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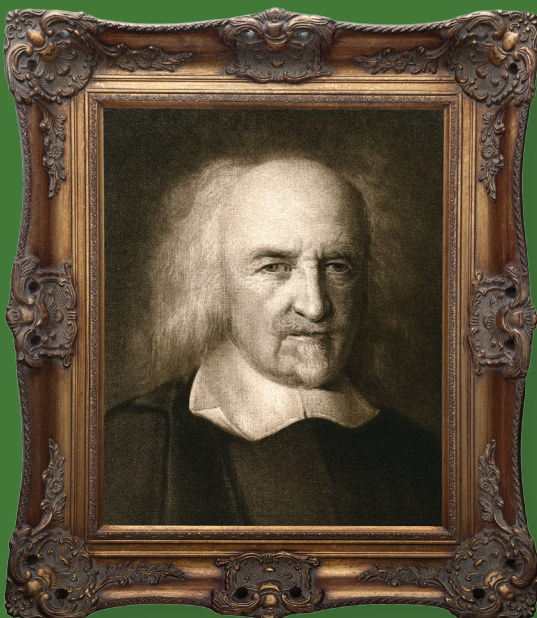
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# Natural Law and Human Nature

Course Guidebook

Professor Father Joseph Koterski, S.J.  
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After teaching ancient philosophy for two years at the Center for Thomistic Studies of the University of St. Thomas in Houston, Texas, he joined the Maryland Province of the Society. Ordained a priest in 1992, after taking the M. Div. and S.T.L. degrees from the Weston School of Theology in Cambridge, Massachusetts, he began teaching philosophy at Fordham University, where he now directs the M.A. program in philosophical resources and specializes in the history of medieval philosophy and natural law ethics.

At Fordham, Father Koterski serves as the editor-in-chief of *International Philosophical Quarterly* and as chaplain and tutor for the Queens Court Residential College for Freshmen. In 1998, he received the Dean's Award for Outstanding Undergraduate Teaching, and in 2000, he received the Graduate Teacher of the Year Award. In addition to the many articles and reviews he has written, Father Koterski is the co-editor of *Prophecy and Diplomacy: The Social Teaching of Pope John Paul II* and the editor of the annual proceedings of the University Faculty for Life organization, *Life and Learning*.

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# Natural Law and Human Nature

## Scope:

This set of lectures will provide both philosophical and historical consideration for the idea of a natural moral law and its basis in our common human nature. To a great extent, the approach that one takes to questions of ethics and the type of answers at which one arrives depends on the view one takes of human nature. Whether human rights are actually protected by specific legislation or not, the moral demand that a given rights claim ought to be respected depends on recognizing a fundamental dignity in every human being without respect to that person's beliefs or stage of development. Also at issue here is the question of whether human beings are different in kind or just different in degree of complexity in comparison with other animal species, especially the higher primates, because only a genuine difference in kind warrants a difference in the way we treat them.

Although the first thoroughgoing treatise on natural law came only with Thomas Aquinas in the thirteenth century, we will profit by reviewing the works of various Greek philosophers and Roman jurists who explored the notions of nature and law, as well as the biblical and patristic developments of such notions as creation and providence. Each age contributed important notions to the articulation of natural moral law as a specifically human way of participating in the divine plan for directing human beings toward a course of life that would fulfill the potentialities of human nature by free, responsible decisions. This historical study will help us to appreciate how difficult some of the crucial insights of natural law theory were to formulate and defend. We will also review the important developments in natural law thinking during the modern period, including such notions as the social contract as the source of political legitimacy and the natural rights of life, liberty, and the pursuit of happiness that have played such a large role in the American experiment in ordered liberty.

Our study will then turn to an attempt to apply these ideas about the natural moral law to a range of contemporary problems. In the legal arena, we will consider the debates over human rights and the practice of judicial reform and its use in promoting social reform during periods when consensus has not yet developed. In the sphere of medicine and bioethics, we will consider the possibilities for its use on the controversial questions of abortion, euthanasia, and stem-cell research. And in an effort to consider some current challenges that are raised against natural law, we will consider the

implications of the theory of evolution for natural law theory, as well as such questions as whether or not one needs to believe in God to accept the idea of natural law.

# Lecture One

## The Philosophical Approach

**Scope:** By considering a number of famous cases (Antigone, the Nuremberg trials, and Martin Luther King), we recall the long tradition of invoking an unwritten but universal law that stands higher than the written laws and customs of particular communities. In each example, we find an appeal by aggrieved parties to the ideal of justice that laws ought to respect and defend, an appeal that claims the support of a standard that is objective and impartial. Such experiences ground the long and admittedly checkered history of the idea of natural law. The lecture then explains what is required for a philosophical approach to this question and outlines topics to be covered in the course.

### Outline

- I. That there is a law higher than human legislation has been known since antiquity.
  - A. In Sophocles's *Antigone*, the heroine Antigone speaks of a higher law that requires her to bury her brother despite the order from Creon forbidding the burial of such rebels in the civil war that had afflicted Thebes. The following is a portion of the relevant text:  
Creon (to Antigone): "You, tell me not at length but in a word. You knew the order not to do this thing."  
Antigone: "I knew, of course I knew. The word was plain."  
Creon: "And still you dared to overstep these laws."  
Antigone: "For me it was not Zeus who made that order. Nor did that Justice who lives with the gods below mark out such laws to hold among mankind. Nor did I think your orders were so strong that you, a mortal man, could over-run the gods' unwritten and unfailing laws. Not now, nor yesterday's, they always live, and no one knows their origin in time ..."  
(Lines 446–457 in the translation of Elizabeth Wyckoff in *The Complete Greek Tragedies*, ed. David Grene and Richmond Lattimore [Chicago: University of Chicago Press, 1959], vol. 2, pp. 173–174.)

- B. Reference to this higher law has been indispensable in modern jurisprudence.
1. At the Nuremberg trials, problems of jurisdiction prevented the crimes from being prosecuted under the laws of any one of the participating nations; therefore, the indictments referred to “crimes against humanity.”
  2. Likewise, postwar courts in the Federal Republic of Germany recognized the need for consideration of the higher law in cases about the restoration of property: “These laws of confiscation, though clothed in the formal rules ... of a law, ... [are] an extremely grave violation of the supra-positive principle of equality before the law as well as of the supra-positive guarantee of any legal order and must remain inviolable ... [These provisions] were and are by reason of their unjust content and their violation of the basic demands of any legal order null and void; this law could not, even at and during the time of the Nazi regime, *produce any legitimate legal effect*.” (Judgment rendered on February 28, 1955, quoted in Rommen, pp. 14–15.)
  3. Positive, in the term “supra-positive,” refers to a law that has been posited, that is, laid down, by human authority. Supra-positive, in contrast, refers to a principle that stands above legislation enacted by man. By using the term *supra-positive*, the German court is invoking natural law, without having to call it by this term.
- C. In American history, appeal to this higher law has been made in cases of civil rights.
1. The letter of Martin Luther King, Jr., from a Birmingham jail actually invokes the writings of Thomas Aquinas to make a case against racial prejudice under existing laws: “A just law is a man-made code that squares with the moral law or the law of God ... An unjust law is a code that is out of harmony with the moral law. To put it in the terms of Saint Thomas Aquinas: ‘An unjust law is a human law that is not rooted in eternal law and natural law.’”
  2. A century before, in 1859, Charles H. Langston was convicted in Ohio for violating the federal law requiring the return of fugitive slaves, but in his speech before sentencing he invoked the higher law: “I will do all I can, for any man thus seized



and held, though the inevitable penalty ... hang over me! We all have a common humanity and you all would do that; your manhood would require it; and no matter what the laws might be, you would honor yourself for doing it, while your friends and your children to all generations would honor you for doing it, and every good and honest man would say you have done right!" (Finkelman, *Slavery, Race, and the American Legal System*, pp. 17–18.)

**II.** There is a need for a philosophical approach.

- A.** Common sense intuitions about being treated fairly need to be given rigorous scrutiny, both to become more precise and to expose weaknesses, such as hasty generalization and mere prejudice.
- B.** The institutionalization of ideas is necessary so that everyone receives fair treatment by law courts. Moral standards become more precise when they take legal form (law codes).
- C.** The legal theory assumed by most courts today is legal positivism, a theory that suggests that the only law that courts should enforce is law created by men and, thus, that law and morality must be kept separate. This gives rise to recurrent questions about justice: Do questions about justice properly belong to judicial review, or should judicial review be restricted to questions of procedural fairness (leaving substantive questions about justice to the political arena where laws are made)?
- D.** Objectivity, universality, and intelligibility are philosophical ideals that are extremely important in our consideration of natural law.
  - 1.** In considering universality, we will aim at theory or justification that applies to every human being.
  - 2.** Objectivity refers to the standard of evidence; we will seek to offer arguments that are compelling to anyone of open mind and good will, not merely arguments that rest on subjective preference.
  - 3.** Intelligibility is the name philosophers give to the structure and form of any being that makes that being able to be understood.

**III.** In this course, we will submit the notions of law, nature, human nature, and natural law to philosophical scrutiny to try to provide a theory of ethics that has objectivity, universality, and intelligibility.

**Suggested Reading:**

Paul Finkelman, ed., *Slavery, Race, and the American Legal System, 1700–1872* (New York: Garland, 1988) vol. 4, pp. 17–18.

Martin Luther King, Jr., “Letter from Birmingham Jail,” in *Why We Can’t Wait* (New York: Harper & Row, 1964), pp. 76, 82.

Heinrich Rommen, “Natural Law in Decisions of the Federal Supreme Court and of the Constitutional Courts in Germany,” in *Natural Law Forum* 4/1 (1959) 1–25.

**Questions to Consider:**

1. In the *Antigone* of Sophocles, Antigone explicitly appeals to a higher law as the justification for transgressing the edict of Creon against burying her rebel brother. Could Creon (or any legitimate ruler) not also appeal to a higher law to argue that there is a moral duty (prior to any civil law) that binds a ruler to do what is necessary to preserve civil peace and order?
2. Slavery and discrimination have come to be seen as morally repugnant offenses against the natural law, but for generations, they were tolerated. If they were always wrong because they were offenses against human dignity, how is it possible that a given culture did not recognize them as wrong?

## **Lecture Two**

### **The General Nature of Ethics**

**Scope:** The study of ethics involves consideration of questions about good and bad, right and wrong, the obligatory and the permissible. Given the wide variety of ethical approaches that have been devised, we will begin by making a general comparison between natural law ethics and some of the main alternatives (virtue ethics, duty ethics, utilitarianism, and divine command morality). Among the other preliminary questions that need to be addressed are: (1) certain important objections to the very project of natural law thinking, including relativism, subjectivism, and skepticism; and (2) the main assumptions made by all theories of natural law, including the possibility of knowing universal moral truths and the legitimacy of discussing natural kinds.

### **Outline**

- I.** Ethics asks questions of good and bad, right and wrong, the obligatory and the permissible. In this course, we will try to appreciate both the philosophical considerations needed to understand natural law, as well as its history, in which insights have emerged.
  - A.** In Lectures Two through Four, we will look at a general overview of ethical theory and the definitions used in natural law theory.
  - B.** Lectures Five through Sixteen cover the historical evolution of the idea of natural law.
  - C.** Some important questions that any natural law theory must face and some important contemporary applications of the theory will be the subjects of Lectures Seventeen through Twenty-Four.
- II.** Ethics is an attempt to systematize and reflect theoretically about questions of morality. Among the standard approaches to the study of ethics, natural law has a distinctive standpoint.
  - A.** These are some of the philosophical approaches to morality now prominent:
    - 1.** The virtue ethics of Aristotle;

2. The duty ethics of Kant;
  3. The utilitarian ethics of Bentham and Mill;
  4. The divine command morality in some religious traditions.
- B.** Natural law theory is another approach to questions of ethics.
1. Here, morality is rooted in “nature” to achieve objectivity: *Nature* here does not mean “mother nature” or “the great outdoors” or “doing what comes naturally” or “the brute state of nature.”
  2. Rather, *nature* here answers the question “What sort of being is X?” by identifying the structures and abilities to act that belong to the individuals of a given class and not to others.
  3. “Universality” is required for ethical claims to be comprehensive.
  4. We must test ethical claims for their reasonability to anyone of good will. We must ask: Did a person know and did he really choose this course of action?
  5. We must remain mindful of the religious roots of morality by tracing goodness and rightness back to the Creator of human nature.

### III. We must be aware of some important objections.

- A.** Relativism—especially in the form of cultural relativism—prefers to see ethics as merely customary and regional rather than normative or universal. In fact, morality comes from the Latin term *mores*, which means “customs.”
- B.** Subjectivism—particularly in modern life—denies that there are objective moral standards and urges that values need to be embraced and chosen by individuals. We find these ideas in the modern period with Nietzsche and in the ancient period in Plato’s *Gorgias*.
- C.** Skepticism—considered specifically with regard to morals—offers theoretical objections to the very possibility of knowing universal moral truths.

### IV. The following are central assumptions of natural law theories. These points will need philosophical discussion and justification as we proceed.

- A. While granting that knowledge of moral truths can be more difficult the further one proceeds into specific and detailed questions, there is reason to affirm the possibility in principle of knowing moral truths.
  1. For example, is it possible for one not to know that it is wrong deliberately to take an innocent human life?
  2. I will take the position that there are certain moral truths that are undeniable, that is, truths that cannot be denied or not known without becoming arbitrary and unreasonable.
- B. In addition to considering moral knowledge, we must also look at natural kinds. A natural kind is a group that can be objectively distinguished from another group on the basis of some property. Some important considerations about natural kinds (species) must be taken into account, including:
  1. A distinction must be made between differences of kind and differences of degree.
  2. More controversial than the distinction between, say, water and salt is the distinction between human beings and the higher primates as a difference in kind.
  3. We may ask how human beings stand vis-a-vis our close relatives in the animal kingdom.
  4. The answer I will give is that rationality—manifest in the powers of intellect and of will—is the distinguishing feature of human beings.

### **Suggested Reading:**

Mortimer J. Adler, *The Difference of Man and the Difference It Makes* (New York: Fordham University Press [1967], 1993).

Vernon J. Bourke, *Ethics* (New York: Macmillan, 1951).

William Frankena, *Ethics* (Englewood Cliffs: Prentice-Hall, 1973).

Louis P. Pojman, *Ethics: Discovering Right and Wrong*, 3<sup>rd</sup> ed. (Belmont, CA: Wadsworth, 1999).

### **Questions to Consider:**

1. Unlike complete skeptics (who hold that nothing can be known with certainty), moral skeptics hold the view that there are no moral truths that can be known. What do you think of the arguments against

moral skepticism that even moral skeptics demand to be treated fairly when it comes to receiving payment for work they have done?

2. In opposition to cultural relativism, natural law theorists generally hold it possible to see real progress and regress in moral understanding, for instance, on the question of the acceptability or unacceptability of slavery. How should one go about measuring cultural progress in morality?

## Lecture Three

### Law, Nature, Natural Law

**Scope:** In order to proceed with any philosophical analysis, the terms need to be clearly defined. For the study of natural law ethics, we need to consider the meaning of *nature* and *law*, as well as their synthesis as *natural law*. In future lectures, we will review the historical development of thinking about these ideas, but in this lecture, we will consider the definitions that have become standard since the time of one of natural law's great theorists, Thomas Aquinas. We must understand his general concept of law, as well as his distinction of natural law from eternal law, divine law, and human legislation. Likewise, an appreciation of Aquinas's use of the Aristotelian idea of nature as an internal principle of any being's development and typical activities will prepare us for an overview of the contours of natural law ethics in the following lecture.

### Outline

- I. Clear definitions are extremely important in philosophy.
  - A. These include definitions in terms of genus and specific difference.
  - B. Definitions in terms of structure and function are also important.
  - C. We must also consider the use and abuse of definitions in ethics.
    - 1. Some groups have attempted to define a certain person or group of persons "out" of the human race.
    - 2. Nazis, for example, defined Jews and gypsies as "parasites" to give the impression that they belonged in a different genus.
- II. Certain definitions of natural law have become standard since the time of the great natural law theorist Thomas Aquinas.
  - A. *Law* has been defined as "an ordering of reason, promulgated by the person in charge of a community, for the common good."
    - 1. All law must be reasonable.
    - 2. All law must be publicly disclosed.
    - 3. All law must be promulgated by an authority. An authority is that person or office who is witnessing to an earlier, higher, or prior truth and using power to perform the role of an authentic

witness (e.g., police officers upholding laws they did not create or math teachers explaining the laws of fractions). This idea of legitimate authority is crucial to the notion of a law.

4. All law must be for the common good, not for the self-interest of a ruler or the ruler's favorites.

**B.** For Thomas Aquinas and the natural law tradition, this definition of law will hold for all the instances of law that we find. There are, however, objections to such a definition.

1. Those with a voluntarist notion of law hold that a law is a law simply because of the will of the ruler.
2. Others insist that it is impossible to know the nature of things in matters of morality and, thus, to derive a moral law from anything's nature.

**C.** Thomas Aquinas urges that there are four kinds of law.

1. Eternal law is God's providential ordering of natures to their ends, including the design of human nature.
2. Divine law refers to God's explicit commands, for instance, in the Decalogue as found in Exodus and Deuteronomy and in the Two Great Commandments of Jesus in the Gospels.
3. Natural law involves human participation in God's eternal law as regards the providential ordering of human life; the use of human reason to reflect on what our common human nature is; and what is required to respect that nature, as found in all human beings.
4. Human law, or positive law (*positive* in the sense of "posited" or "laid down by human authority"), consists of legislation of various types, including constitutions, statutes, administrative decrees, and even customs. Laws of this type are far more specific than natural law and determine matters that natural law leaves indeterminate, but these laws should never violate natural law.

**III.** The following observations refer to the concepts of nature and human nature.

- A.** According to Aristotle, "natures" can be discovered by observation and reflection (inductive analysis).
- B.** The nature distinctively common to all the members of a given species in terms of structural features and the powers to perform typical activities can be articulated.



- C. Nature can thus be seen as the internal principle of something's development and typical activities. For example, if we see a caterpillar, then a cocoon, and then a butterfly, we might think we have three different kinds of things. Yet, by observing over time, we see a common nature unfolding from within the being.
1. The *natural* is not just the "average" or the "normal" but what is "normative" for the full maturation of an individual in its species.
  2. The "privilege of the normal case" helps us to describe the features typical of a mature, healthy, adult instance of this class of beings. Philosophers look to mature instances of a species to compare the full set of traits that belong to one species with the traits typical of a different species.
  3. The "normal" case does not, however, serve as a demarcation criteria for species membership. Those who are immature or ill or wounded or incapacitated or aged are nevertheless members of the species throughout their existence even if they do not exhibit the functions of the "privileged normal case."
  4. Membership in the species is not defined in terms of the function. But when we are comparing one species with other species, function is precisely what we look at. Membership in the species is determined by the fact that the individual is generated by other members of the human species.
- D. For moral purposes, we are concerned with how the definition of human nature is reached and what it contains. Aristotle's definition, which Thomas Aquinas supports, treats the human being as "rational animal."
1. In this definition, the focus is first of all on the genus, what is shared with a larger group (animal, mammal, primate).
  2. The specific difference, what sets humans apart, is our rationality.
  3. A further crucial distinction that has been made since Aristotle is that we are also persons.
  4. Human nature embodies both practical and theoretical rationality, which gives us, as humans, a special dignity and certain moral rights and duties.

### **Suggested Reading:**

Heinrich A. Rommen, *The Natural Law: A Study in Legal and Social History and Philosophy*, trans. by Thomas R. Hanley (Indianapolis: The Liberty Fund [1936, 1948], 1998), esp. “The Nature of Law” in chapter 11: “The Nature of Law.”

Yves R. Simon, *The Tradition of Natural Law: A Philosopher’s Reflections*, edited by Vukan Kuic and with an introduction by Russell Hittinger (New York: Fordham University Press, 1965, 1992), esp. “The Concept of Nature” in chapter 3 and “The Definition of Law” in chapter 4.

### **Questions to Consider:**

1. On the assumption that the natural law analysis of human nature does reveal certain moral obligations and prohibitions, should civil laws be enacted to cover all these moral obligations and prohibitions? How about obligations of gratitude, for instance?
2. Should civil law restrain all vice, or should some vices be tolerated (discouraged but not forbidden) in the interests of freedom and liberty in a community? How about such practices as gambling, prostitution, drug use?

# Lecture Four

## Principles of Natural Law Theory

**Scope:** In subsequent lectures, we will examine the long history of the vast variety of theories that have been labeled “natural law,” but first, we must see the predominant features of the general theory. Natural law theorists hold it to be a universal standard based on human nature and discoverable by human reasoning that is capable of elucidating many aspects of personal and social morality, including the nature and limits of political obligation, the relative merits of diverse forms of government, and the moral legitimacy of specific legislation.

### Outline

- I. Natural law is grounded on an understanding of the nature of the human person.
  - A. Philosophical anthropology is the effort to deal with human beings precisely as “persons.”
  - B. Natural law depends on the existence of a natural kind—the human kind—distinguishable from other sorts of animals.
- II. The natural kind that we human beings are relies on the definition of *human being* as “rational animal.”
  - A. The genus *animal* consists of beings with a material body, alive, capable of nutrition, growth, reproduction, locomotion, sensory activity, and so on. In all these respects, an objective pattern of development is found in human beings that is crucial to natural law theory. This pattern is especially evident in the mature instances of the species, which (by the privilege of the normal case) allow us to give an objective description of the entire species.
  - B. *Person* is a moral category—that which deserves protection by having an intrinsic dignity and rights, as well as a moral responsibility.
  - C. Are all persons human? Are all humans persons?
    - 1. Yes, all human beings are persons, but the category of person is larger than the category of human. For instance,

*person* can describe not only human beings but other personal beings, such as God (in Christian understanding) or angels.

2. Boethius, a sixth-century Roman jurist, defined *person* as “an individual substance of a rational nature.” He sought to capture the notion of rationality in a unified substance.
3. The Latin term *persona* has theatrical origins. It means “to sound through” and came to refer both to the mask a character wore and the role the character played. Boethius saw the usefulness of this term as a way to capture the idea that a human being is responsible for the story of his own life, like the role an actor plays on stage.
4. The term *person* includes intelligence, rationality, and will.

