Prologue

Slavery and the Laws and Rights of Nature

> We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain inalienable Rights, that among these are Life, Liberty, and the pursuit of Happiness.
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> Declaration of Independence, 1776

> Neither aiming at originality of principle or sentiment, nor yet copied from any particular and previous writing, [the Declaration of Independence] was intended to be an expression of the American mind, and to give to that expression the proper tone and spirit called for by the occasion. All its authority rests then on the harmonizing sentiments of the day, whether expressed in conversation, in letters, printed essays, or in the elementary books of public right, as Aristotle, Cicero, Locke, Sidney, &c.
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> Thomas Jefferson, 1825

Years ago, the twentieth-century American philosopher Henry Veatch began a bibliographic essay on the Western tradition of natural-law theory by exclaiming, "Surely, the ancient and honorable doctrine of natural law is dead, is it not? And many would add, 'Long dead and well dead!'"[1] But to the contrary, Veatch

[1] Henry B. Veatch, "Natural Law: Dead or Alive?" *Literature of Liberty: A Review of Contemporary Liberal Thought* 1, no. 4 (1978), 7.

concluded, funeral orations for the perennial philosophy of natural law had been delivered prematurely, as the post–World War II search for objective standards of political right had led to a renaissance of natural-law thinking in the Western world. Still, natural-law theory today remains at the periphery of academic discussions of ethics and politics, and one of the chief reasons for the continuing disrepute of natural-law doctrines, in addition to trends in epistemology and ontology, is the unhappy association of natural law with certain practices that are repugnant to our modern sensibilities.

The historical defense of slavery as "natural" – and, therefore, just – particularly burdens the contemporary enterprise of natural-law thinking. If something as unjust and immoral as chattel slavery could be defended in terms of nature, then why turn to nature as a guide for political and ethical life? The appeal to Aristotle by some nineteenth-century defenders of race-based and hereditary chatteldom further cements the unfortunate association of natural law with human bondage. Aristotle's doctrine of natural slavery – defended by no less a natural lawyer than Thomas Aquinas – has indeed cast a long shadow over the natural-law tradition, which has been invoked throughout history to defend practices, such as slavery, that are now widely and rightly disparaged.[2]

In this vein, several prominent nineteenth-century American academics enlisted Aristotle in defense of the South's peculiar institution. As George Frederick Holmes wrote in the *Southern Literary Messenger* in 1850, "The main thesis in regard to Slavery is laid down in the most precise terms, and in the form most convenient for discussion, by Aristotle in his Politics. His position is that 'Nature has clearly designed some men for freedom and others for slavery: – and with respect to the latter, slavery is both just and beneficial.'"[3] One of the logical implications of

[2] See Aristotle, *Politics* (trans. Simpson) 1253b1–1255b41; Aristotle, *Nichomacheaan Ethics* (trans. Irwin) 1145a15–1154b35; cf. Thomas Aquinas, *Commentary on Aristotle's Politics*, trans. Richard J. Regan (Indianapolis, IN: Hackett Publishing, 2007), 10; 19–41.

[3] George Frederick Holmes, "Observations on a Passage in the Politics of Aristotle on Slavery," *Southern Literary Messenge* 16, no. 4 (1850), 193.

Aristotle's argument, Holmes assumed, was that Africans were naturally slavish and Europeans naturally virtuous, so that the enslavement of Africans by Europeans was not only just but beneficial for the slaves themselves.

From the details of Aristotle's teaching on natural slavery, however, such an assumption is far from warranted. Aristotle's natural slave is a physically able but incontinent individual whose own good can only be realized through the direction of another. The natural master, on the other hand, is nearly the opposite: an extraordinarily virtuous individual who can obtain a "certain mutual benefit and friendship" from the man he would rule.[4] Yet Aristotle invited a comparison between this idealized version of slavery and slavery on the ground, so to speak, when he reflected on the practical difficulty of identifying natural slaves and natural masters; for, as Aristotle asserted, nature has a desire to clearly demarcate men into the categories of free and slave by some easily recognizable indicator of virtue such as body type or birth, but she is "seldom able to realize it."[5] Thus, even if one were to concede along with Aristotle that "by nature some are free and others slaves," still the discussion of natural slavery in terms of virtue would present a strong challenge to slavery as it actually existed in ancient (not to mention modern) societies.

