between morality and law the resources to deal with some of the strongest arguments of "progressive positivists" like Frederick Schauer, Neil MacCormick, and Robin West. However, Fuller's theory also seems to have a troubling aspect. Even if lawmaking is seen as a purposive activity whose ultimate goal is respecting the moral agency of the governed, it is not at all clear how Fuller's eight "principles of legality"—eight principles that he claims are found in all lawmaking

regimes—can prevent the lawmaker from focusing only on respecting the moral agency of particular classes of people. There may be a significant difference between "those whose agency the law respects" and "those who are governed by the law." Luban notes, for example, that the vast majority of legal regimes throughout history have tolerated gender subordination while respecting the eight principles; this suggests that Fuller's account of the moral dictates of lawmaking do not in fact guarantee that the law has the moral content that Fuller ascribes to it.

Though natural law raises numerous interesting theoretical issues, it also has certain implications for public policy. In "Fairness in Holdings: A Natural Law Account of Property and Welfare Rights," Joseph Boyle uses a Catholic natural law perspective to develop an argument for the establishment of welfare rights. Boyle begins by surveying Aquinas's account of property. Aquinas believes that it is morally permissible for humans to possess various things and use them for human benefit. Yet there are two aspects to this concept of possession. When considered as the authority to take care of and distribute things, Aquinas thinks possession of things should be held by individuals; when possession is considered in terms of the actual use of goods, Aquinas says that possession should be in common. Under Aquinas's theory, individual ownership is permitted because it allows for the advantageous use of things, but the discretion that ownership provides is matched by an obligation to give to others that which one does not need. This obligation emerges from a moral norm of neighborly assistance; our obligation to help others begins with those who are close to us, and over time gradually expands outward. This expansion is affected by the technology and social organization in society. The result is that in modern states, our duties of neighborly assistance extend well beyond those whom we meet face-to-face. Carrying out these duties, Boyle argues, requires the sort of social coordination that can only be provided through political action. Unlike voluntary organizations, political society can utilize regulatory power and compel public support in order to help the needy. That aid to the needy is provided through politically established means does not change the fact that the ultimate root of these welfare rights is the prepolitical obligation of individuals to provide neighborly assistance. This implies, in addition, that one's political obligation to help the needy may not exhaust one's moral obligation. Even after one has paid one's taxes and fulfilled other state-imposed commitments, one may still be morally required to help one's neighbors or other needy individuals.

In the volume's final essay, "Natural Law, Natural Rights, and Classical Liberalism: On Montesquieu's Critique of Hobbes," Michael Zuckert analyzes the natural law views that Montesquieu presents in his *The Spirit of the Laws*. In the philosophical wake of Hobbes's *Leviathan*, a diverse array of natural law thinking emerged, and Montesquieu's precise location amid these varying schools of thought is difficult to ascertain. Zuck-

ert examines three critiques of Hobbes that emerge in *Spirit*, and argues that Montesquieu's overall project should be seen as an attempt to develop a natural law doctrine based on Cartesian ontology and aimed at refuting Hobbes's conventionalism. In the first of these critiques, Montesquieu seems to differ with Hobbes over the character of the natural law, but Zuckert shows that once we fully assess Montesquieu's position on this issue, the actual differences raised in this critique are minimal. In contrast, Montesquieu's second critique of Hobbes makes the differences between the two apparent. Though both Hobbes and Montesquieu agree in paying significant theoretical attention to the state of nature, the conclusions they reach are very different. Hobbes argued that man develops society in order to overcome the state of nature; in contrast, Montesquieu argues that the "laws of nature," his term for the natural forces motivating human action, spur humans to assemble into societies. On Montesquieu's account, only after men enter into societies and lose the feelings of weakness that they had in the state of nature do they become more aggressive and enter into a Hobbesian state of war. It is this state of war, created by social life, that drives men to develop positive laws; these positive laws, Montesquieu says, are a reassertion of the laws of nature. In later sections of *Spirit*, Montesquieu's third critique of Hobbes emerges as Montesquieu presents an account of political right through which positive laws can be judged. Based on natural right, Montesquieu's account is quite different from that of Hobbes, and is in fact fairly close to the account presented by Locke. Unlike Locke, however, Montesquieu's standard of good government is simply the ability to provide citizens with the opinion of security. This emphasis on the *opinion* of security represents Montesquieu's subjectivization of the criteria of political right. Advocating this subjective criterion leads Montesquieu to favor various political mechanisms that provide citizens with greater peace of mind. Hence, unlike many of his contemporaries, Montesquieu advocates an independent judiciary and popular representation.

Natural law theory is of ancient pedigree, yet it has proven to be of enduring value, providing both valuable insights and alternatives to contemporary ethical, legal, and moral theories. These nine essays—written by leading legal theorists and philosophers—offer important insights into the nature and implications of the natural law perspective.

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