**D.** Studying the parts of Boethius’s definition may be helpful.

1. Individual: not in some radically atomistic sense of being unrelated to others (see E below), but simply in the sense that each human being is a distinct being, increasingly capable (as it matures) of acting on its own in society and history.
2. Substance: a technical term that varies in meaning, depending on the philosopher. Here, it means an internally unified being. In the case of persons, the *substance* refers neither to some underlying seat of consciousness, as if the body were something else, nor merely to the body, as if consciousness were merely some complicated bodily activity, but to the unity of “body and soul,” the totality that develops through all the stages of one’s life, whatever changes, chance events, and choices occur.
3. Nature: in general, the kind of being, distinguished by structure and typical activities; in this case, the internal principle of development that is typical of human beings.
4. Rational: the endowment of reason by which we are progressively able to have and to use knowledge about the world, to deliberate about courses of action, to make free choices. Personal uniqueness is a function of rational choices.

**E.** For natural law, the social dimensions of human nature must also be considered. Although the details of social organization vary

considerably, the human need for social relationships of various types is constant.

1. From conception through death, human beings need families for all sorts of reasons, not just for the provision of material necessities but also for the development of psychological and spiritual needs, such as learning how to love and be loved.
2. Human beings often prosper through social interaction at various levels, from voluntary local associations to membership and participation in national and international organizations. Presumably what is “natural” here is not any particular way of associating but simply the need to do so.
3. Natural law requires the patience to look at a history of a culture, a society, a family, an individual.
4. British Freudian psychologist Elizabeth Moberly stresses the necessity of social organization and family structure for human development.
5. Differing political structures are responsible for bringing out different virtues. Social culture is greatly affected by political regime.

### **III. Moral knowledge of the natural law comes about first by inclination.**

- A. But our inclinations must be submitted to rational reflection.
- B. Patterns of association, dependence, and human maturation can, thus, be discerned in the effort to develop a holistic appreciation of the natural moral law.

### **Suggested Reading:**

Thomas Hibbs, *Virtue's Splendor: Wisdom, Prudence, and the Human Good* (New York: Fordham University Press, 2001).

John F. Kavanaugh, *Who Count as Persons? Human Identity and the Ethics of Killing* (Washington, D.C.: Georgetown University Press, 2001).

### **Questions to Consider:**

1. Some theorists deny that all human beings are persons. They argue that only those human beings who are already born and capable of rational activity are persons but that those who have serious genetic defects or those who have become mentally incapacitated do not

enjoy the same rights as those who are normal. How would you evaluate this position?

2. Existentialists have denied that there is any such thing as human nature—not because humans lack a common body structure or a typical psychic structure, but because human freedom opens up so many options for our lives. They ask: How can there be a common nature that might be useful in ethics if each person's life is unique and the result of one's own choices? What do you think?

## Lecture Five

### Greek Ideas of Nature and Justice

**Scope:** If the natural law is an unwritten but universal standard of morality, how did it ever come to be known? The effort to recount some important parts of the history of thinking about natural law in this and subsequent lectures will not only foster an appreciation of the genius involved in articulating this idea but should also deepen our understanding of this way of thinking about morality. We start with the Greek thinkers, who began Western philosophy in the quest for better understanding of the cosmos and human life. Although each thinker to be mentioned in our survey explored much else that might be noted in the general history of philosophy, we will confine ourselves to what is relevant for the tradition of natural law thinking.

### Outline

- I. A note for the historical lectures that follow: Constant watchfulness is needed to determine genuine instances of natural law from various counterfeits. The history is checkered, and claims about “nature” have been used as rationalizations both for defending and overturning the status quo, including justification for the worldwide rule of the Roman emperors, a way to connect the power structures of feudal barons to a grand hierarchical plan for the cosmos, the quest for participation in political power by rising middle and lower classes, and support for revolution in France.
- II. Among the pre-Socratic philosophers, there was a parallel rise of natural philosophy and ethics.
  - A. The pre-Socratic philosophers sought to discover a “first principle” (in Greek, an *arche*, as in the word *archeology*) at the basis of all the other elements and capable of explaining the cosmos without recourse to mythological deities.
    1. In contrast to the recourse to gods and goddesses frequent in ancient poetry, the “Milesian physicists” attempted explanations in terms of some material force. Thales, for instance, posited “water” as this first principle; Anaximenes

said that it was “air”; Anaximander, that it was “the indefinite.”

2. They sought an answer in terms of nature, a physical explanation. In fact, the Greek word *physis* means “nature.”
3. Although the brevity of the texts available from these and other early figures makes it difficult to be certain that we know all that they meant, what is clear is that they were all aiming for a philosophical rather than a mythological principle of explanation—one that would be objective, universal, and intelligible.
4. Pythagoras tried to describe the cosmos using mathematical relationships and urged people to conform their actions to the harmonies he thought common to the physical universe, the human body, and musical ratios.
5. Figures like Heraclitus used the element of fire to symbolize the unchanging standard of universal justice amid the constant change that marks the world.
6. Monists like Parmenides treated “Being” as the single principle, then posed logical conundrums about how there could be any such thing as change.
7. Pluralists, such as Empedocles or the atomists Democritus and Leucippus, tried to explain change by hypothesizing plural original principles in interaction.

**B.** In summary, early Greek science should not so much be conceived as secular in spirit as interested in countering the anthropomorphic explanations of physical phenomena typical of mythology. The intellectual curiosity involved in searching for regularities in the universe was often linked with concern for moral values.

**III.** The Sophists were teachers of rhetoric and persuasion. They tended to be critical of conventional moral beliefs and political arrangements. They felt that many of the standards of morality are purely humanly devised and not natural at all.

**A.** Protagoras, for whom “Man is the measure of all things,” regarded law and political arrangements (so different from society to society) as matters of human invention. He argued that one could not depend on some natural disposition toward justice but that citizens need schooling in politics and justice from their communities.



- B. Hippias took the view that the natural likeness of all human beings implies their equality and universal fraternity. He takes such conventional arrangements as the Greek sense of superiority to all “barbarians” as a sign of the potential fallibility of all political and legal arrangements.
- C. Callicles (in Plato’s *Gorgias*) and Thrasymachus (in Plato’s *Republic*) hold that the stronger should naturally rule over the weaker and that law is often a device that allows the weaker to band together against the stronger. The implication is that obedience to law or morality is unnecessary for the stronger, except when it is in their self-interest.

IV. In his struggle against the Sophists, Socrates attempted to provide a more reliable basis for knowledge and ethics. (I make no effort here to determine the difference between Socrates and Plato, the author of dialogues about Socrates.)

- A. In the *Apology*, *Crito*, and *Phaedo*, Socrates reflects on the strong sense he had of the obligation to be a gadfly for Athens.
  - 1. Even if there is no formal doctrine of natural law here, Socrates clearly and persistently questions the conventional understanding of law, justice, and civic obligation.
  - 2. He appeals recurrently to the structure and typical activities of whatever he is discussing to determine its essential nature and purpose. This will regularly be the strategy of natural law thinkers in the effort to draw out moral implications from the analysis of a thing’s nature.
- B. Plato’s *Republic* is a dialogue about the nature of justice, in ten books, with Socrates as the central character.
  - 1. In response to Socrates’s question “What is justice?” Cephalus answers that justice is a matter of paying one’s debts.
  - 2. Cephalus’s son, Polemarchus, says that justice is giving to another person what is owed. His mistake, though, is describing this as helping your friends and hurting your enemies.
  - 3. Socrates spends much of Book I refuting the boisterous Thrasymachus, who will not really engage in serious discussion. Yet in the course of doing so, Socrates is actually exemplifying natural law ethics as reason reflecting on nature.

4. Books II–X discuss an ideal city modeled on the natural harmony in a well-ordered individual, when reason, assisted by the emotions, restrains and rules the lower appetites. In the ideal city, the wise, with the assistance of the courageous, must rule over the appetite-driven masses.
5. Seen as a whole, the *Republic* mounts a refutation of the Sophists by arguing that conflicting impulses in an individual can never be satisfied if they shake off the direction by the reason; likewise, in society, tyrants will arise and take advantage of the populace under the appearance of giving them the order they are unable to provide for themselves. Only those sufficiently wise to grasp the structure of human nature and to see the natural order by the light of the good will be able to establish a sound order in society.
6. Although explicit references to “nature” as the origin of morality are infrequent in Plato, the argument depends on grasping the tripartite structure of the human soul (reason, emotions, desires) and seeing its parallel in the *polis* (the city’s rulers, its military, and its workers) as the source of moral and political arrangements.
7. According to Plato, if we find ourselves in a moral formation that disciplines the passions, reigns in feelings, and looks out for the common good, virtue will naturally develop, leading to genuine happiness, good feeling, and community.
8. To a certain extent, then, Plato may be seen as articulating an early version of natural law theory, because he sees the explicit laws of a community as participating (to whatever degree of success) in the eternal principles of justice.

### **Suggested Reading:**

Julia Annas, *An Introduction to Plato’s Republic*. (Oxford: Clarendon Press, 1981).

W. K. C. Guthrie, *The Sophists* (London: Cambridge University Press, 1971).

Plato’s *Republic*, especially the debate between Socrates and Thrasymachus in Book I. See Plato, *The Collected Dialogues*, edited by Edith Hamilton and Huntington Cairns (Princeton: Princeton University Press, 1961).

### Questions to Consider:

1. In the modern period, Nietzsche takes up the basic position of Callicles and Thrasymachus that might makes right and that civil law, like morality, is simply an effort of the weak to bind those who are naturally stronger from having their will. How would you argue this point?
2. Plato's *Republic* shows the importance of having both a well-ordered soul and a well-ordered state. Do you agree that there are some types of social and governmental organization that better promote a harmonious ordering of a person's character?

## **Lecture Six**

### **Aristotle's Clarification of "Nature"**

**Scope:** Plato's student Aristotle returned to the question of change in the cosmos with an explanation in terms of the four causes (material, formal, efficient, and final) that proved enduringly satisfying. An important part of this solution is the concept of "nature" as the inner principle of a being's structure, development, and typical activities. In his analysis, "artificial" objects (objects constructed by human beings) lack this sort of inner principle; they have their unity as particular objects by virtue of the purpose given to them by their makers. But "natural" objects internally possess a "nature" specific to their kind by which they act "regularly or for the most part" in a certain way and toward a certain end. In principle, it is possible to define the nature of any such physical object by reference to the type of matter and the type of form that constitute it and give it a directedness toward a certain goal (in the case of living things, their maturation and the reproduction of the species).

### **Outline**

- I. Aristotle developed his theory of the four causes—material, formal, efficient, and final—as a way to handle the perplexing problem of change.
  - A. Aristotle uses the example of a bronze sculpture.
    - 1. The material cause is the "stuff" that goes into making the sculpture.
    - 2. The formal cause is the arrangement or the shape.
    - 3. The efficient cause is the sculptor himself.
    - 4. The final cause is the goal or purpose in the sculptor's mind.
  - B. Aristotle also illustrates this procedure with an example of plant growth.
    - 1. In an acorn, one finds matter, form, and everything needed to develop an oak tree.
    - 2. The efficient cause is water, an agent that starts the process unfolding.

3. In the case of a natural object, the goal or purpose (the final cause, or *telos*) is rooted in the acorn, rather than being extrinsic, as was the case of the sculpture.
- C. A third example comes from biological generation of animals.
1. The gametes (the egg and the sperm) that united at fertilization provide the matter and the new form that will direct all the further development of the individual as it grows.
  2. But the gametes come together only when appropriate agent causes unite in sexual intercourse (the mating of two animals).
  3. The mature form of the new individual is already latent in the newly formed being that results from fertilization.
- D. As human beings, we are able to make conscious choices by virtue of our rationality. But there are also things that we cannot control, that are part of us by virtue of the end within us directing our growth and development.
- E. The Pre-Socratics held opposing views of change.
1. Heraclitus claimed that everything is constantly in change, such that “one cannot ever step twice into the same river”—an anticipation of process philosophy.
  2. For Parmenides, change seemed to be only an illusion, for to change would either mean for something that does not exist to come into being (but “from nothing, nothing comes”) or for what does exist to cease existing.
- F. Aristotle felt that there was truth in both positions, if properly considered. He argued that in change, something must stay the same even while something becomes different, and so he invoked three principles of change:
1. The substrate is what is receptive to form or structure; what has a certain form at any given time but can be brought to take on other forms.
  2. Form is the structure or arrangement that makes something *what* it actually is.
  3. Privation is the lack of a form.
- G. Change, then, is the process by which some underlying substrate receives a new form or structure that it lacked at the beginning of the change.
1. This may well involve the loss of some form or structure that it had at the start.

2. Hence, change is not a matter of all-or-nothing (going from nonexistence to existence) as Parmenides had worried, nor is it so pervasive as to disallow all stability (as Heraclitus had urged), but a process in which something stays the same and something is different.
- H. Aristotle thought of the end—the final cause—as directing all the changes. Although the final cause is external to a product made by human craft, it is already present in the natural organism.
- I. By talking about “being” in a way that is not static and locating the focus of that dynamism in the notion of final cause, Aristotle devised a solution that is useful both to natural science and to ethics.
- J. Further, Aristotle distinguished substantial change from accidental change.
1. In “substantial change,” one dominant structure is replaced by another (for example, the food we eat ceases to be what it was and becomes part of us, or a burned log becomes a pile of ash). Food is substantially changed when eaten.
  2. In “accidental change,” the forms in question are not the dominant structure that unifies the being and makes it an instance of this type or that, but rather a subsidiary structure (such as a quality, a quantity, or a relation). For example, we take in new matter when we eat and we make it part of us. We are only accidentally changed when we eat some food.
  3. The dynamism of nature concerns the patterns of change expected in any kind of being. The generation of a being (like the destruction of a being) is an example of “substantial change”; the growth and development of a being along the lines that are typical of the kind are “accidental changes.”
  4. In teleology, organs and various subsystems work for the good of the organism. The changes that a being of any particular kind undergoes in the process of maturation typical of the species serve in one way or another the good of the individual and the good of the species. At every stage of this development, the various organs and bodily systems serve the good of the whole organism.

- II.** Aristotle's approach to studying "nature" was empirical.
- A.** Through observation and reflection, Aristotle was able to identify the specific differences typical of each natural kind.
  - B.** He observed that it is not only structural properties but typical activities that provide the evidence for the claim that a given natural kind exists.
  - C.** One cannot directly see a nature or, for that matter, a power. But from the actual structure and the observed activities, one can infer that there had to have been a power sufficient to produce those effects.
  - D.** Further, a "nature" refers to the type of being that possesses a given set of powers capable of producing the observed structures and activities. Aristotle's approach here is strictly empirical.
- III.** Aristotle applied his concept of nature to human beings.
- A.** Aristotle was interested in studying other cultures and took note of the reports of his student Alexander ("the Great") of life in other parts of the world.
  - B.** He became convinced that a common human nature exists.
  - C.** He defined the human being as a rational, political, and social animal.
    - 1.** He identified the highest among the powers typical of human beings as rationality, in all its various forms and stages of development: thinking, knowing, speaking, deliberating, wishing, willing, loving, choosing, and so on.
    - 2.** He was especially interested in rationality's manifestation in language.
  - D.** Through language, Aristotle was able to appreciate the ability of the mind to grasp abstractions, make judgments, and form patterns of reasoning. Through patterns of reasoning, we can delve deeper into the meanings of things than we can through mere observation.

**Suggested Reading:**

Michael Behe, *Darwin's Black Box: The Biochemical Challenge to Evolution* (New York: The Free Press, 1996).

Alasdair MacIntyre, *Dependent Rational Animals: Why Human Beings Need the Virtues* (Chicago and LaSalle: Open Court, 1999).

Henry Veatch, *Aristotle: A Contemporary Appreciation* (Bloomington: Indiana University Press, 1974).

**Questions to Consider:**

1. There have been many attempts to identify precisely the specific difference that distinguishes human beings from such other intelligent species as dolphins and various kinds of primates, including the capacity for language, the ability to use tools, the potential for education and culture. How does the intelligence manifested by these species differ from our human intelligence?
2. Granted that human beings need various kinds of education to develop their native powers of rationality, our rational powers themselves seem to be innate and not acquired. What signs of rationality are present even in human beings who never manage to develop very far? What do you think about those positions that require a certain level of development to justify a claim that the individual has such moral rights as the right to life and liberty?



## Lecture Seven

### Aristotle on Justice and Politics

**Scope:** Aristotle's political and moral writings rely in some important respects on this notion of nature, especially for seeking in human nature a grounding for the objectivity and universality of his moral claims. But Aristotle cannot be properly called a "natural law" thinker in the strict sense, partly because the *Nicomachean Ethics* is organized around the virtues rather than around law. In addition, Aristotle uses the notion of "nature" in his ethics, but he apparently envisions a world of stable everlasting "natures" (somewhat like Platonic Ideas) and does not invoke a deity as the creator of those natures. Although he does argue for the existence of a divine Prime Mover, he does not envision this divinity as the provident legislator of a natural law within those natures in the manner that is typical of the later natural law tradition.

### Outline

- I. Aristotle is not, strictly speaking, a natural law theorist, largely because he does not articulate his ethics in terms of law. But he is very much a virtue theorist and what he wrote was essential for the subsequent development of natural law theory.
  - A. The central concept of the *Nicomachean Ethics* is the development of virtue by the cultivation of good habits so that these patterns of excellence in regard to desire and action become a kind of "second nature."
  - B. For Aristotle there are four major virtues:
    - 1. Prudence;
    - 2. Courage;
    - 3. Temperance;
    - 4. Justice.
  - C. Aristotle offers a careful definition of virtue:
    - 1. Virtue is the habit or state of character by which one is well-disposed and ready to choose the mean between the extremes of excess and deficiency.
    - 2. The *mean* refers not just to the average or the mediocre, but to that peak of excellence that is just right, whether it be in

regard to one's emotions and desires (such as the virtues of courage and temperance) or in regard to the giving and taking of goods and services (the virtue of justice).

3. For Aristotle, *virtue* is not simply a matter of "nature" in the sense of what is physically determined. Rather, *virtue* is "natural" in the sense that it is what fulfills human potential, what manifests full development of the final cause within us.

- D. As the theoretical basis for determining what the various moral virtues are, Aristotle argues (in *Nicomachean Ethics* I.7) that virtue or excellence is a matter of being able and ready to do the function that is distinctive of one's species. This, of course, is a basic argument pattern of any natural law theory.
- E. Given that rationality is the specific difference that distinguishes the human species from all others, each virtue will have rationality as a key component.
  1. A dependable disposition to make rational choices will best fulfill the potential of a human being.
  2. The virtue of temperance, for instance, includes a sound assessment of how much and in what ways a particular individual can and should seek after pleasures of various kinds, without ever becoming a slave to pleasure.
  3. Likewise, the virtue of courage includes a rational assessment of the dangers that need to be faced and a sound judgment about what strengths an individual actually has and what strengths one lacks, so as to use one's abilities well, neither paralyzed with fear nor overbold.

- II. In the *Nicomachean Ethics*, Aristotle sees these virtues as being important, contributory factors in what makes for human flourishing. He associates these virtues with nature and natural function, and it is this part of his theory that is extremely important to natural law theory.
  - A. Aristotle notes that plants and animals are well designed to meet the normal challenges of the environment and for the continuity of the species.
  - B. He notes that the young of an animal species require certain training.
  - C. He notes similar characteristics in the human species.

- D. But he also notes that the human species has cultural needs that are achieved by the proper functioning of rationality, a power that is proper to humans.
- E. Aristotle contends that this concentration on the power of rationality as our proper function shows us the basic outlines of our ethics and politics. Our personal and communal lives must be designed to make good use of these natural powers.

III. In Book V of the *Nicomachean Ethics*, Aristotle explicitly contrasts the unchangeable standard of “natural justice” with “justice by convention” (law made by the state). By *natural justice*, Aristotle means what is “due” or “fair,” and he intends that this sense of what is “due” or “fair” should stand behind any human law, any form of “justice by convention.”

IV. In his *Politics*, Aristotle explicitly appeals to some sort of universal and unwritten natural law.

- A. *Politics* I, 10, 13, 15 discusses “a common law according to nature” that actually exists and can be known by everyone. Aristotle makes reference to Sophocles’s *Antigone*.
- B. Although this work makes no detailed effort to explain the scope of this universal natural law or to use it to criticize human legislation, it has given subsequent thinkers a procedure for discerning where nature leads, and it provides a number of instances of how nature yields norms.
  - 1. Anything’s essential nature can be determined by considering its purpose or end, which can, in turn, be discovered from its structure and typical activities.
  - 2. The method for discovering natural purposes is, thus, teleological analysis. By this method, Aristotle himself argues that human beings are social by nature and that political arrangements must answer natural human needs.
  - 3. In contrast with many in the natural law tradition who will argue for human equality on the basis of nature, Aristotle (mistakenly, in my opinion) tends to argue for the existence of a natural hierarchy, in which females are inferior to males and in which some individuals are natural slaves by reason of their mental inferiority.

- C. Aristotle, like the ancients, believed that the goals of individuals are subsidiary to the goals of the state. The good of the state will ensure the good of its citizens, but the state has greater importance than its individual citizens, who must be prepared to sacrifice themselves for the state.

### **Suggested Reading:**

Prudence Allen, *The Concept of Woman: The Aristotelian Revolution, 750 B.C.–A.D. 1250* (Grand Rapids: Eerdmans [1985], 1997).

Yves Simon, *The Definition of Moral Virtue*, ed. Vukan Kuic (New York: Fordham University Press, 1986).

———, *A General Theory of Authority* (Notre Dame: University of Notre Dame Press, 1962).

### **Questions to Consider:**

1. Aristotle calls virtue “second nature” because once virtue is acquired, one so readily acts according to some virtuous principle (such as justice or temperance or courage) that one hardly needs to deliberate in order to choose well. How does one develop virtues of this sort?
2. Further, Aristotle claims that such virtues as courage, temperance, and justice are natural virtues—not in the sense that they are simply present without our having to develop them but rather in the sense that our natures are really fulfilled when our characters are developed in this fashion. What do you think about the implications of this position and, specifically, that the corresponding bad habits (the vices) are actually unnatural?