This, of course, is not to vindicate or defend Aristotle's position on slavery, but rather to suggest that there is no easy or obvious connection between Aristotle's doctrine of natural slavery and slavery as it has actually existed in any particular society. There are, as well, important differences between ancient slavery and the form of slavery that took root in seventeenth- and eighteenth-century America. "In antiquity," Tocqueville noted, "the slave belonged to the same race as his master and was often superior to him in education and knowledge. Freedom alone separated them; once freedom was granted, their differences melted away."[6] In America, masters could scarcely contemplate

[4] Aristotle, *Politics*, 1255b14.
[5] Aristotle, *Politics*, 1255b3.
[6] Alexis de Tocqueville, *Democracy in America*, trans. Gerald E. Bevan (London: Penguin Books, 2003), 399–400.

the education of the slave. As Frederick Douglass recounted overhearing his master quip, educated men were unfit for the kind of slavery practiced in the new world.[7] If an American slave nevertheless managed to gain freedom and education, he was still marked off from the ruling population by skin color and excluded from society by a virulent and widespread racism. Moving beyond Aristotle, therefore, we might ask how a natural-law ethical and political theory would apply in this context and make some attempt to distinguish between better and worse formulations of the natural-law arguments that were made during the course of debate on American slavery. Such an inquiry, however, requires at least a preliminary historical consideration of how natural-law thinkers have answered the fundamental (and yet convoluted and controversial) questions, "What is nature?" and "What is law?"

Classical Natural Law

The classical natural-law tradition developed from the wisdom literatures of Athens, Rome, and Jerusalem, which insisted, in different ways, that the order of the universe is such that human reason can discover morally obligatory principles of action that are rooted in human nature. As Paul Sigmund writes, "in all its diverse forms, the theory of natural law represents a common affirmation about the possibility of arriving at objective standards, and a common procedure for doing so – looking for a purposive order in nature and man."[8] Aristotelian ethics and metaphysics were particularly important in later theorizing about the epistemological and ontological foundations of any such natural moral standards. One could not know what was good for a being, Aristotle taught, unless one first had knowledge of a being's nature, which was understood in terms of functionality or purpose. When inquiring into the nature of man, Aristotle

[7] See Frederick Douglass, *Narrative of the Life and Times of Frederick Douglass*, ed. David Blight (Bedford Books, 1993), 57.

[8] Paul E. Sigmund, preface to *Natural Law in Political Thought* (Lanham, MD: Winthrop Publishers, 1971), ix.

answered that man was a rational animal whose proper function was "activity of the soul in accord with reason or requiring reason."[9] In addition to being a rational animal, man was also a political animal, whose individual good required that he live in political community. A man who was able to live apart from the polis, Aristotle famously suggested, would be either a beast or a god.[10] Nature and reason, then, were the starting points for Aristotelian ethics, and politics, which was necessary for human flourishing, was a central and vital aspect of ethical study.

Although Aristotle spoke infrequently about natural law – making reference to a common law "according to nature" only in passing – he did explicitly juxtapose a standard of "natural justice" with a form of "justice by convention."[11] There was, in other words, a standard of justice, understood in terms of nature, that transcended any mere conventional practice. The idea that nature somehow served as a source of moral and political norms developed within the Roman and Christian orbits, as well. In the voice of Laelius, the Roman philosopher and statesman Cicero had taught that "true law is right reason, conformable to nature, universal, unchangeable, eternal" and that God was "its author, its promulgator, its enforcer."[12] Paul, in his letter to the church at Rome, had similarly insisted that there was a law written by God on the hearts of men, and later Christian writers such as Augustine identified that law as the "highest reason, which must always be obeyed."[13] Owing chiefly to the synthesis of Augustinian theology and Aristotelian philosophy in Thomas Aquinas's *Summa Theologiae* (wherein Thomas's brief statement

[9] Aristotle, *Nichomachean Ethics*, 1098a13–16.
[10] Aristotle, *Politics*, 1253a25–29.
[11] Aristotle, *Rhetoric* (trans. Roberts), 1372b2–8; Aristotle, *Nichomachean Ethics*, 1134b19–1135a15.
[12] Marcus Tullius Cicero, *The Political Works of Marcus Tullius Cicero: Comprising his Treatise on the Commonwealth; and his Treatise on the Laws*, trans. Francis Barham, 2 vols. (London: Edmund Spettigue, 1841–42). Vol. 1, Book III, Para. 36. http://oll.libertyfund.org/title/546/83303 (accessed April 29, 2011).
[13] Augustine, *On Free Choice of the Will*, trans. Thomas Williams (Indianapolis, IN: Hackett Publishing Company, 1993), 11. See Romans 2.15.

on natural law occupies a mere 8 questions out of more than 500), natural-law theory in the Middle Ages became associated with a scholastic blend of Aristotelian metaphysics and providential monotheism.