## Lecture Eight

### The Stoic Idea of Natural Law

**Scope:** In his *Republic*, the Roman statesman Cicero provides the first thoroughgoing theory of natural law as “right reason in accord with nature,” but his knowledge of the subject is much indebted to Greek Stoicism. Although complete materialists, Stoics, such as Zeno and Chrysippus, held for a universal moral order that governed human beings and all other parts of the universe by “right reason, which fills all things and is the same as Zeus, lord and ruler of the universe.” A deep conservative in matters of Roman politics, Cicero tended to use appeals to natural law as a justification for existing laws and not as a basis for overturning positive laws, let alone as a basis for radical change. In distinguishing between moral and immoral warfare, he articulates a notion of just war and originates the term *ius gentium* (“law of nations”), a term that will play a large role in the subsequent history of natural law as the rational standard to which all legal systems are subject. He also maintains as a part of natural law the doctrine of the fundamental equality among all human beings.

### Outline

- I. Greek stoicism (begun by Zeno about 300 B.C.) championed the notion of self-reliance and “right reason in accord with nature.”
  - A. The Stoics believed that both the material universe and all human culture were under the governance of what Zeno called “right reason, which pervades all things and is identical with Zeus, the lord and ruler of everything that exists.”
  - B. The idea of “right reason” is important in the concept of natural law. It suggests that reason can operate rightly or wrongly. Reason operates rightly when it is discerning the truth and when it is figuring out how matters that are open to choice are to be selected in such a way as to achieve a kind of harmony.
  - C. According to Chrysippus (232–206 B.C.), “For all beings which are social by nature, the natural law directs what must be done and forbids what must not be done.”

- D. Against the view that law and politics were based solely on individual or national self-interest, Panaetius (185–110 B.C.) argued for the reality of natural justice. He claimed that all human beings possess the basic capacity to participate in divine reason and that a fundamental equality and universal kinship exists among all human beings.
  - E. The Stoics connected “right reason” to God. For them, God was perfect and impersonal, not willful or subjective. This concept had two results:
    1. It allowed ethics to be seen in terms of law, rather than purely in terms of virtue.
    2. Individual morality came to be seen as in the service of political morality.
  - F. After the Roman conquest of Greece in 146 B.C., Stoicism was brought to Rome and found such adherents as Scipio Africanus the Younger. Scipio and members of his circle would appear as characters in Cicero’s dialogues.
- II. Cicero (106–43 B.C.) summarized the philosophical and political theories of the Stoics and transmitted to the medieval world the notion of natural law as right reason in accord with nature.
- A. *De re publica* (*On the Commonwealth*, 54–51 B.C.) links law and reason:
    1. Book III, chapter 22, states: “There is a true law, right reason in accord with nature; it is of universal application, unchanging and everlasting.... It is wrong to abrogate this law and it cannot be annulled.... There is one law, eternal and unchangeable, binding at all times upon all peoples; and there will be, as it were, one common master and ruler of men, God, who is the author of this law, its interpreter and sponsor.”
    2. This passage enunciates what will be the main themes for natural law for the rest of its history.
    3. The “reason” mentioned here is not just the power to form concepts or to take part in logical argumentation, but *right reason*, a specifically moral power by which human beings can differentiate good and evil and can discern what is in harmony with human nature and what violates human nature.
    4. The passage also implies that if we override the natural law, there will be a natural law sanction—a punishment.

5. Although Cicero does not articulate the content of natural law very fully, he does make clear that, at the very least, there are duties to observe justice, to respect the lives and property of others, and to contribute to society.
  6. Ancient thinkers such as Cicero do not talk in terms of natural rights but in terms of natural duties. The concept of natural duties will become important for the articulation of natural rights in the modern era.
- B.** Book III, chapter 23, of *De re publica* articulates a careful distinction between just and unjust warfare.
1. In answer to the charge that states are simply the result of force and conquest, Cicero argues that Roman wars were waged to repel invaders or to restore justice.
  2. He insists that for war to be justified, it must be formally declared and that war may not begin until an explicit demand for the redress of the wrong done has been made and rejected.
- C.** *De Officiis* (*On Moral Duties*, 44 B.C.) stresses the duties we have to one another because human beings are social by nature. We may not operate simply out of self-interest.
1. This is powerfully illustrated in the passage from Book III, chapter 5: “To take away wrongfully from another and for one man to advance his own interest by the disadvantage of another man is more contrary to nature than death, than poverty, than pain, than any other evil....”
  2. In direct contrast with earlier Stoics, Cicero also praises public service and political participation in this treatise.
  3. Bk. III, chs. 5 & 17: It is in Cicero’s writings that the idea of *ius gentium* (the law of nations) appears for the first time. While there is some dispute in modern scholarship about the precise reference of this term, Cicero uses it to describe the common element in the legal systems of diverse cultures that consists of the natural law requirement of respect for justice.
- D.** *De Legibus* (*On Laws*, 43 B.C.) makes an argument for the moral equality of all human beings on the basis of their common nature; yet paradoxically, Cicero still defends the institution of slavery (at Book III, chapter 25).
- E.** In Book I, chapter 10, of *De Legibus*, Cicero expands on his concept of a common human nature. He states: “No single being is

so like another ... as all of us are to one another ... Reason, which alone raises us above the level of the beasts, is certainly common to us all and, though varying in what it learns, at least in the capacity to learn, it is invariable.”

1. This idea is fundamental to natural law theory.
2. Yet right after he makes this comment, Cicero proceeds to defend slavery!

### **Suggested Reading:**

Heinrich A. Rommen, *The Natural Law: A Study in Legal and Social History and Philosophy*, translated by Thomas R. Hanley (Indianapolis: The Liberty Fund [1936, 1948], 1998), esp. “The Nature of Law” in chapter 1: “The Legacy of Greece and Rome.”

Paul E. Sigmund, *Natural Law in Political Thought* (Cambridge: Winthrop Publ., 1971), chapter 2: “Natural Law in Roman Thought.”

### **Questions to Consider:**

1. “Right reason” is easier to discuss in the abstract than to identify in concrete situations. What do you think are the necessary characteristics of a person with “right reason”? What are some of the factors for identifying someone’s reason as merely self-interested or insufficiently impartial?
2. The usual conditions for determining a war to be just are three: (1) formal declaration of war by proper authority, (2) a just cause, (3) right intention in using the necessary force. What do you think of this set of criteria? How would you analyze the justice of recent wars?



## Lecture Nine

### Biblical Views of Nature and Law

**Scope:** Another channel of thought that is extremely influential for the tradition of natural law comes from the Jewish and Christian Scriptures. Biblical authors tend to view the universe as God's creation and tend to use a category like "nature" only late in the history of revelation, for instance, in some of the books of the "Wisdom literature." Law, on the other hand, is a tremendously important biblical category already from the time of God's giving of the Torah to Moses. Certain biblical books even use the idea of natural law. It is implicit, for instance, in the Wisdom of Solomon and quite explicit in Paul's Letter to the Romans. Many early Christian authors favor the use of Stoic ideas, such as divine providence, that will become an intrinsic part of natural law theory, while others take the position that comes eventually to be known as fideism—a complete reliance on faith for the knowledge needed for salvation and a distrust in human powers to know the natures of things well enough to use them (if not generally, then at least, in matters of morality and salvation).

### Outline

- I. Law is a tremendously important biblical category.
  - A. *B'rith*—covenant—is, in many ways, the central concept of biblical revelation.
    1. Much more solemn than any human contract, the covenant is the consecrated establishment of God's relationship to human beings and, in particular, to the people of Israel.
    2. The Bible records such covenants as taking place: (1) with Adam at the time of the creation of the world and the commission of stewardship received from God, (2) with Noah after the Flood, (3) with Abraham, (4) with Moses, and (5) with David, as well as (6) the promise in Jeremiah of a new and everlasting covenant that Christians take to be the covenant established by Jesus.
    3. The most elaborate descriptions of the establishment of a covenant are found in Exodus and Deuteronomy, texts that

parallel the standard form of suzerainty treaties in the ancient Near East: the identification of the parties to the covenant, the recall of the history of their relationship, the stipulations of the agreement, the blessings that will come from keeping the covenant faithfully, and the sanctions to be imposed for failure.

- B.** The first five books of the Bible (Genesis through Deuteronomy) are together known as Torah (law). They contain various forms of legal statements.
  - 1.** The Ten Commandments are found in two places: Exodus 20: 2–17 and Deuteronomy 5: 6–21.
  - 2.** Leviticus contains a collection of laws pertaining to worship, ritual, and sacrifice, including the Holiness Code of chapters 17–26. Although much of this book is a record of priestly traditions, careful analysis of the categories and distinctions used reveals a strong sense of the differences among natural kinds (in the spirit akin to natural law thinking).
  - 3.** As a “fence around the Law” (the Ten Commandments), there are some five hundred particular laws that need to be observed for the righteous. The idea is that concern with respecting these particular laws will help to prevent one from ever violating the main divine commandments.
- C.** Although the source of law in the Bible is clearly a divine authority and not philosophical explanation, this approach to law has important historical connections to natural law theory.
  - 1.** The interest of natural law theorists in the “natures” of various things correlates well with the biblical category of “creatures” of various “kinds.” Creatures of different kinds need to be treated differently for human beings to exercise the kind of stewardship that God requires of Adam and his descendants.
  - 2.** The God who created all the various kinds of beings was the same God who made the covenants described in the Bible and who gave the Torah and the laws that surround the Ten Commandments.
  - 3.** Thus, natural law theorists have always had reason to ask about the links between these divine commands and the obligations that constitute natural law as discovered by philosophical reflection.

- II.** The Wisdom literature tradition is arguably the most philosophical portion of the Bible. It includes certain psalms and the books of Proverbs, Job, Qoheleth (Ecclesiastes), Sirach (Ecclesiasticus), Song of Songs, Daniel, and the Wisdom of Solomon.
- A.** The problem of evil (in general) is the perceived need to explain why bad things happen to good, or at least, innocent, people. Needless to say, this is a universal human problem; biblically stated, it sometimes takes the form of reflection on the situations of widows, orphans, and exiles. It is found often in the Wisdom books.
1. Amid the prayers pleading with God to send help for those who are suffering, there are many questions raised about the justice of their situations. One can understand those who suffer because of their sins and crimes, but why do the innocent and the just have to suffer?
  2. The covenant with Noah changed the original covenant at creation. The expulsion of Adam and Eve from the Garden can be seen as an immediate punishment for a misdeed.
  3. But God promises Noah after the Flood that never again will there be a flood to destroy the whole earth, however much the world might deserve it. Instead, "I will rain upon the just and the unjust alike."
  4. According to at least one important tradition for understanding this passage, God permits the innocent and the guilty to live together without interfering most of the time and reserves judgment until the afterlife.
  5. Yet, living people need to determine right and wrong and to punish evildoing.
- B.** In the Wisdom of Solomon, Solomon urges his fellow kings to be just and he prays for wisdom, including the wisdom to know what is truly just.
- III.** In the New Testament of the Christian Bible, inferences to natural law can also be found.
- A.** Like the Scriptures of Israel, the Christian portion of the Bible is the record of divine revelation, not the product of philosophizing. Yet philosophy, too, has left certain marks on these books. We will use Paul's Letter to the Romans as our example.

1. After explaining himself and his basic perspective, Paul turns to a philosophical argument to show that even those who have not had the benefit of special revelation should have known of God: 2. Romans 1: 17–23: “For the wrath of God is revealed from heaven against all ungodliness and wickedness of men who by their wickedness suppress the truth. For what can be known about God is plain to them, because God has shown it to them. Ever since the creation of the world his invisible nature, namely, his eternal power and deity, has been clearly perceived in the things that have been made. So they are without excuse; for, although they knew God, they did not honor him as God or give thanks to him, but they became futile in their thinking and their senseless minds were darkened. Claiming to be wise, they became fools, and exchanged the glory of the immortal God for images resembling mortal man or birds or animals or reptiles.”
  2. For our purposes, the significant point here is that Paul is making the claim that even apart from revelation, such as the Ten Commandments, it was possible for people to know about morality, just as they could know about the existence of God, and that they are culpable for failing in either respect.
- B.** Although it is not possible to detect a specific philosophical school that Paul is following here, one can discern in what follows a willingness to see moral right and wrong, good and bad, in terms of nature in a fashion quite similar to at least one standard natural law approach:
1. Romans 1: 24–28: “Therefore God gave them up in the lusts of their hearts to impurity, to the dishonoring of their bodies among themselves, because they exchanged the truth about God for a lie and worshiped and served the creature rather than the Creator, who is blessed forever. Amen. For this reason, God gave them up to dishonorable passions. Their women exchanged natural relations for unnatural, and the men likewise gave up natural relations with women and were consumed with passion for one another, men committing shameless acts with men and receiving in their own persons the due penalty for their error.”
  2. At one level, what is operating in this passage is a kind of moral psychology about how a person who is in error about

the nature of the divine can fall into error about the proper order of one's loves.

3. But one can also see an assertion about morality based on nature, namely, that sexual intercourse is unnatural and dishonorable when directed to someone of the same sex.
  4. The position is not argued for here, but simply asserted.
  5. What is of special interest for our study is that the assertion is not made in terms, say, of the Decalogue, but in terms of what is natural and unnatural.
- C. Anxious to push on to the discussion of the law that God revealed as the Torah, Paul reflects for a few moments on the natural law known even to the pagans.
1. Romans 2: 12–16: “All who have sinned without the law will also perish without the law, and all who have sinned under the law will be judged by the law. For it is not the hearers of the law who are righteous before God, but the doers of the law who will be justified. When Gentiles who have not the law do by nature what the law requires, they are a law unto themselves, even though they do not have the law. They show that what the law requires is written on their hearts, while their conscience also bears witness and their conflicting thoughts accuse or perhaps excuse them on that day when, according to my gospel, God judges the secrets of men by Christ Jesus.”
  2. Among other themes in this text, we find the idea that the Gentiles (without knowledge of divine law by revelation) are nevertheless responsible for reading the natural law that is “written on their hearts.” Hereafter, this turn of phrase will recur again and again in discussions of natural law.

### **Suggested Reading:**

Mary Douglas, *Leviticus as Literature* (Oxford: Oxford University Press, 1999), esp. chapters 6 and 8.

Micahel Duggan, *The Consuming Fire: An Introduction to the Old Testament* (San Francisco: Ignatius Press, 1991).

Servais Pinckaers, *The Sources of Christian Ethics*, trans. by Mary Thomas Noble (Washington, D.C.: Catholic University of America Press, 1995).

### **Questions to Consider:**

1. For the sake of argument, take up any one of the commandments (e.g., “Thou shalt not kill,” “Thou shalt not steal,” or “Honor thy father and thy mother”) and ask yourself if the moral position taken here depends solely and entirely on God’s command, or whether a reasonable person would come to the same position from analysis of the human situation.
2. Presumably, revelation and faith are needed to know just who God is. But is there a natural law obligation to find out whether there is a God and, if there is, to give God proper worship?

## **Lecture Ten**

### **Early Christians, Nature, and Law**

**Scope:** In the fusion of classical culture with revelation (the Scriptures of Israel and Christianity) in the Middle Ages, the concept of nature from ancient philosophy comes to be understood in the context of original sin. A distinction is made between the ideal nature possessed by Adam and Eve in the Garden and nature as damaged by original sin. Although there is disagreement over the gravity of the wound human nature has received and the way in which regeneration in Christ saves, there is widespread agreement about some of the points essential to natural law theory—the existence of a human nature and the reality of a moral order that one knows even apart from grace.

### **Outline**

- I. The patristic period (that is, the period of the “Fathers of the Church”) is extremely broad and varied. This lecture attempts to treat only one theme relevant to this course on natural law, the idea of “fallen human nature.”
  - A. Patristic reflection on the book of Genesis in the Old Testament fuses the ancient concept of nature with the concept of original sin as found in the story of creation.
    1. Christian writers returned again and again to the story of creation that is told in Genesis, both because it is intrinsically interesting and because of their conviction that all things were renewed in Christ. The Christian Scriptures proclaim him the “new Adam” who heals and restores all humanity by his suffering, death, and resurrection.
    2. The controlling interpretive idea throughout the patristic period is called the doctrine of “recapitulation”—the notion that the life of Christ recapitulates the whole life of Israel but completes whatever is incomplete, perfects whatever is imperfect, and sanctifies whatever is sinful.
    3. Although this doctrine is applied by patristic writers to the whole breadth of the history of Israel, using the whole length of Christ’s life, special attention is always paid to the

beginnings: to the story of God's creation of Adam and Eve in the Garden of Eden, in original justice and innocence.

- B. The idea of original sin has to do with the fall of Adam and dismissal from the Garden.
  - 1. Curiously, the other books of the Old Testament rarely return to the story of Adam and Eve that is told in Genesis, but Christian authors, anxious to articulate for the reader Christ's coming and his passion, find new insight in this ancient text: the original sin of Adam that not only brings death into the world for the first time but that has deleterious effects on the entire human race.
  - 2. The dramatic story told in Genesis 3 recounts the sort of life Adam and Eve enjoyed in Paradise, their temptation by Satan, their confrontation by God, and their punishment—not only expulsion from Eden but such afflictions as the need to toil and to suffer pain in childbirth.
- C. The human proclivity to sin in various ways struck patristic writers as manifest. Without in any way wanting to deny or mitigate the personal responsibility one bears for one's own freely chosen actions, they also tended to see a weakness toward sin that afflicted the whole of humanity, the idea of fallen nature.
  - 1. The story of original sin told in Genesis offered a narrative account of certain events at the beginning of human history with effects that never ceased to reverberate.
  - 2. The more systematic thinkers saw in the story of original sin an explanation for the species-wide weakness: All human beings are the descendants of Adam and Eve and, thus, bear their punishment as a kind of negative inheritance.
  - 3. Those Christian authors who were more versed in such philosophical ideas as "nature" found it easy to see the consequence of Adam's sin for the whole human race in terms of "fallen human nature." Below we will consider the most prominent proponent of this way of thinking, Augustine of Hippo.
  - 4. Such Stoics as Seneca (1–65 A.D.) made it convenient for Christians to make the connection between the fallen nature of experience and an original ideal state of existence, because the Stoic idea of nature also contained the notion of a lost Golden Age when liberty and equality had reigned.



- D.** We must understand at the outset that the orthodox Christian position on the subject of original sin requires a careful distinction.
  - 1.** Original sin was only an actual sin for Adam. For all subsequent human beings, “original sin” designates not an actual sin that they have committed, but rather a sorry inheritance: a darkening of the mind, a weakening of the will, a propensity to yield to emotions that reason ought to control.
  - 2.** Beyond this, there has been a huge amount of discussion about just what original sin is and how it is transmitted, but that discussion is beyond the scope of these lectures.

**II.** Augustine’s views on morality were important for the development of natural law.

- A.** Augustine (354–430 A.D.) was a native of North Africa.
  - 1.** He received education in rhetoric and taught the subject in Rome and Milan.
  - 2.** He sought wisdom in the Manichean religion, as well as in neoplatonic philosophy, but at age thirty, he had an experience of the grace of Christ that brought about his conversion.
  - 3.** After his baptism, he returned to Africa in the hope of living a contemplative life in the community.
  - 4.** Before long, he was ordained a priest, then bishop in Hippo.
  - 5.** Here, he governed the church and wrote a vast number of treatises that became the main guides for Christian theology for the next thousand years and still illuminate Christian thinking.
- B.** One of the most important areas of Augustine’s thought is that of morality and its relation to religious faith. Although this topic is enormously complex, we can highlight a few of the component parts.
  - 1.** Even before his religious conversion to Christianity, Augustine became convinced that some of the other positions to which he felt attracted (such as Manicheanism) had to be wrong, precisely because they failed to do justice to our responsibility for what we knowingly choose to do.
  - 2.** To be a subject of moral praise or blame, the human being must be regarded as having an inner source of free choice, namely, the will. Augustine’s ideas in this area have long been recognized as crucial.

3. Augustine believed in the need for grace to liberate the will: Without in any way reneging on the power of the will to make free choices (and, thus, the responsibility of human beings for the consequences of their choices), Augustine's reflections on his own conversion, as well as on the difficulties of choosing rightly, led him to the conviction that one desperately needs God's grace to heal the will so that it can do its tasks well.
4. The attempt to explain just how the grace of God and the freedom of the will fit together occupied Augustine for the rest of his life, and scholars still debate the issue with great enthusiasm and profit. No attempt will be made here to settle that issue.
5. Rather, for the purpose of the study of natural law, we simply note the relation of this doctrine to Augustine's reflections on Saint Paul and on the serious consequences of original sin for human life. One of its sad effects was to weaken the orientation of the will toward the true good in such a way that even when we know what morality requires, we do not always do it. In short, fallen human nature makes it difficult to act morally without the help of grace.

**III.** Augustine was a pessimist, even about the natural virtues, as well as about natural law.

- A. Augustine's affection for classical Roman culture remained evident all his life long, but his theological perspective brought him to see even Rome, which he considered the most noble of pagan civilizations, to be inherently flawed.
  1. Augustine's massive treatise *The City of God* is a sustained argument for the thesis that it was not the introduction of Christianity that brought about the fall of Rome, but that Rome was falling of its own weight.
  2. The specific problem that was the downfall of Rome was, for Augustine, the falsity of its religion: Despite the praiseworthy striving of Romans for human excellence, the Roman Republic was ultimately built on a failure of justice, that is, a failure to pay due worship to the true God.
  3. In the course of making this argument, Augustine takes the bold position that "without faith there can be no real virtue"—that even the natural virtues are "false virtues," whose apparent strength will be undone by pride.

- B. The emphasis in Augustinian ethics, considered as a whole, is probably best captured by the phrase *ordo amorum*—the order of one’s loves.
1. Descriptively, one gains a picture of the orientation of a person by mapping what one loves most, then how one orders the rest of one’s loves.
  2. Prescriptively, the order of loves that one ought to have is to love most what is most lovable, namely, God. Then, one ought to love one’s fellow human beings, because each one of them is made in the image and likeness of God. Finally, one should love all other things on the face of the earth insofar as they are useful in helping one to live and to respect the objects that deserve one’s greater love.
- C. For Augustine, natural law theory is more an undercurrent than a point of emphasis.
1. Augustine’s *De civitate dei* is heavily dependent on the ideas of Cicero’s *De republica* for the articulation of political philosophy.
  2. Like Saint Paul, Augustine can praise the pagans for living as well as they could according to their lights and see them as culpable when they fail to respect what natural morality commands them.
  3. Ever mindful of the weakening of the will and darkening of the intellect that was brought on by original sin and that persists in our fallen human nature, Augustine is not optimistic that we can fulfill the natural law on our own without the aid of divine grace.
  4. Until the recovery of Aristotelian philosophy in the late twelfth century, the theory of natural law was not be prominent in Christian ethics.

### **Suggested Reading:**

Charles Norris Cochrane, *Christianity and Classical Culture: From Augustus to Augustine*, esp. chapters 9 and 10 on Augustine.

Paul M. Quay, S.J., *The Mystery Hidden for Ages in God* (New York: Peter Lang, 1995), esp. chapter 6 on original sin and chapter 8 on the doctrine of recapitulation.

### **Questions to Consider:**

1. What evidence is there for the Augustinian position that our minds are somewhat darkened and our wills weak by original sin? If original sin in us is properly understood as a kind of defect in our order of loves, what precisely is the defect? What do we not spontaneously love enough? What do we spontaneously love too much?
2. In what ways is the will free when we choose? Are we free to choose what will attract us and what will repel us, or are we free only with respect to which attractions we choose to follow and which we choose to neglect?

## Lecture Eleven

### Roman, Canon, and Natural Law

**Scope:** One of the practical effects of the Stoic understanding of natural law (discussed in Lecture Eight) can be seen in the categories of Roman law, which had enormous influence on natural law theory, especially through the use of Roman law in the organic development of canon law (ecclesiastical law) and its systematization by Gratian in the twelfth century. Justinian's collection of Roman law, the *Corpus iuris civilis* (529 A.D.), tends to identify natural law with the *ius gentium*. Other Roman jurists, such as Ulpian, however, question this identification, especially in reaction to its provisions for regulating slavery, which Ulpian finds contrary to the principle of natural law about human equality. Canon lawyers in the tradition of Gratian tend to regard natural law as a kind of divine law, because it comes from God and one can find evidence for it in the Scriptures.

### Outline

- I. Roman law had an enormous influence on the development of natural law. It was a body of law that owed much of its formation to judicial legislation.
  - A. Roman jurists borrowed extensively from the Stoics, who were pragmatic and eclectic in their philosophizing.
  - B. Consequently, Roman law is much more pragmatic than philosophical, but some of its theorists exhibit a steady appreciation for natural law as a rational basis for all legal systems.
  - C. One of the major concepts that Roman lawyers borrowed from the Stoics was the idea of universal equality.
  - D. They were also acquainted with Aristotle's teaching on ethics, courtesy of Cicero.
    1. They were indebted to Aristotle's theory of justice, particularly his concept of equity.
    2. They found this useful in interpreting and implementing legislation that did not address specific, localized circumstances.

- E. As the Roman Empire expanded, natural law gave Roman jurists a way to transcend the boundaries of the city of Rome, permitting them to tolerate local customs.
- F. This development of legal commonality shaped the concept of *ius gentium* (the law of nations)—the idea that there is a natural law or natural justice behind any given civil code.

## II. Roman jurists disagreed about natural law.

- A. Ulpian (third century) clearly distinguishes natural law from *ius gentium* but tends to associate natural law with animal instinct.
- B. Ulpian's fellow jurists disagree with him, particularly Gaius, who stressed that the natural law and the *ius gentium* were one and the same. Gaius contended that what a lawyer needs to know about natural law can be culled from other legal institutions.
- C. Both Ulpian and Gaius point out that where natural law touches civil law is in such areas as kinship and contracts, which they see as common to all the different cultures that they come into contact with in the course of their legal work.
- D. In the case of contracts, for example, these jurists believe that one should not be bound by the literal terms of a contract if the original terms were badly phrased; they recognize a need to understand the intentions of the contracting parties.
- E. In all these respects, they have a strong sense of the impact of natural law on civil law and they try to record it.
- F. Such debates continue into our own time, for example, in the debates on the subject of same-sex marriage.

## III. Roman law makes a distinction between *ius* and *lex* that is important to know for terminological purposes in the subsequent history of natural law.

- A. *Ius* refers to a general system of law and right.
- B. *Lex* generally refers to a particular piece of legislation or a particular legal principle within the general system of *ius*.

## IV. Justinian is to be credited with the codification of Roman law: the *Corpus iuris civilis* of 529 A.D. This is a collection of the writings of legal experts, a handbook for law students, and a codification of the law then in force in the Roman Empire.

- A. On the first page of the *Digest*, we find three incompatible definitions of natural law.
    1. Title I, 1 (3), citing Ulpian: “Natural law is that which all animals have been taught by nature; this law is not peculiar to the human species, it is common to all animals which are produced on land and sea, and to fowls of the air as well. From it comes the union of man and woman called by us matrimony, and therewith the procreation and rearing of children; we find in fact that animals in general, the very wild beasts, are marked by acquaintance with this law.”
    2. Ibid., citing Gaius: “All nations which are governed by statutes and customs make use partly of law which is peculiar to the respective nations, and partly of such as is common to all mankind. Whatever law any nation has established for itself is peculiar to the particular state and is called civil law, as being the peculiar law of that state, but law which natural reason has laid down for mankind in general is maintained equally by all men, and is called *ius gentium*, as being the law which all nations use.”
    3. Ibid., citing Paulus: “The word *ius* is used in a number of different senses: in the first place, in that in which the name is applied to that which is under all circumstances fair and right, as in the case of natural law (*ius naturale*); secondly, where the word signifies that which is available for the benefit of all or most persons in any particular state, as in the case of the expression civil law (*ius civile*)...”
  - B. *Corpus iuris civilis* is an attempt to reconcile these differences, where possible, both on practical points of law and on such philosophical concerns as the relation of natural law to particular legislation.
- V. Canon law is the body of church law developed over the centuries. With the publication of Gratian’s *Decretum*, it began to be studied systematically by faculties of canon law in the universities founded in the twelfth and thirteenth centuries.
- A. Gratian was a monk from Bologna who published *Concordantia Discordantium Canonum* (*A Harmony of Discordant Canons*, better known as the *Decretum*) about 1139.

- B. After juxtaposing available sources and precedents on a given question, Gratian generally attempts to reconcile statements that at least appear to be contradictory. In doing so, he often tries to formulate principles of law.
- C. Near the beginning of the volume, Gratian identifies natural law with scriptural revelation, on the grounds that both command us to keep the Golden Rule. He also argues that divine law commands what is according to nature, and he regularly speaks of “natural and divine law.”
- D. In general, the canonists considered natural law to be divine because it came from God and receives confirmation in Scripture. But in *Decretum* D.6, Gratian notes that some things contained in the Scriptures (e.g., the ceremonial laws) are no longer binding.
- E. Distinction 1 of the *Decretum* cites Isidore of Seville (560–636) that the natural law mandates “the possession of all things in common and one freedom for all.”
  - 1. This reflects the fundamental patristic position about the norms governing the original (idyllic) state of nature (before the fall of Adam and Eve) in which the goods of this earth were owned by all in common.
  - 2. Institutions such as slavery and private property were introduced only as a result of sin (see *Decretum* C.12, q.1. c.2).
- F. What Gratian adds to this patristic heritage is a natural principle for judicial review by which an appeal to natural law could annul positive law. (See *Decretum* D.8: “anything... which is against natural law is... null and void.”)
  - 1. Although this principle seems never to have been applied to the case of slavery, it was used by canon lawyers in ecclesiastical courts to overturn local laws and customs.
  - 2. As far as we know, ecclesiastical courts were the first to use the notion of natural law as a higher law capable of invalidating unreasonable legislation.

### **Suggested Reading:**

Harold Berman, *Law and Revolution* (Cambridge: Harvard University Press, 1983).

A. P. D’Entreves, *Natural Law: An Introduction to Legal Philosophy* (Piscataway: Transaction, 1994 [1951]).



### Questions to Consider:

1. The distinction the canon lawyers made between *lex* (legal obligation) and *ius* (obligation to do what is right) is also evident in secular contexts. What examples can you think of in which there is a difference between legal and moral obligations?
2. Virtually everyone would now agree that the right to acquire private property cannot in principle include the right to own another person as one's own property. What is the basis for this condition on the limits of what can be legitimately owned? Do you think that there are any other factors that, in principle, prevent anything from becoming "property"?

## Lecture Twelve

### The Thomistic Synthesis

**Scope:** The Dominican Thomas Aquinas (1224–1274) developed an incredible synthesis of traditional Christian teachings with the newly rediscovered works of Aristotle. In the course of his *Summa theologiae* (*Summa of Theology*), there is a treatise on law, in which he distinguishes natural law (as part of eternal law, God's providential plan for the universe) from divine law (the commandments revealed in the Old and New Testaments) and human law (obligatory but always subject to the higher standard of natural law). Following Ulpian, Aquinas regards human nature as instinctually equipped by the Creator with certain natural inclinations, but he also strongly urges the need for moral instruction for an individual's conscience to be sufficiently well developed to judge correctly about specific moral questions that arise. Natural law forms one important component in the larger whole of Thomistic ethics. One must also take into consideration the need for virtue (natural and supernatural) and grace. Aquinas systematically applies natural law to such diverse issues as property and theft, suicide, promise keeping, sexuality, obedience to God, and political organization.

### Outline

- I. The rediscovery of Aristotle's natural philosophy in the late twelfth and early thirteenth centuries attracted the genius of Friar Thomas Aquinas (1224–1274).
  - A. Aquinas was a Dominican who taught at the papal court and at the Universities of Naples and Paris. Among his important scholarly works is the composition of a theological response to the opportunities and challenges presented to Catholicism by the rediscovery of the works of Aristotle.
    1. Before the thirteenth century, Christian theologians tended to be generally in the Augustinian tradition (and, thus, somewhat pessimistic about the prospects of human nature for salvation or for moral living apart from grace).

2. In philosophy, they tended to prefer a platonic approach as relatively more friendly to such religious beliefs as the creation of the world (in contrast to the eternal world envisioned by Aristotle) and the immortality of the soul.
  3. Except for his logical works, Aristotle was largely unknown in the West.
  4. In the late twelfth and early thirteenth centuries, knowledge of Aristotle returned, at first through contact with Islam and later by direct translation from the Greek.
  5. This generated enormous enthusiasm, especially for the new prospects of science by way of Aristotelian natural philosophy, but simultaneously, great fears arose about the compatibility of this learning with certain Christian beliefs.
  6. Aquinas found ways to make certain subtle but significant changes to the basic Aristotelian perspective that not only made its powerful resources more compatible with theology but actually provided an even stronger defense of these traditional religious positions.
- B.** One general rubric that can be of great help for understanding much of Thomas's thought is: Grace does not destroy but builds on nature.
1. Even though Aquinas accepts the notion of original sin, he does not have so dark and pessimistic a view of the damage done to the powers of human knowing and willing as many in the Augustinian tradition had held.
  2. In fact, Aquinas's starting point in considerations of natural law is the great likeness there is between human nature and divine nature: In the powers of understanding and willing, human beings resemble their divine source more closely than anything else in the universe.
  3. In many respects, this is an optimistic view of human nature. Even though human beings suffer from some darkening of intellect and some weakness of will, there remains a certain basic goodness—not enough for anyone to reach salvation on one's own, but sufficient to make possible such natural virtues as prudence, courage, temperance, and justice.
  4. The divine grace needed for salvation is envisioned as healing what is damaged and building on a fundamentally good

foundation: human nature and its intrinsic orientation to the natural end of happiness.

- II.** Unlike the canonists, who tended to identify natural and divine law rather closely, Aquinas distinguishes sharply among four kinds of law (see Lecture Three): eternal law, divine law, natural law, and human, positive law.
- A.** *Natural law* refers to the moral obligation (rather than blind compulsion and necessity) that is specific to rational creatures as their way of participating by their reason in the *eternal law* through which God governs the world. For irrational creatures, God has created a design by which they regularly, and for the most part, successfully achieve their ends without having to make choices.
  - B.** Human reason is seen as capable of discerning the divinely created norms that are embedded in human nature to choose to live life in a way that will be in conformity to the will of God and make one happy.
  - C.** *Divine law* refers to the explicit revelation of the moral obligations that one should, in principle, be able to learn through discerning the natural law. This explicit revelation is designed to make clear what might be doubtful, especially for those without sufficient time or ability to reach clarity about the moral obligations of the natural law.
  - D.** There are also precepts of a ceremonial nature (laws about specific ways to worship, ritual purity, and so on) that are of divine origin but do not have a moral dimension.
  - E.** *Human law* is truly the construction of human minds and wills, but in order to be binding in conscience, human law must meet the basic criteria of any law; namely, it must be a reasonable directive, formally enacted by those in charge of the community, and for the common good. Much of what is dealt with will become right and wrong only by enactment, not by nature.
  - F.** Aquinas identifies law (especially natural law) as an essential aspect of a theory of morality, but not the only one.
    - 1.** One must also take into consideration such qualities as *virtue* (the reliable disposition to do what is good and right, not just minimally but with real human excellence) and *conscience*

(the developed ability to pass sound judgment on the goodness and wickedness of actions as a prudent person would do).

2. There is also the factor of *moral suasion*, the legitimate pressure exerted by communities to make individuals do what is morally upright and, where appropriate, beneficial for the community.
3. Finally, there is *grace*, the divine assistance provided to heal wounds in our nature and to perfect what is basically good and potentially available for becoming better and even perfect.

### III. Aquinas is probably the first theorist to make distinctions between various levels of natural law.

- A. For Aquinas, natural law has a self-evident fundamental directive: Good is to be sought and pursued; evil, to be shunned and avoided.
  1. Because of the way that all human desiring works, we will be attracted to merely apparent goods, not just genuine goods, and we will be repulsed by merely apparent evils, not just genuine evils; therefore, Aquinas's principle is too general and must be made more specific and discerning.
  2. The place to look for specifying this general precept is one's own nature. The natural law, in effect, gives us the directive to "realize our own natures" by choosing well. God has already indicated his will for human beings, in making us able to know our essential nature and able to decide to act in ways suitable for fostering that nature and achieving the ends to which we are naturally inclined.
  3. The intellect must then investigate the natural inclinations to discern which will, in fact, bring about the natural end of happiness and which are somehow excessive, insufficient, or disordered in a way that would lead to frustrating the natural end. We must remember that some of our inclinations are subject to passion.
- B. There are three basic groups of natural inclination, and each yields insight into our natural law obligation.
  1. There are those inclinations that human beings share with all other creatures, especially a desire to continue in existence. The corresponding moral imperatives include a prohibition on murder, suicide, and mutilation and the command to do what it takes in order to exist for oneself and others.

2. There are some inclinations that human beings share with other animals, especially a desire to grow, reproduce, and use one's powers of sensation and locomotion. The corresponding moral imperatives include the duties to care for one's offspring, as well as prohibitions on activities that would imperil the propagation of the species.
  3. There are some inclinations that are unique to human beings by virtue of their possession of intellect and will, such as the desire to learn and to live in society. The corresponding moral imperatives include prohibitions on lying and on offending those with whom one must live, as well as the duties to honor one's elders and to use one's talents.
  4. The examples of duties and prohibitions cited here are not in any way intended as exhaustive, but simply as illustrative of what reason can discover.
  5. The negative commands of the natural law are viewed as universal and exceptionless, binding always and everywhere. The positive commands, on the other hand, bind only when one considers the circumstances.
  6. For example, one need not always tell all the truth one knows, but one may not deliberately deceive by untruth someone who has the right to know. Likewise, one need not always be feeding oneself or others, but one may never deliberately starve oneself or others to death. And so on.
- C. Now, the discovery of these secondary precepts of the natural law does not exhaust the resources of reason reflecting on our God-given nature. Tertiary precepts can be articulated as we consider with greater precision and detail what will foster and what will frustrate our natural end.
1. Natural law should not try to settle every matter with the same degree of clarity and certainty.
  2. But one should never foreclose the effort to try to discern morality by this method, because it is the most reliable natural means for attaining objectivity, universality, and intelligibility in ethical matters.
  3. Actual observance of morality will require not just knowledge of what is good and right but also the assistance of such factors as the natural virtues that one can acquire by habituation; community support by law and custom, as well as

by praise and blame; divine assistance through grace in the form of the supernatural virtues and other forms of special assistance; and so on.

### **Suggested Reading:**

Thomas Aquinas, *Summa theologiae* (*Summa of Theology*), I–II, 90–97, especially q. 94 on “Natural Law.”

Yves R. Simon, *The Tradition of Natural Law: A Philosopher’s Reflections*, edited by Vukan Kuic and with an introduction by Russell Hittinger (New York: Fordham University Press, 1965, 1992).

### **Questions to Consider:**

1. Aquinas puts enormous emphasis on the idea that we need to reflect on our natural inclinations to obtain the data necessary for reason to determine our moral obligations under the natural law. What are the advantages and disadvantages of such a method? What grounds are there for ever coming to the conclusion that a natural inclination might be badly disordered?
2. Aquinas makes a much sharper distinction (than did the canonists) between natural law and divine law. Why does he do so and what are the advantages and disadvantages of doing so?

## **Lecture Thirteen**

### **Late Medieval and Early Modern Views**

**Scope:** Philosophers in the modern period progressively liberated themselves from connections with theology and the Church. The idea of natural law had been part of a vast hierarchical vision of the university, but it came to be a revolutionary ideology for the transformation of the political and social order. In part, this came about under the influence of nominalism's denial that there are such things as natures, but also as the result of voluntarism, which sees the force of moral obligation in the natural law to rest in God's will. For the sake of addressing questions of law and politics in a religiously divided Europe, some early Protestant thinkers used the scholastic terminology of natural law to separate natural law from theology, by urging that natural law would still oblige, even if there were no God as the author of nature.

### **Outline**

- I. In the fourteenth century, there was a widespread reaction against the Thomistic synthesis. In general, it took the name of nominalism, and we will consider William of Ockham as its greatest representative.
  - A. Metaphysical nominalism is the position that universals are only names for the similarities found among individual objects, rather than terms by which to express the real essences of things.
    - 1. This is a radical break with the moderate realism of such philosophers as Thomas Aquinas, who admitted the existence of many "natural kinds" of things in the universe.
    - 2. It is impossible from this starting point to affirm the existence of a universal moral law founded on essential aspects of human nature. If there is a universal moral law, there must be some other source for it, such as divine command.
  - B. William of Ockham (1290–1349), an English Franciscan at Oxford, took the position of metaphysical nominalism, denying that there were any such things as real essences.
    - 1. Ockham's razor ("Shave away unnecessary entities!") is an extremely useful and important tool for avoiding the postulation of unnecessary hypotheses. As a principle of



parsimony, it forbids us to assume any additional layer of explanation if we can explain a phenomenon without it. In point of fact, the principle predates Ockham and was invoked by such figures as Aquinas.

2. But this principle of parsimony is a two-edged sword, because it also justifies us in postulating the factors without which we cannot give an adequate explanation for some phenomenon. This principle is a perennial tool for good science and good philosophy.
3. What is in question is whether universal essences are saved or shaved away by Ockham's principle of parsimony. Granted, there is no reason to suppose that there are actually separate essences that are one more part or building block in the composition of any object (this seems to have been Plato's mistake in postulating a theory of ideas separately existing in a distinct world of ideas).
4. But it seems impossible to account for how we know the many separately existing physical objects all to be members of this or that natural kind, unless they really do have the same structural principle; that is, the same essence (universally true of each member of the kind). Yet, this is what Ockham denies, and this denial makes it impossible to speak of natural law.

**II.** Paradoxically, Ockham still writes explicitly about natural law, using the term in three distinct senses.

**A.** In the first sense, he uses the term to mean the unchangeable commands of natural reason, such as "never commit adultery." But Ockham does not tell us how such principles could ever be discovered, if all that we can do is to impose general names on the perceived similarities and can never come to know the natures of anything.

1. Either he is being inconsistent here, or he felt a need to grant that human beings receive some kind of divine inspiration about moral principles deep within our natures, even if we are unable to reason to the natures of anything on our own.
2. This was an intractable problem for nominalism, not only in the context of theological discussions such as this, but also in later secularized contexts. In the next lecture, we will see Hobbes attempt a theory of natural law that does not rely on any capacity to know the natures of anything.

- B. A second sense concerns precepts based on our natural equality before the Fall but no longer binding to conscience. On account of sin, universal freedom and the common ownership of goods have been changed by the need to make such arrangements as private property and slavery.
  - 1. Ockham is a voluntarist (one who takes God's will, rather than divine reason, to be the ultimate source of laws).
  - 2. Unwilling to allow any restrictions on God's power or freedom, Ockham holds that natural law is binding only because commanded by God.
  - 3. God does not ordinarily alter the content of natural law, but there is nothing inherently impossible about using his absolute power to do so. Even adultery could be right, and the categories of what human reason finds right do not constrain God.
- C. A third way in which Ockham speaks about natural law involves principles that have come to be known "from the law of nations or from some human deed."
  - 1. Ockham called this *ius naturale ex suppositione* ("the natural law by supposition"); that is, what we must act on as if it were a natural law, such as necessity of consent for the legitimacy of any government.
  - 2. But this idea entirely evacuates the notion of "natural law" of its traditional meaning and merely preserves a useful rhetorical term for the elaboration of an entirely different kind of ethics.

**III.** Baroque scholasticism revived natural law theory in the sixteenth century as part of a general recovery of Thomistic realism in philosophy and theology. Among the interesting figures of this period are the Dominicans Cajetan, Banez, and de Vitoria, as well as Jesuits, such as Bellarmine, Lessius, and Suarez, who will serve as our example here.

- A. Francisco Suarez (1548–1617), the author of *On Laws* and *God the Lawgiver*, tried to combine the intellectualism of Thomistic natural law theory with the voluntarism favored by the metaphysical nominalists.