Following Aristotle, Thomas defined man as a "rational animal" who was directed to his natural end through action in accordance with reason.[14] Thomas's ethics and politics were also linked with his natural theology, and he described the rational order of the cosmos as an eternal law that existed in the mind of God. Thomas's distinction between four types of law – eternal, divine, natural, and human – was thus part of an ontological theory about the rational structure of the universe. This was separate, however, from the epistemological question of how humans became acquainted with and participated in the requirements of this rational order. On that score, Thomas insisted that humans participated in the eternal law through the indemonstrable and underived first principles of natural law, which, like mathematical axioms, formed a part of humanity's latent knowledge.

Law in whatever form, Thomas taught, was "nothing else than an ordinance of reason for the common good, made by him who has care of the community, and promulgated."[15] Natural law, as law, fit this description: It was ordained by God for the common good of his creation and promulgated through human nature. The first principles of natural law were, moreover, right for all and (at some level) known to all, and they provided the foundation for practical reason.[16] To be truly law, a legislative enactment, according this schema, had to be made by legitimate public authority for the common good according to rational standards of justice. Insofar as a human ordinance diverged from any of the essential characteristics of law, it was a fraudulent act of violence rather than a morally binding dictate issued by legitimate authority.

[14] *S.T.*, I-II, Q. 94, Art. 2.
[15] *S.T.*, I-II, Q. 90, Art. 4.
[16] *S.T.*, I-II, Q. 94. Art. 4.

Modern Natural Rights

Several foundational aspects of Thomas's natural-law theory came under attack during the modern era, as enlightenment thinkers attempted to give an account of political right without reference to purposes or ends inherent in nature. The modern trend of distinguishing between the realms of objective material nature and subjective standards of good and right thus initiated a radical departure from the natural teleology of the Aristotelian tradition. If nature did not divulge the purposes of a being, or if natural purposes were irrelevant to morality, then the term "good" could not be employed to describe something that fulfilled its natural function well. Rather, as the seventeenth-century English philosopher Thomas Hobbes wrote, "whatsoever is the object of any man's appetite or desire that is it which he for his part calleth good … [for there is] nothing simply and absolutely so, nor any common rule of good and evil to be taken from the nature of the objects themselves, but from the person of the man."[17] The Hobbesian turn toward a subjective account of the good led away from the traditional doctrine of natural law and toward a new theory of natural right.

In Hobbes's reformulation, what one had a right to do according to nature was understood quite apart from, and in fact prior to, the laws of nature. Right, in the way Hobbes employed the term, meant "the liberty to do or to forbear," and the foundation of natural right was each man's liberty in the state of nature to use his faculties for the protection of his life and limbs.[18] Indeed, for Hobbes, the *nature* of man did not extend beyond his material existence.[19] Further, every man was himself the judge of what means were conducive to the end of self-preservation, and all things that were conducive to self-preservation were man's liberty or right by nature. The laws of nature, Hobbes thus asserted, were mere maxims that "declare unto us the ways of

[17] Thomas Hobbes, *Leviathan*, ed. Edwin Curley (Indianapolis, IN: Hackett Publishing Company, 1994), Chap. 6, Para. 7.
[18] Hobbes, *Leviathan*, 14.3.
[19] See ibid., 14.1.

peace, where the same may be obtained, and of defence where it may not."[20]

Such an argument effectively rendered the old moral code, with the primacy of duty and obligation, meaningless. Natural law became indistinguishable from material self-interest, and the laws of nature were merely prudential guidelines for securing the natural right of self-preservation. At the same time, Hobbes undercut the Aristotelian basis for the legitimate rule of the virtuous over the vicious by emphasizing the natural equality of all men (in terms of relative power) and making irresistible force the sole desideratum of authority.[21] The institution of despotic dominion – along with paternal dominion and the dominion of a sovereign in a commonwealth – was therefore understood in terms of mere force.[22] Accordingly, the laws of a commonwealth were merely the commands of a sovereign power (whatever those commands happened to be).

Within the revolutionary milieu of seventeenth-century England, other theories as well – such as Robert Filmer's patriarchal argument for the divine right of kings – were put forward to justify absolute sovereign power. The general contours of Filmer's argument can be roughly summarized by the chapter headings of his 1680 tract *Patriarcha*: (1) "That the first kings were fathers of families"; (2) "That is it unnatural for the people to govern or choose governors"; and that (3) "Positive laws do not infringe the natural and fatherly powers of kings."[23] In other words, the commonwealth was an extended family, with a natural fatherly authority, sanctioned by God, at the head. Filmer's theory, however, was discordant with the main of the natural-law tradition (whose advocates had long supported a constitutionally mixed regime), and it is perhaps not surprising that English Whigs and American revolutionaries favored the more radical political teachings of Algernon Sidney and John Locke, among others.