1. The order of nature on which human reason reflects in order to discover natural law, Suarez argues, is itself a reflection of God's immutable and rational nature.
  2. But the obligatory force of natural law is the will of God, because all law depends on the command of a superior. God's will makes the natural law binding on conscience, even in those respects where our reason comes to discover the reason that a given moral precept commands what it does and where we are unaware of God's intention that we should obey it.
  3. For example, we might not know that God has forbidden the swearing of false oaths and testimony, but we might have figured out for ourselves that human society cannot survive if false oaths and testimony are morally permitted.
- B.** Although Suarez claims to be following Aquinas, much of his thought is responsive to Ockham and nominalists.
1. Would it not be denial of God's omnipotence if it were not possible for God to command us even to hate him?
  2. To avoid the voluntarist notion that God can simply choose to annul natural law by direct choice, Suarez spends huge effort interpreting scriptural passages, such as God's command to Abraham to kill his son Isaac or his directive to the prophet Hosea to have intercourse with a prostitute, as situations in which the divine command altered the nature of the actions in question.
- C.** Like Nicholas of Cusa, Suarez finds in natural freedom the basis for linking political legitimacy to the consent of the governed.
1. Likewise, he finds *ius gentium* ultimately to be based on the consent of various nations to be governed by some rule or policy.
  2. Unlike Aquinas, Suarez denies that the precepts of *ius gentium* are conclusions of natural law.
  3. One can begin to see here the change from understanding the *ius gentium* as that set of common legal principles that is recognized so broadly by many cultures, because each of them has reflected to some degree about human nature. The modern meaning of *ius gentium* is international law based on the consent of sovereign nations (such as commercial relations and diplomacy).

**IV.** The perceived need for objectivity in morality, especially in a period of deep-seated confessional differences, kept the notion of natural law an attractive option. As an example of early Protestant thinking on natural law, we will consider the thought of Hugo Grotius, a figure who had enormous influence on the history of natural law thought.

**A.** Hugo Grotius (1583–1645), a Dutch (Arminian Calvinist) Protestant, used natural law for a secular, non-theological purpose: the establishment of an international legal system that includes both natural law and human positive law.

1. Grotius's book *The Law of War and Peace* (1625) defines natural law in a manner that anticipates, but does not yet reach, the stress on human autonomy that will be typical of the later deists: "The law of nature is a dictate of right reason, which points out that an act, according as it is or is not in conformity with rational and social nature, has in it a quality of moral baseness, or moral necessity; and that, in consequence, such an act is either forbidden, or enjoined by the author of nature, God" (Bk. I, ch. 1).
2. The effort to provide an independent validation of natural law by reason had often been made by medieval scholastics, but the decision to do so had a whole new meaning at this time of fractious disputes between Catholics and Protestants, given the search for a non-religious ground for regulating the relations among states.

**B.** One of the most important but controversial claims by Grotius is that natural law would still have validity "even if we should concede what cannot be conceded without the utmost wickedness, that there is no God, or that the affairs of men are of no concern to Him" (*De iure belli ac pacis*, Prolegomena, #11).

1. This claim still accepts that God is the ultimate source of natural law.
2. But historically, it opens the way to a secularized version of the theory.
3. In some respects, the work of Grotius seems to be an effort to devise a system of natural law based on deduction from just a few self-evident truths, rather than on inductive observation of human society. For instance, he equates its precepts with mathematical formulae: "Just as God cannot cause that two

times two should not make four, so He cannot cause that that which is intrinsically evil be not evil.”

4. But Grotius also offers some reflections based on observation, such as the need that promises and treaties be observed if there is to be peace in society.
- C. Grotius’s version of natural law theory has political applications.
1. For Grotius, the right to wage just war flows from the basic natural right to self-defense.
  2. He offers a justification for absolutism when he notes the right of a people to deliver itself over to a sovereign for the sake of various advantages.
  3. He even offers a natural law basis for slavery in those cases in which a person has voluntarily surrendered himself to someone seen to be superior or has suffered defeat in a just war.
  4. In Grotius, the *ius gentium* is not thought of as the set of common elements in all legal systems, but as a law among nations, established by either expressed or tacit consent. There may be a close relation of *ius gentium* to the natural law in matters of content, if the parties so decide, but its provisions are taken to be the result of agreement among the contracting nations, not a matter of natural law obligations.

### **Suggested Reading:**

Stephen Buckle, *Natural Law and the Theory of Property: Grotius to Hume* (Oxford: Clarendon Press, 1991), esp. pp. 1–124.

Knud Haakonssen, *Natural Law and Moral Philosophy: From Grotius to the Scottish Enlightenment* (Cambridge: Cambridge University Press, 1996).

Richard Weaver, *Ideas Have Consequences* (Chicago: University of Chicago Press, 1994 [1948]).

### **Questions to Consider:**

1. In a period or a culture of religious pluralism, what is it that natural law can offer with respect to settling contested social and political questions in matters of morality?

2. Are the ultimate roots of natural law obligation matters of reason or will? That is, are natural law obligations ultimately binding because of decisions by the author of natural law, or are the obligations of natural law binding to human conscience, because it comes to understand the real natures of things?

## **Lecture Fourteen**

### **Hobbes and Locke**

**Scope:** Liberal individualism began to emerge in the period from the sixteenth to the eighteenth centuries. On the one hand, we have the radical individualism of Thomas Hobbes. Hobbes assumed a state of nature in which there is no government or social organization, but only the drive for self-preservation that places one individual in competition with others who operate under similar drives in a war of all against all. Hobbes sees natural law as a set of practical rules for survival. By contrast, John Locke follows such thinkers as Hooker and Pufendorf and offers a theory of natural law that focuses on natural rights. He assumes that natural equality prevailed in the original condition of peace and good will, but that there was a willingness to establish a social contract and to surrender certain prerogatives, such as the power to punish those who have done us wrong, in order to gain more secure protection for one's other natural rights.

### **Outline**

- I.** Some important characteristics typical of modern forms of natural law theory include rationalism, individualism, and political radicalism.
  - A.** The theory is rationalist in the sense given to that word in the history of philosophy; namely, that claims to have knowledge of the truth are restricted to the products of human intelligence. In principle, a skeptical attitude is adopted toward all religious claims to have any knowledge on the basis of faith and revelation. The natural law theory of this period has broken its medieval associations with theology and the Church.
  - B.** The theory is individualist in that society is envisioned as the result of human agreement (the social contract), not as an entity with its own nature. It makes an increasing appeal to consent and consensus of community.
  - C.** It is politically radical in the sense that a revolutionary ideology is offered as a justification for vast changes in economic, political, and social relationships.

- II.** *Leviathan* (1651) by Thomas Hobbes (1588–1679) contains a radically individualistic natural law.
- A.** The assumptions of Hobbes’s analysis are twofold:
1. Hobbes sees a state of nature in which organized society and government are absent. Life in this state of nature is “solitary, poor, nasty, brutish, and short.”
  2. There is a predominance of the inner drive for self-preservation that often puts one person into conflict with others who operate under the same drive.
- B.** The only viable solution to the problem of conflict in the pure state of nature is to seek peace through a social contract, in which one calculates self-interest and decides to surrender one’s right of natural liberty to a sovereign.
1. The submission to the sovereign is expected to be complete, except that the sovereign may not threaten the lives of the citizens (which was the reason for entering into the social contract).
  2. The natural right of freedom is conceived by Hobbes as the right to do anything likely to preserve one’s life. This is a license unlimited in the state of nature (before the creation of society and government) to do whatever one sees fit for one’s existence and safety.
- C.** For Hobbes, the laws of nature (*Leviathan*, ch. 15) are not “laws” at all, because Hobbes cannot envision a law as binding unless backed by sufficient force, and only in society will there be certainty of enforcement by the sovereign.
1. Rather, morality is thought to consist of certain practical rules of survival that restrict natural liberty for the sake of gaining greater security and protection and, thus, for ending “the war of all against all.”
  2. The single natural law principle that Hobbes has is that one should at all costs preserve oneself. Prudent reasoning might well involve deciding to achieve self-preservation by respecting the peaceful social order, which also allows others to preserve themselves, even if doing so will mean that part of one’s liberty is curtailed by the need to obey the sovereign who is maintaining the social order.
  3. In effect, it is a choice to act for the interests of the community (which coincides with the individual’s own long-



term interests) over the demands of impulse or short-term self-interest. Morality, for Hobbes, is a matter of following the single natural law of conducting oneself rationally for the sake of self-preservation.

- D. The sense in which Hobbes's theory is still natural law is that he presents moral principles derived from what he considers to be the attributes of human nature.
1. Where traditional natural law assumed a natural order to the universe and to society, Hobbes posited human artifice to be the sole producer of order out of chaos, given the fact that there will invariably be conflict between the desires and actions of people.
  2. Hobbes replaces the hierarchy of goods typical of older natural law theories with a single project: self-preservation. Where earlier theories envision society as constituted by various families and groups, Hobbes sees society as a collection of individuals.
  3. Traditional natural law theory saw an important receptivity to reason in its function of appreciating the order of the universe, but Hobbes sees reason only as instrumental.
  4. Hobbes's radical ideas generated a vigorous reaction by those who thought that people were basically rational and moral even in the state of nature.
  5. In *De jure naturae et gentium* (1672), Samuel Pufendorf (1632–1694) argued for the existence of two innate inclinations: a natural sociability, as well as an inclination to self-love.

III. John Locke (1632–1704) often follows the line of thought begun by Pufendorf but manages a creative alternative to Hobbes that had widespread influence.

- A. In the *Second Treatise of Civil Government* (1691), Locke departs from a much more traditional view of natural law that he had taken in his 1664 work, published only in 1954 as *Essays on the Law of Nature*.
1. Following a suggestion about the need in pre-political society for communal consent to some form of government in the *Laws of Ecclesiastical Polity* (1593) by Richard Hooker (1553–1600), Locke articulates a notion of the social contract

made by individuals in the state of nature for better protection of their natural rights.

2. Locke envisions the state of nature not as Hobbes's war of all against all, but as a state of "peace, good-will, mutual assistance, and preservation" (#19). The natural equality of all individuals is Locke's reason for the necessity of the individual act of consent to any proposed government (and, thereafter, the tacit consent of individuals to obey the rules of the existing community in which they find themselves).
- B.** Even though the purpose of government is to render freedom more secure, what the individual gives up when entering civil society is some of the natural freedom each person possesses in the state of nature. For Hobbes, freedom was a fact of the state of nature; for Locke, it is a moral right.
1. The function of government is to protect the natural rights of each individual to life, liberty, and property that were harder to preserve in the state of nature.
  2. There are various duties that come once the social contract is in place, but there already were certain moral obligations in the state of nature.
- C.** Property rights are of central concern to Locke.
1. For Locke, the concept of property comes from human nature.
  2. The right to exclusive material possession (property) comes from the mixture of one's labor ("property in his own person") with land or goods that do not already belong to someone else. Only through appropriation by an individual are the resources of the earth able to be used effectively for the preservation of humanity.
  3. The only natural limit on the accumulation of property is spoilage. The invention of money (which is not perishable) removes any limit on accumulation.
- D.** Locke urges that there is a right to revolution if natural rights are seriously violated and if no other way to adjudicate the problem remains.

### **Suggested Reading:**

Stephen Buckle, *Natural Law and the Theory of Property: Grotius to Hume* (Oxford: Clarendon Press, 1991), esp. pp. 125–298.

A. P. d'Entreves, *Natural Law: An Introduction to Legal Philosophy* (Piscataway: Transaction, 1994 [1951]).

Leo Strauss, *Natural Right and History* (Chicago: University of Chicago Press, 1953).

**Questions to Consider:**

1. The standard list of “natural rights” includes life, liberty, property, and the pursuit of happiness. Are there any other basic rights you would add to the list? Do “natural rights” need somehow to be grounded in “human nature”? By what criteria might we distinguish a legitimate natural right from what we merely wish for (however intensely)?
2. What rights would you consider to be “civil” rather than “natural”? That is, what rights are rights only because they have been granted by some civil society, rather than grounded in our human nature (regardless of whether a particular government recognizes them in law)?

## **Lecture Fifteen**

### **Natural Law and the Founding Fathers**

**Scope:** The founders of the American experiment in representative democracy drew heavily on the tradition of natural law that they knew from English jurisprudence, as well as from political philosophers, such as John Locke. The Declaration of Independence claims the witness of “Nature and Nature’s God” for its assertions about our inalienable rights to life, liberty, and the pursuit of happiness. Not only do the U.S. Constitution and the Bill of Rights contain such concepts as natural rights, the rule of law, the fundamental equality of all human beings, and the separation of powers, but the very supremacy of the Constitution is rooted in the recognition that it embodies the eternal and immutable principle of natural justice. Subsequent judicial practice has invoked the natural law tradition of the superiority of justice to statutory law in the famous doctrine of judicial review.

### **Outline**

- I. The Declaration of Independence was composed by Thomas Jefferson and adopted by the Second Continental Congress.
  - A. The document relies heavily on the natural law theory of John Locke and specifically mentions the natural right of a people to rebel when there is no other way to redress violations of that people’s rights.
    1. In addition to Locke’s doctrine of natural rights, other important sources for Jefferson include British jurists Edward Coke and William Blackstone for discussions of the possibility of having the judiciary enforce natural law limits on legislation.
    2. There is a notable difference between Locke’s doctrine of natural rights and Jefferson’s Declaration of Independence. The latter document lists as inalienable rights “life, liberty, and the pursuit of happiness.” Locke had made the third item “property.”
    3. Before the Continental Congress changed the wording, Jefferson’s original draft used the words “sacred and

inviolable” rather than “inalienable.” This wording may show what Jefferson had in mind by the term *natural right*.

- B. Sir Edward Coke’s *Institutes and Reports* were the standard works on British law until the publication of Blackstone’s *Commentaries*.
  - 1. Coke cites *Calvin’s Case* (1608) in which “the law of nature cannot be changed, or taken away” and “should direct this case.”
  - 2. He also cites *Bonham’s Case* (1609): “the common law will control the acts of Parliament and sometimes adjudge them to be utterly void.”
- C. Sir William Blackstone’s *Commentaries on the Laws of England* (1765) paradoxically contains both statements about the supremacy of natural law to all human legislation and assertions about the virtually unlimited authority of Parliament.
  - 1. For example, in support of natural law, Blackstone states: “This law of nature, being coeval with mankind and dictated by God himself, is superior in obligation to all others ... No human laws are of any validity, if contrary to this.”
  - 2. Alasdair MacIntyre points out that Blackstone understands natural law entirely in terms of seeking one’s own happiness, which in effect, empties natural law of all theological content. (See A. MacIntyre, *Whose Justice? Which Rationality?*)
  - 3. In commenting on the limits of the rights of property, Blackstone holds that such practices as eminent domain are justifiable, as long as compensation is paid, precisely because the consent of the property holder has been given, even if only through an elected representative.
  - 4. American colonists relied both on their historic rights as Englishmen and on their natural rights (based on the superiority of natural and common law) to stress the illegitimacy of legislative activity without the consent of the governed and, ultimately, the right to rebel.
  - 5. Natural law allusions occur in the text of the Declaration: “Nature and Nature’s God.”
  - 6. Ironically, Jefferson’s first draft of the Declaration actually condemns slavery (and, thus, may be evidence that even the slaveholder Jefferson recognized slavery as a violation of the natural right to liberty), but the passage was removed by the Continental Congress, presumably out of a desire not to

weaken support for the cause of independence by alienating slave owners.

7. Jefferson tells us that the fact of slavery in his country haunted him “like a firebell in the night”; “Indeed, I tremble for my country when I reflect that God is just, and that his justice will not rest for forever.”

**II.** The Constitution of the United States not only reflects a number of important natural law concepts, but in the course of the Republic’s history, has come to be regarded with the veneration it enjoys because of its embodiment of the “higher law” that is natural law.

- A. The legality and supremacy of the Constitution depend on natural law.
- B. Granted, one strand of thought takes such lines as “ordained... by the people of the United States” in an entirely voluntarist sense, as if laws were simply an expression for the commands of the human lawgiver and as if the highest possible source for such commands consists in “the will of the people.” There can be no doubt that the consent of the governed plays a large role in the common understanding of the legitimacy and authority of American constitutional government.
- C. But historically, the claim that supremacy and legitimacy come solely from being rooted in the popular will is a theory of relatively recent origin that is forgetful of the “higher law” background that was operative for the Founders of the American Republic.
- D. For the American Founders, the supremacy of a constitution comes from its content, that is, the way in which a given constitution embodies essential and unchanging justice, to which the people give witness precisely by choosing to enact such a constitution. To this notion, essay after essay in *The Federalist Papers* give witness.

**III.** Among the natural law concepts that are most prominent in American constitutional history are the notions of the superiority of the rule of law to rule by power, judicial review, the separation of powers, and fundamental human equality.

- A. In contrast to the voluntarist assumptions of all rule by power, the American Constitution outlines a program for rule by law that

depends on intellectual appreciation of the greater likelihood of natural justice and objective fairness when all parties know in advance the rules for conducting public business and public regulation of private enterprise.

- B.** The power to supervise legislation and to nullify anything inconsistent with the Constitution does not rest on a power explicitly given to the judiciary anywhere in the Constitution, and no court in England had such a power. Rather, the American practice of judicial review was inaugurated by Chief Justice John Marshall in *Marbury v. Madison* (1803) and is now taken for granted.
1. Even though not bestowed by the Founders, the power of judicial review can be argued to flow from the nature of the judicial office itself. The theoretical justification for this limitation on the power of the legislative branch almost invariably invokes the tradition of natural law by insisting that statutes that violate natural justice need to be voided and that there must be some independent branch of government capable of doing so.
  2. In some periods, the jurists have restricted themselves to testing for the conformity of statutory and administrative law to the Constitution. Blackstone and other English theorists had consistently rejected attempts to assign to judges any power to void legislation found to be opposed to the higher natural law. They presumed that Parliament would correct errors identified by the court.
  3. In other periods, jurists who presumed a close association between the Constitution and natural law have been more willing to look to concepts of the natural law, even when not explicitly stated in the Constitution, especially when the common law (the usual source of individual rights) has fallen short of judicial expectations. One sees this frequently in the argumentation used in civil rights cases.
- IV.** The separation of powers into distinct branches of government (executive, legislative, and judicial) was a new political idea designed to restrain individuals in any one of these branches who would attempt to dominate a situation or even usurp the powers assigned elsewhere.

- A. The justification for the separation of powers resides in the recognition that justice, not power itself, is the warrant for the exercise of any power by authority.
- B. The text of the Constitution tends to make legislature supreme, but to ensure the limitation of power, the system calls for a department of government capable of checking the legislature. As the judiciary has developed, it has become a branch that may appeal to the standard of natural justice to temper the possible abuses of that power to avoid a possible “tyranny by the majority.”
- C. The notion of inalienable rights (so rhetorically prominent in the Declaration) is incorporated into American constitutional government through the Bill of Rights, the first ten Amendments of the Constitution. That the rights explicitly identified here are a translation of the principles of eternal justice in the form of personal and private natural rights is clear from the Ninth Amendment’s stipulation that “the enumeration of certain rights in this Constitution shall not prejudice other rights not so enumerated.”

### **Suggested Reading:**

Edward Corwin, “The ‘Higher Law’ Background of American Constitutional Law” (1928, 1929) in *Corwin on the Constitution*, Vol. I: *The Foundations of American Constitutional and Political Thought, the Powers of Congress, and the President’s Power of Removal*, ed. Richard Loss (Ithaca and London: Cornell University Press, 1981), pp. 79–139.

Charles Grove Haines, *The Revival of Natural Law Concepts: A Study of the Establishment and of the Interpretation of Limits on Legislatures with Special Reference to the Development of Certain Phases of American Constitutional Law* (Cambridge: Harvard University Press, 1930).

### **Questions to Consider:**

1. Is the right to free speech a natural right or a civil right? Is it unlimited? By what criteria could it ever justly be restricted?
2. For the sake of improving the likelihood of achieving justice in a society, what are the chief advantages and disadvantages of such ideas as the separation of powers and limited government?



## **Lecture Sixteen**

### **Descartes, Rousseau, and Kant**

**Scope:** Many of the important philosophers in the modern period cast doubt on the entire project of natural law. The mechanization of the world picture in the seventeenth century went hand in hand with the rejection of the notion of final causality that is so important to the project of deriving an ethics from a consideration of nature. Political thinkers such as Jean Jacques Rousseau severely criticized traditional natural law ideas, but paradoxically, Rousseau's own social contract theory actually invokes the notion of human nature as the source of freedom and equality as basic principles of his moral theory. Immanuel Kant took the principles that Rousseau had elaborated for the political order (universality, generality, impartiality, and free consent) as the basis for individual morality. Although the main thrust of Kant's theory of the categorical imperative is to stress the autonomy of reason, one of Kant's own formulations of the principle actually invokes the language of the natural law, and the application he makes of his principles often seems to presume the very sort of knowledge of nature that he holds to be inaccessible to us.

### **Outline**

- I. In the seventeenth and eighteenth centuries, we see the elimination of final causality and the compartmentalization of ethics and science.
  - A. René Descartes (1596–1650) is one of the founders of modern philosophy.
    - 1. The natural law theory of Baroque scholasticism is one of the first casualties of his strict compartmentalization of the theoretical and practical spheres of thought. For mechanized science, all references to final causality have to be removed.
    - 2. Because traditional natural law theory focuses on the end or goal of human life, Descartes regards it as entirely unacceptable as a scientific basis for morality.
    - 3. In many ways, the strict separation he invokes between science and ethics begins the pattern typical in modern philosophy of emphasizing freedom and autonomy and seeing

any natural standard of morality as constraining and heteronomous.

- B.** Jean Jacques Rousseau (1712–1778) opposed the notion of natural law as a deductive system by which to know the law that governed humanity in the state of nature.
1. In his *Social Contract*, he attacks the traditional notion that it is possible for reason to learn the principles of natural law by reflecting on either the state of nature or the current state of civilization. He attacks the intellectual natural law theories of both Roman theorists and such moderns as Grotius and Hobbes, especially their justifications of slavery.
  2. In *Emile* (1762), Rousseau has the Vicar of Savoy praise “the inner light” of conscience, whose commands “are not judgments but feelings.” Likewise, in his *Discourse on the Origin of Inequality* (1754), Rousseau defends an emotive (intuitionist) view of morality.
- C.** But Rousseau does treat human nature (when considered in light of such true feelings of the heart as pity and altruism) as a useful guide for learning the fundamental principles of morality and politics. Although deeply opposed to an intellectual theory of natural law, Rousseau champions the notion that our better and nobler feelings can help us discover our true nature as free individuals living according to laws that we impose on ourselves.
1. Curiously, Rousseau uses some of the same notions that Locke and Pufendorf used (the state of nature and the social contract) but for vastly different purposes.
  2. The chief emotions of someone in the state of nature, for Rousseau, are pity and self-love, flowing from spontaneous natural goodness but as yet untrained.
  3. Virtually all of Rousseau’s writings are about the need for education that comes through social relationships of ever-greater complexity.
  4. But civilization can as easily corrupt individuals as improve them; therefore, much of Rousseau’s literary energies go into proposing ways for retaining the advantages that government and culture bring while rooting out the often attached evils of inequality, self-deception, and exploitation.
  5. In short, Rousseau wants to cultivate the sort of life that is possible only in society and, at the same time, to maximize the

original freedom of the state of nature before the introduction of government.

- D. The preferred way to resolve the tensions between the constraints of civil society and the natural freedom of equals is through the social contract.
  - 1. Rousseau envisions the social contract as the surrender of everyone to the “general will,” by which impartial laws for the common good, made by everyone’s participation in directly democratic processes (not by representatives), will thus freely apply to everyone.
  - 2. One point of connection to natural law theory here lies in Rousseau’s conviction that individuals who will the general good unselfishly (as part of the general will), will, in fact, produce a natural harmony, similar to the order of the universe championed by natural law thinkers since the Stoics.
  - 3. The idea of natural freedom has always had an important place in natural law theory, but Rousseau places it at the very center of ethics. For him, both moral and legal obligation can only be understood by each individual as the free and unforced acceptance of principles that apply to everyone. Governments that claim allegiance without consent are illegitimate.

**II.** The shift from nature to reason in ethics brings us to Kant’s categorical imperative.

- A. The willingness to see natural, as well as human, virtues grounded in natural laws goes back to classical antiquity.
  - 1. Philosophical distinctions between nature and morality, or freedom and law, were not meant to imply a total separation between the two.
  - 2. Ever since Immanuel Kant (1724–1804), however, it has seemed naïve to think them connected, given the wedge he drove between the world of nature and the world of morality.
  - 3. Where the ancients saw similarity and continuity between the laws of nature and the laws of morality, Kant stresses the differences.
- B. For Kant, freedom and autonomy are the most telling aspects of human nature.

1. Kant's theory of morals and law derives from his notion of human nature, especially his understanding of moral choice, but it is important to note that it is a very different view of human nature.
  2. Neither the analysis of physical nature nor the utilitarian calculation in terms of consequences is, for Kant, the proper standard of value.
  3. The most telling aspects of human existence are rationality and freedom; therefore, morality must be defined in ways that privilege reason and choice.
  4. Rather than link goodness to any external end or goal, truly moral action will be the action that by our reasoning we come to reverence as our duty and that we choose for no other motive than the recognition of this duty.
  5. In order to be a moral principle, a precept needs to be chosen for oneself, not imposed by someone else or by "nature" (seen as antecedent to choice).
- C. Kant calls the principle of morality the *categorical imperative* (namely, that one chooses to act or not to act solely on the basis of principle and never on the basis of the calculation of results). When trying to think out the morality of some possible action, one needs to state it in a universal form that could apply to everyone:
1. I will have to allow everyone to do what I choose to permit myself to do.
  2. I must deny to myself what I do not want others to be permitted to do.
  3. In short, I must never make an exception for myself.
  4. What Kant thought he was gaining for individual ethics by this highly formalistic view of ethics was the advantage that Rousseau sought for political morality: universality, impartiality, and free consent.
  5. Despite great differences between this system of ethics and natural law theory, it is interesting to note that some of Kant's alternative formulations of the categorical imperative still refer to the human person and to natural law. In one way, he, too, can be considered to be part of the natural law tradition.
  6. The original formulation of the categorical imperative is entirely formal: "Act in such a way that the maxim of your action can become law for all mankind." This is to make

reason the universal legislator. If a person fails to obey the universally valid maxim of reason, that person is no longer truly autonomous in Kant's judgment.

7. But one subsequent formulation focuses on the intrinsic dignity of each person: "So, act as to treat all men not simply as a means, but always as, at the same time, ends in themselves." This formulation rejects the entire utilitarian project, in which everything, including humans, is considered as possible items whose value is weighed in the utilitarian calculus of advantages and disadvantages, costs and benefits.
8. One can see Kant wrestling with the need to think in terms of a common human nature to find precepts that are universal, even while maintaining a commitment to personal freedom. For instance, he writes: "In this lies the paradox that merely the dignity of humanity as rational nature without any end or advantage to be gained by it, and thus respect for a mere idea, should serve as the inflexible precept of the will."

**III.** Rather than attempt to recount the history of natural law thinking in the twentieth century, we will use the remaining lectures to enter the debates over one or another aspect of natural law in the contemporary period.

### **Suggested Reading:**

Immanuel Kant, *Groundwork for the Metaphysics of Morals* (available in many modern translations).

Paul Sigmund, *Natural Law in Political Thought* (Cambridge: Winthrop, 1971), esp. chapter 7: "Rousseau and Burke: Critics or Exponents of Natural Law?" and chapter 9: "Natural Law in Law and History: Kant, Marx, and Modern Legal Theory."

### **Questions to Consider:**

1. How trustworthy do you find Rousseau's readiness to trust morality to the spontaneous natural goodness latent in everyone? Is moral virtue really a matter of letting this inner inclination move freely, or is there a need for discipline and virtue to train and guide spontaneous inclinations?

2. In some ways, the Kantian categorical imperative is simply a philosophical restatement of the Golden Rule: “Do unto others as you would have them do unto you.” But how can this position handle the problem of people who are willing to have done to them what we consider intolerable? Or, conversely, would those rugged independent souls who would rather have nothing done unto them have no obligation to love anyone else?

## Lecture Seventeen

### Can Rights Exist Without Natural Law?

**Scope:** Natural law thinking has often used a specific set of terms, but there is no need to do so. This lecture is devoted to one of the most frequent instances of natural law thinking today that rarely, if ever, invokes the term *natural law*. International organizations have regularly appealed to natural rights during the twentieth century, and many have included reference to them in their charters. Discussions about “human rights” tend to appeal to “human dignity” as grounds for the claims that people must respect in one area or another, whether it be the right to life, liberty, and the pursuit of happiness or access to education, jobs, communications, and so on. Fundamentally, this is natural law thinking, because it is an appeal to a higher, but unwritten, standard rooted in the type of being that humans are. Whatever disagreements there are about exactly what should be on the list of human rights, the reasoning by which one comes to the conclusion and by which one distinguishes such basic rights from rights that can be acquired and lost (contractual rights, for instance) is natural law reasoning under another name.

### Outline

- I. Today one hears more about rights (“human rights,” “civil rights,” and “human dignity”) than about “natural law.”
  - A. Rhetorically, these terms often seem intended as trump cards that ought to be decisive in political and legal discussion. What, if any, relation does the current romance with the rhetoric of rights have to do with natural law?
  - B. A pair of documents from the eighteenth century ground this terminology.
    - 1. The 1776 Declaration of Independence borrows heavily from the Lockean notion of individual rights in asserting the right to rebellion, but makes little reference to any correlative duties.

2. In some contrast, the 1789 French Declaration of the Rights of Man and the Citizen emphasizes the duties that individuals, by virtue of their human nature, have, as well as their rights.

**II.** The rhetoric of rights has become extremely influential in our culture.

- A. As a way of living under “the rule of law,” our culture has come to have a pervasively legal character.
  1. Although somewhat skeptical about the power of law to exert much direct influence on social behavior, de Toqueville noticed the strong impact on the morals and character of the American people of the prominent role that law was already playing during the 1800s.
  2. In her book *Rights Talk*, Harvard law professor Mary Ann Glendon comments on the far greater reach the law has now than then and notes that law, more than shared religion or culture, has come to be the primary carrier of such values as liberty, equality, and justice.
- B. Among the contributing factors to this development was the legal dimension of the struggle for civil rights during the 1950s and 1960s.
  1. In *Brown v. Board of Education* (a 1954 decision to which a unanimous vote of the justices gave remarkable moral authority), the Supreme Court chose to deal with certain problems of social justice that demanded reform but had experienced slow progress.
  2. Until that time, American constitutional law had focused on the division of authority between states and the federal government and on the allocation of power among the branches of the federal government, not on personal liberty. It was presumed that liberty would be well protected by certain structural features of our political regime.
  3. Since then, the courts have taken a range of issues away from local and legislative control and have found relatively broad new constitutional protection for many aspects of personal liberty, including such diverse issues as child abuse, treatment of the mentally and physically handicapped, diversity of lifestyle, consumer protection, cruelty to animals, prisons, hospitals, school systems, and the environment.



4. The re-conceptualization of what a right or entitlement is (not to mention the considerable expansion of the list of basic entitlements) has ensued by virtue of what Glendon calls “the story” the law is telling, the lesson it is teaching.
- C. Civil rights litigation has produced far-reaching effects on other areas of life.
1. Until recently, some important parts of the Bill of Rights were thought to apply only to the federal government, but the Supreme Court’s development of the doctrine of “incorporation” has meant that more and more of the rights guaranteed by the first eight Amendments were declared to be binding on the states; that is, they were incorporated into the Fourteenth Amendment.
  2. The Warren Court used the power of judicial review to protect all sorts of individual rights from interference by the states, as well as by the federal government, and currently, a vast amount of the Court’s work involves claims of violation of individual rights.

**III. A comparable rhetoric of rights has also come to permeate international discussion.**

- A. Lists of human rights have been incorporated into many documents, including the following:
1. 1948 United Nations Universal Declaration of Human Rights;
  2. European Social Charter of February 26, 1965;
  3. International Covenant of Civil and Political Rights of December 16, 1966.
- B. In general, these international documents tend to stress a balance between duties and rights, but they almost never try to make an argument about the ground of these rights; rather, they simply assert the rights claim as self-evident.
1. It may simply be that these are legal documents or political manifestos and not philosophical treatises.
  2. It may also be that those who issued these documents shy away from carrying such philosophical baggage as “human nature” or “the natural and intrinsic ends of the human person” and prefer to seek public recognition for their claims as evident to reasonable people.

- IV. But it is a legitimate philosophical question to ask about the ultimate basis of the rhetoric of rights, and for this purpose, natural law theory may be quite useful.
- A. To make a claim about rights and entitlements for some group, it is necessary to specify the group. If the group in question is the entire human race, then the basis for the claim will ultimately be the nature that all the members of this group share, as natural law theorists have often argued.
  - B. Appeals to human rights and human dignity are used both to affect desirable legislation and to ground the correction of what is perceived as bad laws, bad policies, and bad customs. In this function, the appeal to rights takes an approach similar to the formal practice of judicial review.
  - C. But adjudicating apparent clashes of rights, as well as assessing the legitimacy of any particular claim of rights (and, thereby, the duty of someone or some group to respect or redress those rights), both require that a reasonable case be presented to justify the claims being made.
  - D. Even without explicitly using the language of natural law, the rights approach actually bears considerable similarity to the tradition of natural law ethics, which has historically seen great shifts in the rhetorical terminology that made sense at any given time.
  - E. Merely to couch the claim in terms of “rights” does not settle the matter any more than to use a term such as “natural law.” What is always required is that arguments be provided that will convince the proverbial spectator, that is, the open-minded but reasonable person willing to discern good/bad, right/wrong, obligatory/forbidden/ permissible, in ways that are intelligible, objective, and universal as far as possible.

### **Suggested Reading:**

Mary Ann Glendon, *Rights Talk: The Impoverishment of Political Discourse* (New York: The Free Press, 1991).

Charles Grove Haines, *The Revival of Natural Law Concepts* (Cambridge: Harvard University Press, 1930), esp. pp. 75–234 on the use of natural law concepts in the public law of the United States.

Leo Strauss, *Natural Right and History* (Chicago: University of Chicago Press, 1950).

**Questions to Consider:**

1. Which rights would you be willing to include on a list of basic human rights that are possessed by every human being, regardless of whether recognized by a particular government, and which rights would you regard as civil rights, that is, belonging only to the citizens of a given country and protected by that country's laws? On what basis do you draw the distinction?
2. Are basic human rights genuinely inalienable? That is, does the possession of a human nature for as long as one lives make it impossible to have such a right removed or even willingly to surrender such a right? What do you think about these cases: the status of the "right to life" for a person convicted of a heinous crime or the legitimacy of selling oneself into slavery for the benefit of one's destitute family?

## **Lecture Eighteen**

### **The Question of Evolution**

**Scope:** One of the important presuppositions of classical natural law theory is the presence of such a thing as human nature. But modern biology has raised many interesting questions for natural law theory. Does the theory of evolution, for instance, negate all natural law and natural rights claims by reducing us to just another animal species—more intelligent, perhaps, more clever, and more powerful, but no different in kind? Among the related points that need discussion here is the materialism that is often assumed by proponents of evolutionary theory. Are the assumptions of materialism (that there is no such thing as spiritual or immaterial reality) justified? It also will prove helpful here to distinguish between “the natural law” in the moral sense of that term and scientific “laws of nature.” In a certain way, the terms are related, but in fact, they are conceptually distinct. The imperatives of the natural moral law involve norms for the evaluation of human conduct; the laws of nature are formulations of regularities that have been observed in the physical universe (including the sphere of human actions; e.g., psychological constants in human conduct).

### **Outline**

- I. Good cases can be made both for and against the theory of evolution, and this lecture will not try to settle the matter. Much depends on exactly what a given theory of evolution includes and excludes. Here, we will simply attempt to make some philosophical observations that bear on the question of natural law.
  - A. Darwinian and neo-Darwinian theories of evolution rely on two basic principles:
    - 1. Random variation: novelty in the world is said to come about in such a way as to produce new species. Various mechanisms (such as radiation from the sun, chance chemical interactions, and so on) have been proposed for explaining the variation that springs up, without invoking any notion of a mind somewhere that is designing the new species.

2. Natural selection: the winnowing process by which some species succeed while other species fail in the attempt to adapt to their environments, to meet the challenges that arise, and to reproduce themselves.
- B.** In *Darwin's Black Box: The Biochemical Challenge to Evolution*, Michael Behe readily grants that the process of natural selection is at work in the world, but he raises some important questions for evolutionary theory about the notion of random variation from the viewpoint of contemporary biochemistry.
1. Random variation, by definition, means that there is no "guiding hand" that in advance knows the purpose for which an assembly process is headed. This is crucial to the theory of evolution, in the strict sense.
  2. But living organisms all have biological structures of enormous biochemical complexity that need careful assembly at each level, from the biochemical level of atoms, molecules, proteins, enzymes, and on up.
  3. To say that an object is "complex" is to say that it is composed of irreducibly different parts, that is, parts that are different in kind from one another and that all must be present for the whole object to function. Consider, for example, the different "parts" involved in a mousetrap. At the very least, the mousetrap has a platform, a spring, a hammer, a catch, a holding bar, and some staples or other fasteners to keep things in place on the platform. Without each of these parts, the whole object does not function.
  4. Organic objects of even the simplest variety are enormously more complex wholes made up of biochemical parts of very different kinds. At the very basic level, these parts are made up of different kinds of atoms, which must come together under the right circumstances to form one kind of molecule rather than another. Likewise, those molecules must come together in just the right quantities and arrangements to form proteins, and so on.
  5. Enormously long chains of different kinds of proteins and enzymes need to come together (without any outside guidance or the kind of assistance that a mind can offer) in just the right quantities and amounts for a biological structure to be present and to perform a certain function for the organism as a whole.

6. Behe then issues a general challenge to the field of biochemistry to supply the evidence of actual biochemical pathways by which the organs of even simple biological organisms could have developed randomly, without any guided hand. To date, none has been provided.
  7. Behe's theories are hotly debated in the current literature, but it is interesting to witness this vigorous exchange in the community of scientists about one of the crucial, but insufficiently scrutinized, parts of the theory of evolution.
  8. If evolutionary theory were to fail as a scientific theory, this objection to natural law, of course, immediately fails as well.
- C. We must note that many other questions and challenges have been raised against evolutionary theory, and much evidence and argumentation have been marshaled in its support.

II. If, for the sake of discussion, we were to accept the theory of evolution, we still need to ask about the implications for natural law thinking in ethics. It is important to divide the question to give proper consideration to the question of natural kinds (first raised in Lecture Two) and the question of morality as characteristic of the natural kind called humanity.

- A. The effort to determine whether human beings are different in kind or just different in degree in comparison with other animal species depends not just on biological information, but on philosophical clarity about what *kind* and *degree* mean.
1. One group of things can legitimately be called "different in kind" if all members of that group possess (in varying degrees) some property that is totally lacking in all other objects.
  2. On the other hand, the members of a group can be said to "differ in degree" only if the property in question is found in all the members but in varying amounts.
  3. In *The Difference of Man and the Difference It Makes*, Mortimer Adler provides an especially fine treatment of how to apply this distinction to the case of the human species. It is only reasonable to grant that in many respects, human beings share properties with animals in general, and in some respects, we share properties only with that group of animals called the

primates. Yet, there seems to be a specific difference that distinguishes human beings from other animals: rationality.

4. Although human beings show their rationality in many ways, Adler focuses on the propositional character of human language; that is, the ability demonstrated in all human cultures to learn languages (not some hard-wired species-wide language, but the language specific to a culture and sometimes other languages, as well).
  5. For Adler, the presence in the human species of the rationality needed for language (including its flexibility for expressing so many kinds of thought, its ability to register what is and is not the case, and even its capacity for deception and error, as well as for truth and insight) demonstrates beyond doubt that human beings do constitute a distinctive natural kind.
  6. But for Adler, neither language nor rationality definitely decides the question of whether this difference in kind was produced by the random variation hypothesized in evolutionary theory or by the guiding hand of some divine creator. Even if evolutionary theory proves true, this seems only to reinforce, rather than deny, that we need to investigate the question of morality as it bears on this distinct species (natural kind).
  7. On the interesting question of whether any other animal species (dolphins, for instance, or chimpanzees) may be capable of learning a propositional language (even if they have not developed one for themselves), Adler finds that this simply relocates (not denies) the question of morality. That is, it might mean that we need to include such species in the realm of moral protection, as having the rights of rational agents, but this would only be to expand the sphere of morality, not to eliminate it.
- B.** Whether the human species is the product of some sort of random variation or not, it does seem to be a distinct natural kind, with rationality as its specific difference among all other animal species, even those similar in other respects.
1. Among the activities that are specifically distinctive of humanity as a natural kind are thinking and choosing, and it is precisely these that place humanity in the sphere of morality.

2. We are only morally culpable for what we know and for what we have chosen to do or to refrain from doing. To the extent that we did not know enough to make a deliberate choice or that we were forced (by physical coercion, addictive habit, psychological pressure, or the like), our responsibility is diminished and may even be removed altogether.
  3. It is precisely because no animal of any other species, so far as we know, has either the kind of knowledge or the power of making the deliberate choices needed for entering into the sphere of morality that we do not hold these creatures morally praiseworthy or blameworthy. Of course, many people are fond of praising the loyalty of their dogs, but on reflection, this is really a matter of appreciating the devoted affection that these pets show, not a moral judgment.
  4. But we do, increasingly, hold human beings morally accountable as they come to the age of reason. For those human beings who are unable to think things out for themselves or to choose responsibly, we make allowances out of common human sympathy, and we often bear responsibility for their care and protection.
- C. Does evolutionary theory, then, invalidate natural law ethics?
1. Natural law ethics stands or falls with the claim that there is a distinctive human nature.
  2. Likewise, natural law theory claims that there are certain patterns of activity that intrinsically frustrate the natural ends intrinsic to human beings, just as there are certain kinds of conduct that foster the fulfillment of these natural ends. If this is not true, natural law theory has been defeated.
  3. Evolutionary theory does not invalidate either of these assumptions. Admittedly, some evolutionary theorists make sweeping assertions that morality is only the matter of custom or the imposition of force by one group on another or even that morality is simply evolutionarily determined. None of these claims is intrinsic to evolutionary theory itself, however, and most of the time, these prove to be arbitrary assertions by experts in one field when speaking about a field that is not in their area of expertise.
  4. Natural law theorists (like many students of human history) have observed that there is no biological determination that all



human beings always act morally; in fact, just the contrary. Acting morally remains a matter of choosing well in all the circumstances in which individuals need to make choices, and people act immorally, as well as morally.

5. What natural law theory offers is not a description of how human beings necessarily act but some prescriptions for how they ought to act to fulfill their natural ends as rational animals of the human species.

### **Suggested Reading:**

Mortimer, J. Adler, *The Difference of Man and the Difference It Makes* (New York: Fordham University Press, 1993).

Michael Behe, *Darwin's Black Box: The Biochemical Challenge to Evolution* (New York: The Free Press, 1996).

### **Questions to Consider:**

1. What traits and activities (other than propositional language) do you consider to be uniquely human? Are there specifically human ways of living, learning, relating to other members of the species, eating, dressing?
2. As an important case in point, consider the subject of human love. Granted, there are many respects in which sexual intercourse between human beings can be accounted for in the same ways in which the intercourse of animals can be explained. What are the features, if any, that distinguish human love?

## **Lecture Nineteen**

### **The Paradox of Cultural Relativism**

**Scope:** Throughout the twentieth century, the thrust of anthropological study was often to show the irreducible diversity of cultures, and the idea proved appealing to those who wanted to demean moral standards as provincial at best. But recent studies have cast doubt on the accuracy of even famous researchers (Margaret Meade, for instance), and the tide seems to be turning toward a position closer to what natural law theory has long claimed. It is not that there is any one form of government or child-rearing or marriage ritual, for example, that is natural, but human beings have a need to devise appropriate forms. Further, in noting the enormous diversity that exists among human cultures, it is important to note some of the limits of natural law theory against those who make exaggerated claims for it, because there is no quicker way to bring an ethical theory into contempt than to claim that it can do what it cannot.

### **Outline**

- I.** Given so much cultural diversity, can natural law ethics claim universality and objectivity?
  - A.** At the scholarly level of professional anthropology, as well as at the more popular level of prime-time television, there is widespread mindfulness of the huge differences to be found among the world's cultures.
    - 1.** It is not just that there is mutual amazement when, for example, an American encounters the way of life typical of sub-Saharan African peoples or the customary life patterns found in the Orient.
    - 2.** Sometimes, there are violent clashes of culture, as in the recent terror campaign by certain fundamentalist sects in Islam directed against both the liberal West and what those sects perceive as the liberalization of certain Islamic states as they confront modernity.
  - B.** Whatever one makes of these encounters (friendly mutual astonishment at differences or violent repudiation of what seems

not just different, but dangerous), it gives us pause in our discussions about natural law ethics.