[20] Thomas Hobbes, *The Elements of Law*, ed. J.C.A. Gaskin (New York: Oxford University Press, 2008), Part I, Chap 15, Para. 1.
[21] Ibid., I.14.13.
[22] Hobbes, *Leviathan*, 20.14.
[23] Sir Robert Filmer, *Patriarcha; of the Natural Power of Kings* (London: Richard Chiswell, 1680).

Sidney's *Discourses on Government*, published two years before his execution for treason in 1683, read as a point-by-point refutation of Filmer's *Patriarcha*, with chapter headings that declared: (1) "Paternal power is entirely different than political power"; (2) "The people choose their governors by virtue of their natural right to liberty"; and (3) "Kings are entirely subject to the law, which in England means parliament." In contrast to Filmer, Sidney argued that "God and nature" gave freedom to all men and that government, formed by the consent of free men, existed to secure liberty within the bounds of the natural law.[24] In a passage familiar to Thomas Jefferson, Sidney mockingly summarized Filmer's thesis as insisting that some men were "born with crowns upon their heads, and all others with saddles upon their backs."[25] Jefferson, like Sidney, rejected such an assumption, insisting on the "palpable truth that the mass of mankind has not been born with saddles on their backs nor a favored few booted and spurred, ready to ride them legitimately by the grace of God."[26] Yet, although Sidney's arguments against Filmer clearly left an imprint on the American mind, the natural-law theory of Sidney's contemporary, John Locke, perhaps went further than any other to give it shape and form.

"The state of nature has a law of nature to govern it," Locke insisted in his *Second Treatise of Government*, and "… reason, which is that law, teaches all mankind, who will but consult it, that being all equal and independent, no one ought to harm another in his life, health, liberty or possessions."[27] Still, the state of nature was insecure, and, as God had not appointed any one man to rule over the others, each man was necessarily the enforcer and interpreter of the law of nature. In such a state of insecurity, men voluntarily consented to form a government that would

[24] Algernon Sidney, *Discourses Concerning Government*, ed. Thomas West (Indianapolis, IN: Liberty Fund, 1996), Chapter 2, Para. 20.
[25] Ibid., 1.10.
[26] Thomas Jefferson to Robert Weightman (June 24, 1826). http://www.loc.gov/exhibits/declara/rcwltr.html (accessed October 31, 2009).
[27] John Locke, *Two Treatises of Government*, ed. Peter Laslett (New York: Cambridge University Press, 1988), Part II, Chap. 2, Para. 6.

protect their natural rights to life, liberty, and property. A government thus created had no legitimate power to transgress the natural rights of the people, and any man, including a ruler, who showed a design to deprive another of his rights declared war on that man.[28] In Locke's phraseology, "Force without Right, upon a Man's Person, makes a State of War, both where there is, and is not, a common judge."[29] In such a state of war between ruler and ruled, the legitimate power to execute the law of nature devolved back to the offended parties, who could rightfully "appeal to Heaven" (i.e., revolt) and then consent to a different governmental arrangement for the security of their rights.[30]

Locke's profound influence on the American Founders is evidenced by the familiar teaching of the Declaration of Independence that "all men are created equal and … endowed by their Creator with certain inalienable Rights"; that "to secure these rights, Governments are instituted among Men, deriving their just powers from the consent of the governed"; and that "whenever any Form of Government becomes destructive of these ends, it is the Right of the People to alter or to abolish it, and to institute new Government." The American Declaration was indeed an argument that force without right is illegitimate and that the measure of right was to be found in the "laws of Nature and Nature's God." On this point, the ancient and modern natural-law traditions were in agreement. As Alexander Hamilton had written just months before the Declaration was drafted, "Good and wise men, in all ages have embraced" a theory "that the deity, from the relations we stand to himself and to each other, has constituted an eternal and immutable law, which is indispensably obligatory upon all mankind, prior to any human institution whatever. This is what is called the law of nature.… Upon this law depend the natural rights of mankind."[31]

[28] Ibid., II.3.16–17.
[29] Ibid., II.3.19.
[30] Ibid., II.3.20.
[31] Alexander Hamilton, "The Farmer Refuted" (1775) in *The Works of Alexander Hamilton*, ed. Henry Cabot Lodge, 12 vols. (New York: G.P. Putnam's Sons, 1904), 1: 62.