- C. There is something quite astonishing about the claim of natural law ethics to achieve objectivity, universality, and intelligibility, given the wide divergence among cultures.
- D. Cultural relativism is the position that there are no absolute or objective moral standards that apply to all people everywhere and at all times. This position is based on two assumptions.
  - 1. First, societies differ so much in what they consider morally right and wrong that no universal moral standards are held by all societies.
  - 2. Second, the decisive factor in whether it is right for an individual to act in a particular way depends on that person's society. That is to say that morality is never found in a vacuum, but always in a context and, thus, depends on the beliefs, history, goals, and desires of societies.
  - 3. Cultural relativism seems then to be a rather enlightened moral stance, because it recognizes the social matrix of moral values and seems to avoid ethnocentricity by implying tolerance toward other views.
  - 4. One wonders, of course, on what basis relativists dare to criticize those who are intolerant (unless, of course, the principle of tolerance is the one exception to relativism).
  - 5. But there is also the problem of how relativists could ever rationally criticize someone for a heinous position, whether Adolf Hitler's genocidal policies, racism, slavery, or wars of pure conquest.
  - 6. There is also the curious problem that relativists must always regard reformers as wrong in principle, because they go against the prevailing cultural standards. For example, opposition to slavery in the eighteenth century, opposition to the Indian practice of *suttee* (the burning of widows), and promotion of the principle of equal pay for equal work have all involved opposing cultural standards.
  - 7. In short, unless we have an objective moral basis for law, it is difficult to see why there is any general obligation of obedience, and unless there is a universal priority in moral law, there could be no reasonable basis for civil disobedience

against “unjust laws.” All there would ever be would be power struggles.

E. Subjectivism (subjective ethical relativism) is the position that morality depends on the individual, as if morality, like taste, were in the eye of the beholder.

1. Ernest Hemingway, for instance, once wrote: “So far, about morals, I know only that what is moral is what you feel good after, and what is immoral is what you feel bad after. Judged by these moral standards, which I do not defend, the bullfight is very moral to me, because I feel very fine while it is going on and I have a feeling of life and death and mortality and immortality, and after it is over, I feel very sad but fine” (*Death in the Afternoon*, 1932, p. 4).
2. On premises such as these, morality is simply useless, because there is no possibility of interpersonal criticism or rational argument; one simply feels the way one feels, and it would make no difference that Francis of Assisi or Mother Teresa of Calcutta might feel differently.
3. In a philosophy class, one can start to get at the inadequacy of this view by returning an exam with all the tests marked “F”—the howls of outrage are never satisfied by the explanation that I have adopted subjectivism as my standard. Invariably, there is a sense that such a standard is objectively unjust.

II. An adequate response will require us to remember some crucial distinctions about what natural law ethics does and what it does not claim.

- A. The claim to objectivity and universality is not an assertion of absolute identity around the world. In fact, natural law theory’s attentiveness to the creativity possible in human understanding and freedom would lead us to expect much diversity.
1. The question is not whether there is a range of legitimate human responses to the basic and recurrent questions that life presents (such as how to tend to the needs of the young, the old, and the dependent; how to govern our communities; or how to arrange the economic system by which not just basic necessities, but improvements in the standard of living come about).

2. Rather, the question is whether there are certain actions, practices, customs, and character traits that are unacceptable anywhere and at any time. If so, this would be the set of negative precepts of the natural law: what is objectively injurious to human nature and universally so.
  3. Likewise, one may ask if there are not certain duties that individuals and groups in any culture whatsoever will necessarily have when they find themselves in certain recurrent situations. If so, then the set of positive precepts of the natural law (such as the obligation to provide care for one's offspring or the duty to honor one's parents) can be claimed to be universal and objective, despite the fact that the specific ways in which we meet these duties may differ from one culture to another or even within a culture.
  4. Further, even in the range of what is permissible, there is a question about whether some policies and practices may be preferable for human development, whether for virtuous individuals or for cultures, as they try to provide better conditions for human flourishing. If so, this gives us reason to think that not all cultures are equal in their moral development, but that some have made greater progress than others, at least in specific areas, and that it is equally possible that a culture has experienced moral regress or that it is suffering from some kind of moral blindness.
- B.** Further, there is considerable evidence for certain common features in the moralities typical of widely different cultures.
1. The sociologist Clyde Kluckhohn writes: "Every culture has a concept of murder, distinguishing this from execution, killing in war, and other 'justifiable homicides.' The notions of incest and other regulations upon sexual behavior, the prohibitions upon untruth under defined circumstances, of restitution and reciprocity, of mutual obligations between parents and children—these and many other moral concepts are altogether universal" ("Ethical Relativity: Sic et Non" in *Journal of Philosophy*, v. 50).
  2. Commenting on the sadistic, disintegrating tribe of the Ik in Northern Uganda, Colin Turnbull argues that a people without such principles as kindness, loyalty, and cooperation will turn with surprising swiftness into a state of nature, such as

Hobbes described: a war of all against all (*The Mountain People*, Simon and Schuster, 1972).

- C. It seems to me that the cases usually brought up as instances of cultural relativity can be well handled by distinguishing carefully between questions of moral principle and questions about the interpretation of the facts.
1. Hindu refusals to eat the flesh of animals, for example, contrast sharply with Western carnivorous diets. But the difference seems to me to turn on a question of fact, not one of principle. Neither culture tolerates cannibalism as a matter of moral principle, but they disagree about whether the flesh of animals could be the repository of human spirits. Even those isolated cannibal tribes that do eat human flesh do not eat members of the tribe, but only those of other tribes—individuals whom they (in my judgment, mistakenly) do not regard as human.
  2. Even in our own culture, one can see the importance of this distinction. On a question as contentious as the permissibility of abortion, there is at least this much of a common moral principle among those in favor of permitting abortion and those opposed; namely, that we should not kill innocent persons. What they disagree about is whether the unborn really are persons and, thus, whether zygotes, embryos, and fetuses deserve protection as persons. With this in mind, I think that there is every reason to think that analysis of the nature of these entities will be helpful to the resolution of the question.

### **Suggested Reading:**

Milton A. Gonsalves, *Fagothey's Right and Reason: Ethics in Theory and Practice*, 9<sup>th</sup> ed. (Columbus: Merrill, 1989), pp. 101–104.

Louis P. Pojman, *Ethics: Discovering Right and Wrong* (Belmont: Wadsworth, 1999), chapter 2: “Ethical Relativism” and chapter 3: “The Case for Moral Objectivism.”

### **Questions to Consider:**

1. What factors could become prominent in a given society to change its moral values radically, whether for the better by new insights or for the

worse by moral blindness or forgetfulness? For discussion, consider the following case: Holland, which had such close experience with the horrors of the Nazi killing of Jews, gypsies, the mentally retarded, and other groups, now legally permits physician-assisted suicide and euthanasia.

2. Is the distinction between moral principles and interpretation of facts sufficient to explain the diversity found in such cases as the treatment of women in different cultures or the treatment of the aged and the senile?

## **Lecture Twenty**

### **The Problem of God**

**Scope:** Ultimately, the existence of a natural moral law seems to require the existence of a lawgiver, and for this reason, many religious traditions have sensed a deep-seated compatibility between natural law ethics and their own beliefs. Yet there have been a number of thinkers in the wider tradition, who have not made this connection, including Aristotle and the Stoics in antiquity, Grotius in the early modern period, and even recent Marxist thinkers, such as Ernest Bloch. For some thinkers, the very existence of natural law can be the basis for an attempt to prove the existence of God (Newman, for example). But other thinkers tend to regard the universal obligation of the moral law as following from the existence of God rather than being a premise useful in proving God's existence. Even among those who hold that the sanctions of the moral law do ultimately depend on God, there is considerable debate over whether one needs to bring up the question of God in order to grasp moral obligation.

### **Outline**

- I. Questions arise in considering the relationship of God to natural law.
  - A. These include:
    - 1. Does natural law obligation depend on God?
    - 2. What if there is no God? Does natural law still apply?
    - 3. What if one doesn't believe in God? Can one still know whether there is any objective morality?
    - 4. What if one just doesn't know about God?
    - 5. What if one doesn't share quite the same assumptions about God?
  - B. There is no doubt about there being some sort of a connection between the problem of natural law and the problem of God, but it is difficult to establish exactly what this connection is.
    - 1. Is the study of morality and natural law a way to gain knowledge of God?
    - 2. Or must one know the existence of God before one can show that there is a natural moral law?



- C. Such figures as John Henry Cardinal Newman preferred to take morality as the starting point for demonstrating the existence of God.
  - 1. The argument is that awareness of the fact of moral duty requires that there be an eternal mind of God, who wills that obligation.
  - 2. From a *Grammar of Assent*, ed. C. F. Harold (London, 1947), p. 83: "If, as is the case, we feel responsibility, are ashamed, are frightened, at transgressing the voice of conscience, this implies that there is One to whom we are responsible, before whom we are ashamed, whose claim upon us we fear."
- D. Other philosophers have gone elsewhere from the same starting point.
  - 1. Kant, for instance, holds that we can never know about anything that transcends the realm of space and time, but to ensure that fidelity to the demands of morality are properly rewarded, he feels that it is necessary for us to postulate that God exists.
  - 2. In just the opposite spirit, Sartre contends that we must be postulatory atheists to remain free, because the existence of God would immediately compromise human autonomy by establishing an external standard that would be constraining and alienating.
- E. Many theorists think it wiser to admit that the theoretical justification of moral obligation under natural law demands that one first know the existence of a personal God who is both just and loving.
  - 1. Aquinas, for instance, defines natural law as the participation of those creatures possessed of reason in God's eternal law.
  - 2. Many commentators on Aristotle, who is the philosophical source of much of Aquinas's thought, hold that it is precisely because Aristotle's idea of God is so distant and impersonal that he speaks much more often in terms of natural justice than natural law.
- F. But there are natural law thinkers who want to hold that there is (or could be) natural law even if there is no God.
  - 1. Hugo Grotius put the matter succinctly when he wrote: "What we have just said [about natural law] would still hold even if

we granted that there is no God, or that He is not concerned with human affairs” (*De jure belli ac pacis*, Proleg. #11).

2. In the ancient period, the Stoics were committed to the idea of divine law, yet their materialistic pantheism allowed for no personal transcendent God; rather, the very structure of the universe was somehow identified with divine reason.
3. Some contemporary Marxists, such as Ernst Bloch, see no trouble about denying the existence of God as but a religious tool for the oppression of the weak by the powerful, even while affirming natural law as the moral system best designed to protect human dignity. (See E. Bloch, *Natural Law and Human Dignity* [Cambridge: MIT Press, 1987].)
4. And there are some theorists whose study of the diversity of opinions about moral obligation leads them to doubt that we can ever know the natural law sufficiently, either as a starting point for proving God’s existence or as an implication from the divine design of human nature. One popular option here is to regard divine command as the source of moral obligation, as well as the source of our knowledge of moral obligation.

II. A distinction may prove helpful here between how natural law is knowable and how natural law is ultimately grounded.

- A. In my judgment, both the Stoic and Marxist positions present irresolvable problems and internal contradictions.
1. Stoic materialism cannot even provide an adequate account of human freedom, let alone an acceptable explanation of how there can be moral responsibility (not just pragmatic counsel) to act in a way other than one might spontaneously desire.
  2. The atheism of Marxist versions of natural law, like other ethical naturalisms, has recurrent problems explaining how natural law could ever be truly “law” if there is no lawgiver.
  3. The frequent recourse to the charge that moral obligation would be alienating and antithetical to human freedom and autonomy can be answered by remembering that freedom is not uncaused but self-caused or self-determined.
  4. Freedom will then be located in the person as the capacity to choose to act this way or that, to act or not to act. That there are certain objective conditions that determine what will actually foster or frustrate such a being’s growth, development, and even capacity for exercising free choice

does not destroy freedom (but it may well allow us to distinguish between authentic and inauthentic uses of that freedom).

5. Hence, there is nothing intrinsically alienating about a divine creator who has designed a world in which there are moral norms, which that creator leaves its creatures free to honor or ignore at their peril. In fact, the element of risk seems essential to freedom.

**B.** The mainstream of natural law theory has tended to see the source of moral obligation to reside in the teleology or end-directedness that is designed into human existence by the author of human nature as the author of the universe.

1. This perspective in turn implies that the ultimate source of moral obligation is rooted in the divine designer of human nature.
2. But one may still distinguish between the questions of (1) whether moral obligation is necessarily grounded in God and (2) whether one needs to advert to God as the ground of moral obligation to know about that obligation.
3. That is, one can know about the reality of some natural law obligation (e.g., that one should not take innocent life or that one has an obligation to care for one's offspring) without formally adverting to the existence of God.
4. Yet, one cannot ultimately ground these natural law obligations without God actually being the author of our nature and designing into human nature the end-directedness that is the more immediate source of our knowledge of the natural law obligation.
5. This explanation is of considerable help in clarifying differences of opinion about just what our natural law obligations are and how they are best justified and defended, because much turns on what we recognize to be the intrinsic natural ends of human existence.

**III.** Our answer to this question has considerable ramifications with respect to the organization of society and culture.

- A.** These ramifications include questions of political authority and legitimacy.

1. Those who take a strong position on the need to know the existence of God to recognize moral obligation may well also argue that the binding character of legal obligation requires fairly direct connection between the regime and the divine source whose authority human government must share to be legitimate. This idea is seen in theories of the divine right of kings or various forms of theocracy.
  2. Those who urge, instead, that one need not necessarily advert to the existence of God to grasp moral duty may well be able to see the moral duty to obey the laws of a government whose legitimacy is owed solely to the consent of the governed and without any particular divine sanction.
  3. The latter position retains the notion that civil law still needs to respect the divinely sanctioned moral law by never directly transgressing its precepts; yet civil law may take any determinations that the lawgivers deem reasonable on matters not proscribed by the natural moral law.
- B.** Questions also arise about incorporating moral obligations and values into civil law.
1. Beside the general question about whether (and how much) of morality should be codified by civil law (can one, for instance, make the moral obligation of gratitude for favors received into civil law?), the distinction offered here between whether there is a divine ground for moral obligation and whether one needs to advert to this divine ground provides some flexibility.
  2. If one really needs to be aware of the divine grounding of any moral obligation, then civil law must be theocratic to be morally cogent, not just something that operates by threat of punishment. It is interesting to note that virtually all ancient law codes presented themselves as divine in origin.
  3. If one does not need directly to advert to the divine grounding of any moral obligation, deciding how much of morality one wants to codify as law is possible not just on the basis of prudence but also by trusting to naturalistic reasoning for the debates on whether to enact as law any insight about moral value or obligation.
  4. This understanding of the relation between the problem of God and the problem of natural law is crucial to the modern sense of toleration and religious freedom. It allows religious

believers to pursue both their worship of what they hold to be the true God and their participation in the public life of their societies. At the same time, it allows non-believers the freedom to hold their position on the question of God and to participate in the same political process according to their own understanding of morality.

5. Some pre-modern views of the connection between the truth about God and the forms of political organization will need to take other stances. Augustine, for instance, regarded even the best pagan regime that he knew, the Roman Republic, as intrinsically faulty by reason of having a false idea of God at the core of its state-sponsored worship.
6. But from this understanding comes the very idea of toleration—not the view of toleration sometimes championed today, in which the term means the approval of positions that one regards as morally repugnant. Rather, it understands the toleration of difference and even the toleration of evil as a necessity one must endure, because uprooting the evil would imperil the general social order and the freedom that it is designed to serve for the sake of human maturation.

### **Suggested Reading:**

Pierre Manent, *Modern Liberty and Its Discontents*, edited and translated by Daniel J. Mahoney and Paul Seaton, with an introduction by Daniel J. Mahoney (Lanham: Rowman and Littlefield, 1998).

Yves Simon, *The Tradition of Natural Law: A Philosopher's Reflections* (New York: Fordham University Press, 1965, 1992), chapter 3: "Some Theoretical Questions."

### **Questions to Consider:**

1. What moral values and obligations do you see as depending on the way God designed human nature? What strikes you as morally clear and compelling without reference to God?
2. What are the advantages of a secular state? Does religious freedom and the toleration of plural religions with irreconcilably different truth claims make it impossible to hold that there can be truth in matters of religion?

## Lecture Twenty-One

### Current Applications—Jurisprudence

**Scope:** Recent debates have focused on the legitimacy of bringing the principles of natural law into the processes of legislation and judicial review. The subject has arisen in such venues as the debates over biomedical issues, as well as Congressional hearings connected with the nominations of Robert Bork and Clarence Thomas for seats on the U.S. Supreme Court. In addition to such controversial cases, natural law principles can be detected in a number of constitutional and legislative areas, including tort law, penal law, and the graduated income tax.

### Outline

- I. The application of natural law to judicial review of legislation prompts questions of equity and judicial legislation.
  - A. Repeatedly in the development of the theory of natural law, its proponents have viewed it as a “higher law” to be consulted about the justice of specific legislation.
    - 1. Law as made by human beings (whether in the form of constitutions, statutes, administrative policies, or culture-specific customs) must be just in order to be valid.
    - 2. But to recognize the need for law to be just does not yet decide what to do about human laws that come to be recognized as unjust.
  - B. Whether the judiciary is given the power to overturn statutory and administrative laws perceived to be unjust is a matter that must be determined, whether explicitly provided for in a constitution or gradually developed in practice (as was the case in the jurisprudence of the U.S. Supreme Court).
- II. There are three main stages in the development of judicial review.
  - A. As early as 1793, Chief Justice John Jay, in a case called *Chisholm v. Georgia*, argued that “reason and the nature of things” was a good reason for deciding whether private citizens had the right to bring suits against various state governments. His argument was that governments are not just under the law of the Constitution but

are also under justice; hence, private citizens may bring suits against state governments.

- B. However, in American legal history, the practice of judicial review really began with Chief Justice John Marshall in *Marbury v. Madison* (1803).
- C. Until the 1860s and 1870s, judicial review was generally limited to matters of procedure and conformity to the Constitution, rather than to addressing questions of natural justice in any extra-constitutional matter.
- D. The passage of the Fourth Amendment and a reinterpretation of the Fifth Amendment led from “procedural due process” to a doctrine of “substantive due process” in judicial thinking.
- E. In the 1930s, there was new pressure from social reformers again to use natural law reasoning in the further development of the due process clause.
- F. A third period of expansion of judicial authority through natural law arguments came in the 1960s.

III. In 1868, after the passage of the Fourteenth Amendment, Justice Cooley wrote a book called *Constitutional Limitations*, which comments on the works of Blackstone.

- A. Justice Cooley urged that questions about private property were appropriate for the Court’s consideration and that the judiciary had the right to reverse legislation enacted by Congress that interfered with private property.
  - 1. An example of this at that time was the practice of seizing private property for the building of railroad by “eminent domain.”
  - 2. Arguing that the Fifth and Fourth Amendments gave judges more expansive power, Cooley urged that a natural law protection was involved in such cases, prompting that compensation be paid to private owners of seized land.
- B. The increasing use of natural law claims in court cases of the 1860s and 1890s was due in large part to Justice Stephen Field.
  - 1. In the 1871 *Legal Tender* case, Justice Field made an argument that increasingly came to be accepted by most of the judiciary: He attacked a Congressional law that allowed greenbacks as acceptable payment for various debts on the

grounds that this law contravened the “unchangeable principles of right and morality without which society would be impossible” and violated “fundamental principles of eternal justice, upon the existence of which all constitutional government is founded.”

2. In the 1873 *Slaughter House* case on the question of monopolies, Field argues that there is a natural law basis in the Fourteenth Amendment that guarantees the “privileges and immunities of U.S. citizens as a way of guaranteeing all sorts of rights to our property against various infringements by the state.” Here, Field is using Lockean natural law political philosophy as a basis for his court decisions in a way that is extraneous to the strict demands of the Constitution.
3. In the 1877 *Elgin v. Louisiana* case, not only did a majority of the judges accept the view that the due process clause protects property against “unreasonable infringement” but they extended the interpretation of the liberties that are guaranteed by the clause to the whole realm of the liberty of contracts.
4. Thereafter, until the present day, the liberty of contracts has been defended as a natural right.
5. Probably the most notorious case in the whole series is the 1905 *Lockner v. New York* case, which concerned rescinding laws governing maximum hours of work. Social reformers attempted to limit the number of hours that workers could be required to work per week. The judges struck this down as an unreasonable interference with the liberty of contract and, hence, a violation of the Fourteenth Amendment.

IV. Opponents of the use of natural law by the judiciary included Oliver Wendell Holmes, who, in the *Lockner* case, accused the Court of using the Fourteenth Amendment to legislate its own economic and social programs into the Constitution.

- A. He claimed that the results of this judicial use of natural law seemed to depend on just whose version of natural law is used from the bench.
- B. Clearly, it can be used for liberal and conservative purposes alike.

V. The 1930s (the second phase in the development of the judicial use of natural law) saw a strong movement to defend social welfare legislation, using the claim of substantive due process.



- A. Rules of law and rules of reason were sought, which would allow the judiciary to approve or strike down the legislation that protected Franklin Roosevelt's new social reforms.
  - B. In *Palko v. Connecticut* (1937), the majority opinion used the phrase "these rights are implicit in the concept of ordered liberty" to make the case that natural law (the nature of free society) requires that there be guarantees of certain kinds of welfare legislation for those who would, in the past, have been disenfranchised.
  - C. In 1938, Justice Stone, in *U.S. v. Caroline Products*, asks whether legislation that would be inclined to remove certain social reforms by virtue of popular initiative should be given stricter federal scrutiny. He claimed that this was within the Court's purview, where Fourteenth Amendment cases are concerned and where the courts have to use extra-constitutional standards.
  - D. Among the justices who disagreed with this concept is Justice Black. In the 1947 *Adamson v. California* case, Black questioned whether the court was substituting its own particular interpretation of natural law philosophy for what the Constitution originally intended.
  - E. This debate is frequently expressed as a question: Should we honor the original intent of the Constitution or treat it as a living, continuously evolving document?
- VI.** The third phase of the development of judicial use of natural law includes the 1965 case *Griswold v. Connecticut*, which had to do with the selling of contraceptives.
- A. In this case, the Court decided that there should be no regulation of contraception. Justice Douglas used natural law reasoning to claim that "these rights are in the emanations that come from the Bill of Rights."
  - B. This was the period of the 1966 *U.S. v. Miranda* case, which recognized the rights of those arrested to remain silent and to have a lawyer present. The justification for this was the understanding that natural law protected the concept of presuming innocence before guilt.
- VII.** The study of the uses and abuses of natural law reasoning in jurisprudence leaves some with the conviction that it would be better to

restrict judicial review to purely formal and procedural questions, while encouraging those who want natural law arguments to use the political process by which legislation is devised.

**VIII.** Natural law can also be used in the philosophical justification for punishment.

- A. Various purposes have been identified for punishment of convicted criminals, including deterrence, public safety, and retribution.
- B. Questions also arise about devising just punishments; that is, punishments that fit the crime. Such issues include:
  - 1. Time to be served;
  - 2. Modes of confinement and compulsory activity;
  - 3. The limitations of natural law to settle all questions and the need for prudence.
- C. Natural law can be invoked to debate the question of capital punishment.
  - 1. What crimes might be included on a list of those deserving capital punishment?
  - 2. Can a case be made against any use of capital punishment?

**IX.** Natural law can be invoked in the policy of a graduated income tax and the principle of distributive justice to debate such issues as:

- A. The general principle of distributive justice;
- B. The legitimacy of taxation in general;
- C. The natural law case for a graduated income tax system.

### **Suggested Reading:**

Robert P. George, "Natural Law, The Constitution, and the Theory and Practice of Judicial Review," in *Fordham Law Review* 69 (2001).

### **Questions to Consider:**

- 1. The more aggressive use of judicial review has usually been for purposes of social reform in cases where there is still no consensus that policies should be changed. Do you think that this is an unacceptable use of the powers put at the discretion of judges or not?
- 2. Do you think that slavery would eventually have been outlawed by social reform stimulated through judicial review, or was it necessary that a war be fought to bring this about?

## **Lecture Twenty-Two**

### **Current Applications—Bioethics**

**Scope:** It is hard to imagine an area of the moral, political, and legal landscape that is more contentious and fragmented than bioethics and medicine. There are such fundamental disagreements about these matters that the debates sometimes seem interminable. This lecture will not try to oversimplify questions that are enormously complex but will simply attempt to show how the natural law approach to ethics might be applied to a range of current issues, including abortion, infanticide, stem-cell research, euthanasia, and physician-assisted suicide.

### **Outline**

- I.** Natural law can be applied to questions of abortion and infanticide.
  - A.** Natural law analysis of questions about the permissibility of taking the lives of the unborn and the defective newborn must consider the nature of those who will be affected, as well as such other factors that enter into any ethical analysis as the intention of the agent and the likely consequences.
  - B.** Both legally and morally, there is no justification for difference of treatment unless there is a difference of kind. Arbitrarily treating individuals of the same kind differently would be unfair discrimination.
    - 1.** Clearly, a plurality of kinds of things exists in the world; denying that there are genuinely distinct kinds would entail unacceptable consequences. For instance, there would be no difference between killing a human being and killing a horse.
    - 2.** In both cases (abortion and infanticide) those who are going to be affected are innocent human beings, and the natural law allows no deliberate attack on innocent human life.
    - 3.** Establishing that those to be affected are human is a biological question. That they are members of the human species can be readily established in various ways, including direct observation, DNA analysis, and the fact that they were conceived and born of human parents.

4. That even those who are born with genetic defects are still human beings can be established by the fact of the continuity of their lives—that is, that they have not yet undergone the transformation known as death, after which there will no longer be any life activity. (In fact, if they were not alive, the question would not even come up.) The inability to perform some activities is not death, nor is it the transformation of the individual into a member of some other species not protected by natural human rights.
- II.** The question of species membership turns on the question of kind or nature, as discussed above. One can test genetic composition (DNA), because every cell in our bodies contains our distinctive DNA signature; further, the tissue in every one of our organs is always recognizably human, as the work of forensic pathology shows.
- A.** There is no nonarbitrary demarcation point for species membership at any point in the course of human development after the fertilization of the gametes (that is, the union of egg and sperm). Thereafter, there is no change in the nature or kind of being, but only growth and unfolding of the species-specific and person-specific DNA determinants.
  - B.** Natural law would argue that:
    1. Only a difference in kind or nature warrants difference in treatment.
    2. The nature of the zygote, the embryo, and the fetus is the same as that of the infant, the child, the adult: It is the nature of a human being at one or another stage of development.
    3. There may be no private license to kill an innocent human being. Induced abortion (the killing of an innocent human being), therefore, is unwarranted, because it would be arbitrarily treating innocent beings that are the same in kind (all human) differently.
- III.** Sound ethical analysis of these issues (or any issues) also requires consideration of such factors as intention and consequences.
- A.** If analysis of the nature of the act had determined that the act in question were morally permissible, it would have been possible to consider the range of intentions that could be acceptable for undertaking that action.

**B.** In a case like this, where the action is intrinsically immoral, it is impossible to proceed with the analysis of possible intentions or likely consequences, because one may not do evil so that good may come. To do so would involve directly willing an evil means for some end that one desires, whether the envisioned end is thought good, because it is well-intended or because one judges that there will be greater benefits than burdens. Important as these considerations truly are, the end does not justify using immoral means.

**C.** Often there is great complexity in the situations where moral evaluation is being done. Natural law analysis recognizes this by the principle of the double effect, which was developed historically to handle situations such as the need to defend oneself against an attacker or to defend one's country against aggression. The principle of double effect summarizes the conditions under which we may perform an act from which we foresee that an evil consequence will follow.

1. The act must be good or indifferent in itself.
2. The good the agent intends must not be obtained by means of evil.
3. The evil effect must not be intended for itself but only permitted.
4. There must be a proportionately grave reason for permitting the evil effect to occur.
5. All four of the above conditions must be fulfilled; the violation of any of them makes the evil directly willed, not just allowed as an incidental byproduct for which the agent, even though not directly willing the evil effect, would still be responsible.

**D.** The principle of the double effect does not eliminate responsibility, but it does make it possible for someone to deal with conflict situations without incurring moral guilt or blame for the evil effect that is allowed.

**IV.** In regard to abortion, natural law theorists have examined the possible uses of the general principle of double effect and have often agreed that there are scenarios where it may apply—for instance, in the case of a pregnant woman discovered to have a cancerous uterus.

- A. The removal of the cancerous uterus will produce a good effect for the patient.
  - B. The death of the baby (a tragic but foreseen effect of the hysterectomy) is not the means to the good effect, because if the baby were killed but the uterus were not removed, the good effect (the restoration of health) would not be achieved.
  - C. In the scenario envisioned here, the death of the baby is in no way desired.
  - D. The situation under analysis involves two human lives; thus, there is at least some proportionality that would not have been the case if the deliberation had instead turned on a factor such as the impact on a person's career or on some financial consideration.
- V. The question of physician-assisted suicide for those incapacitated by age, illness, or accident can likewise be fruitfully subjected to natural law analysis.
- A. The argumentation here is very similar to that just considered above in the case of abortion and infanticide.
    - 1. Once one has established that those to be affected are innocent human beings, the natural moral law requires the protection of their lives as a right.
    - 2. But rather than laying out the same basic argument again, it may be more helpful to address certain additional factors that come into the discussion.
    - 3. These issues are, of course, very complex, and it should be noted that there is no way to cover all the important aspects here; the intention of this presentation is simply to illustrate some aspects of natural law analysis.
  - B. Unlike the case of abortion and infanticide, where those to be affected are not yet able to speak for themselves, it can sometimes be the case that individuals who are very ill and in great pain may seek the assistance of a physician to end their own lives.
    - 1. It is important to note here a great variety of related issues, both at the broader level of euthanasia in general, as well as correlated issues, such as decisions about those who are no longer able to express their own preferences.
    - 2. Those inclined to utilitarianism tend to argue in favor of permitting euthanasia, including physician-assisted suicide and sometimes even a policy to euthanize some of those who

are terminally ill but cannot express their consent. Natural law analysis forbids all such activity.

3. Perhaps the easiest way to understand this point is to consider what we mean when we say (as we do, for instance, in the Declaration of Independence) that the right to life is “inalienable.” The natural right to life is something that cannot be taken away or given away—if it could be given away, then, in principle, it would not be “inalienable.”
4. The counterexamples that may come to mind (the soldier, for instance, or the martyr) do not (upon reflection) involve giving away one’s rights but, rather, are cases in which one allows another to take what is one’s moral right while trying to defend or witness to something else of high value.
5. Although the natural law does not require that “extraordinary means” be used to prolong life, it forbids that there be any direct attack on innocent human life, even at the patient’s own request. Rather, there is need for genuine human consolation of those in pain and for the use of palliative pain relief where it is available.

C. As with the previous question, it may be necessary to use the principle of double effect for this one.

1. Some forms of pain-relief medication have side effects that may render a person more vulnerable to death.
2. As before, one must examine the matter carefully to be sure that one is not really intending to bring about a death but only to relieve pain.
3. The relief of pain is not what brings about the death; therefore, it may well be permissible and prudent to administer forms of pain relief that have, as a byproduct, a greater vulnerability to death but do not themselves kill a patient.

VI. The debates over stem-cell research that are currently taking place could profit from an introduction of natural law analysis. Once again, there is no claim here to present a thorough analysis of the situation but only to mention one point of interest.

- A. Let us presume, for the sake of argument, that research on stem cells (the cells that have not yet been differentiated to have one particular biological function but are still open to development in

various ways for different purposes) will be likely to be scientifically successful and helpful for human medicine. We should note that this has not yet been demonstrated, but that is another issue.

- B.** Natural law analysis can be helpful when considering the source of these stem cells.
1. As in any natural law analysis, one needs to consider the nature of those to be affected by a proposed action.
  2. When garnering stem cells from adults for the sake of this research, the cells can be obtained without any ill effect on the donor.
  3. One of the main precepts for the ethical analysis of medical research is that experimentation, if it cannot directly benefit the subject being experimented on but can only help others, should at least not harm the donor.
  4. Experimentation on stem cells from adult donors is, thus, in general, permissible.
  5. But experimenting on embryonic stem cells is different. In this case, stem cells are obtained by removing from already existing human embryos precisely those portions of the embryo's structure—the DNA—that contain the determinants of a new person and that will remain unique to that person throughout the course of his or her life.
  6. Because this process entails the destruction of the embryo in the course of making a stem cell, which can then be biochemically induced to develop in some other direction and for some other biological purpose, it seems to me to fall under the natural law prohibition against taking innocent human life.
  7. This argument relies, as outlined before, on the identity of the individual being from its conception until it experiences the radical discontinuity known as death. Unless this has occurred, the entity remains the same individual and belongs to the same natural kind and, thus, must be treated in the same way as other individuals of the same kind. For this reason, it too enjoys the protection of the right to life.

### **Suggested Reading:**

Stephen Schwarz, *The Moral Question of Abortion* (Chicago: Loyola University Press, 1990).



Robert J. Spitzer, *Healing the Culture: A Commonsense Philosophy of Happiness, Freedom, and the Life Issues* (San Francisco: Ignatius Press, 2000).

**Questions to Consider:**

1. How does a policy decision, either to codify natural law's moral prohibition of abortion or to give individuals the legal liberty to make their own decisions about abortion, affect the story that the law is telling about what is good and bad, what is right and wrong?
2. What do you think that natural law would say about individuals suffering from terminal diseases who want to risk treatment by experimental drugs and therapies, which they hope will alleviate the disease but have not yet been proven to have benefit?

## Lecture Twenty-Three

### Current Applications—Social Ethics

**Scope:** How does one bridge the vast differences of opinion in secular and pluralistic societies about such questions as marriage and family, the relations of labor and capital, the legitimacy of private property, the proper distribution of tax burdens, and so on? These are not easy questions, where there is little or no common basis of discussion. Natural law theory has been used profitably by such figures as Walter Lippman (author of *The Public Philosophy*), earlier in the twentieth century, and current figures, such as Alasdair MacIntyre or Edith Wyschgorod, to articulate the conditions needed for genuine constitutional democracy in pluralistic societies. And some religious traditions (such as Catholic moral theology) have used natural law (as a complementary source alongside Scripture) for the purpose of formulating publicly defensible positions on questions of social ethics and, thus, for providing a religiously based position as a way to be heard in a secular context.

### Outline

- I. The nature of society has been debated between classical natural law thinkers, who argued for the notion that societies do have natures, and natural law thinkers of the early modern period, such as Locke, Hobbes, and Rousseau, who argued for the idea of the social contract.
  - A. Does society have nature?
    - 1. Society does not have a nature in the same precise sense as an organic entity, such as a human person, does, because society is not a single, unified substance.
    - 2. But in an analogical sense of the word, it does have a nature, precisely because the human person is intrinsically social and forms associations, whose end is so closely related to the ends intrinsic to human nature.
  - B. What is the nature of society?
    - 1. The breadth and range of associations that this terms covers vary, from the most immediate sort (the family) through

diverse levels of voluntary association, up to the level of the state, and perhaps, even to forms of international cooperation.

2. At each level, human sociability can take diverse forms.
3. *Society* is a unity of human individuals and groups, which serves the purpose of satisfying their mutual needs and relies on their capacity to provide such help.
4. Because of the many ways in which a system of mutual assistance makes possible results that are greater in number and different in kind than the sum total possible through separate individual efforts alone, societies of various levels (such as families, voluntary associations, and states) should be seen as entities that may rightly expect protection and may rightly be expected to honor certain duties.

C. Given the current trend to regard all levels of society as “constructed” rather than “natural,” it is important to keep several points in mind:

1. Societies are composed of a unique type of being, namely, human beings, whose nature is rational (capable of understanding and free choice) and contains the ends intrinsic to a rational being.
2. The variety possible at any level (the family, for instance) certainly can take quite different forms that will, nonetheless, prove effective for specific ends (such as finding shelter or nutrition). These forms may not, however, all be equally effective at serving the end that is uniquely typical of human beings as rational beings, part of whose perfection comes precisely from sociality.
3. The criteria for examining the variety of possible social forms must include their suitability for precisely this end.

II. As an example of a social structure we will take the family and look at the differences involved in human sexual complementarity, which the traditional natural law position has regarded as natural.

A. Human sexual complementarity can be studied on both physical and psychological levels.

1. There is complementarity not only in regard to bodily structure, but also in regard to psychological and spiritual structures (for example, in emotional life, in their predominant virtues and ways of knowing, and so on).

2. Some theorists today regard gender as a social construct, but the mainstream natural law position has tended to regard these complementary differences as natural.
  3. When it comes to procreation and the rearing of children, male and female make different, but equally important, contributions.
  4. There is a special efficiency that comes from a division of labor in matters of providing food and drink, shelter, clothing, and other needs.
- B.** The family is the first and most important source for the learning of language skills and for interpersonal relations, especially for learning how to give and receive love.
1. More advanced technical learning, whether by way of skills or formal learning, often takes advantage of a disposition to learn that is cultivated at home.
  2. If something at the basic level is stunted or injured, a person can end up spending all his or her life (sometimes quite unconsciously) trying to repair the damage.
  3. The home is important for rest and privacy.
- C.** Natural law analysis seeks to highlight the importance of an institution such as marriage as fundamentally natural, because it satisfies human nature and provides a place of security and harmony in which humans can mature: A man becomes more of a man as husband and father, and a woman develops as a woman through being a wife and mother.
- D.** Also in the family structure, the elderly are an important consideration.
1. One's later years are, admittedly, a time when one's needs increase and change, but it is crucial to see that there have been real needs and dependencies all along the way, even in periods of one's greatest strengths.
  2. The range of needs goes beyond food and shelter. It is a matter of being loved, honored, and revered by others. On the part of the aged person, there is a need to display the virtues and wisdom appropriate to age.
  3. Throughout life, there is a need for the family, the smallest unit of society, to be arranged in such a way that respects and honors the inherent rationality and sociality of our human nature.

4. This entails that we never treat a person as a mere means to an end or as a commodity to be used.
5. But there is not just one way to effect these goals, and human creativity has devised quite a number of customs and practices that serve the purpose.

### **Suggested Readings:**

Prudence Allen, *The Concept of Woman: The Aristotelian Revolution, 750 B.C.–A.D.1250* (Grand Rapids: Eerdmans [1985], 1997).

Alasdair MacIntyre, *Dependent Rational Animals: Why Human Beings Need the Virtues* (Chicago and LaSalle: Open Court, 1999).

Johannes Messner, *Social Ethics: Natural Law in the Modern World*, trans. by J. J. Doherty (St. Louis and London: B. Herder, 1949).

Elisabeth Moberly, *Psychogenesis* (Greenwood, SC: Attic Press, 1983).

### **Questions to Consider:**

1. Which aspects of masculinity and of femininity are natural? Which aspects are more the result of nurture and the influence of one's culture? How can one tell the difference?
2. What are the best arguments for and against the view that natural law has long championed, that marriage can only be a heterosexual, not a homosexual, union?

## Lecture Twenty-Four

### The Eternal Return of Natural Law

**Scope:** Modern political theorists, especially those in favor of democracy, often use terminology that is different from what has been typical of natural law theory. They may well speak of “human rights” rather than “natural rights” or talk about “human dignity” rather than “human nature,” but beneath the rhetorical switch, the normative aspect of their arguments still depends on an ideal concept of what it means to be human. Thus, they are still participants in the long traditional of natural law, with special emphasis on the main advantages and limitations of this approach to ethics.

### Outline

- I. Central to the long but varied tradition of natural law thinking has been the quest for an ethical theory, whose principles and applications can lay claim to: (1) objectivity, (2) universality, and (3) intelligibility.
  - A. The stress on “nature” in natural law theory serves to provide an objective grounding for moral claims, that is, to indicate where one will find a fruitful source of information for moral insight.
    1. To merely claim that something is “natural” is not a justification for natural law theory, as, for example, something that is personal, habitual, idiosyncratic, or customary in a given society.
    2. A natural law theory must prove that any claim that it makes is truly natural and normative.
    3. In general, *nature* refers to the inner principles typical of a given kind of being, by which individuals of that kind tend to grow so as to exhibit the sort of structure and activities that are typical of that kind.
    4. The appreciation of natural kinds thus includes an awareness of the ends (the final causes) that are inherent in each individual, including completion in the development of the individual as an instance of that kind.
    5. This insight about final causality, joined to an appreciation about the distinctive goals of the nature of human beings as

persons, invariably requires natural law thinking to consider the metaphysical hierarchy of being and value, as well as to study philosophical anthropology, the philosophy of human nature as both animal and personal.

- B.** Philosophy has always tried to get beyond tribal loyalties and privileged standpoints to find necessary causes and generally valid insights. For this reason, moral theory has always attempted to balance concerns for the particular needs of specific individuals in discrete circumstances with a quest for universal principles that apply to everyone at all times.
1. By considering the questions of morality that bear on all human persons, natural law theory aims to be universal by noting what is good and bad and what is right and wrong for every member of the species, with due allowance for circumstances that impose special obligations (such as having certain responsibilities if one has generated offspring) or that warrant special consideration (such as being in genuine need and unable to provide for oneself).
  2. In the natural law tradition, the quest of universality has led to a fruitful distinction between certain negative precepts that apply always and everywhere (the prohibition, for instance, on ever deliberately taking an innocent life), and various positive precepts that apply only under certain circumstances (the obligation, for instance, to care for one's own children).
  3. It is a matter of finding what is reasonable when we reflect on human nature; it allows us to make progress by means of the universalization of our concerns, even in matters of politics.
  4. A positive (natural law) case can be made for political authority on the grounds that such authority has an obligation to look out for the good of the whole.
  5. It can be argued that capital punishment may be required for public safety. On the other hand, it can be debated whether capital punishment is justified if other means of defending society are available.
  6. This natural law approach to the universally normative on grounds of what is reasonable requires us to reflect on both our individual natures and our social nature.
  7. It also requires us to be attentive to whether conditions justify not just one possible solution but a range of alternatives.

8. This search for universality has usually led to a fruitful distinction between negative precepts (those that apply always and everywhere; for example, the prohibition on murder) and positive precepts (those that apply in certain circumstances only; for example, whether to tell the truth whenever we speak or refrain from speaking, depending on the specific situation).
- C. On the assumption that one bears responsibility only for what one knows, the natural law tradition has often been concerned with investigating how the natural law is known, and it has tended to root the intelligibility of moral obligation in the accessibility of human nature to human reason.
1. A common thread of the entire natural law tradition is the use of reason to reflect on human nature. All claims of natural law obligations, as well as of natural rights, must be submitted to the test of being reasonable, using the standard of the reasonable person, weighing the evidence in the effort to arrive at an impartial decision.
  2. In contrast to legal positivism and ethical relativism, which invariably privilege the will as the source of moral value and delimit intellect to an instrumental role of figuring out how to obtain what one wants, the natural law tradition has always stressed the priority of intellect over will (both in theological and in secular versions of natural law). It has relied on the capacity of the intellect to know the essences of things in order to discern right from wrong and good from bad in matters of morality.
  3. More specifically, the natural law tradition claims that there are certain things that one cannot not know, beginning with the most general principle of the natural law (that good is to be pursued, evil to be avoided), but stretching down through secondary principles, such as that one should not offend those with whom one must live and that one must care for one's offspring.
  4. Because the basic principles of the natural law are in us as operating principles, rather than as explicitly stated propositions, there is also considerable need for the cultivation of moral virtues and the formation of conscience so that individuals will be truly dependable and will have reliable guidance on matters of greater complexity.



5. Hence, there always remains a need for mediation of authorities, such as elders in a family, teachers, religious figures, and the wise, in the proper formation of conscience.
  6. Conscience (an extremely important theme in natural law theory) is understood in natural law theory as a power of our minds to judge actions in light of operating principles that we did not choose, principles that have been established by our nature, if we would only look more carefully at our nature.
- II.** The idea of natural law as a higher law has often been invoked (but used in quite different ways) by political thinkers and by those involved in founding and reforming governments.
- A.** Throughout the history of natural law, the idea that there are principles of right and justice that are entitled to prevail by reason of their intrinsic excellence has been recognized, regardless of whether those in possession of power are willing to recognize them.
1. The notion of inalienable rights necessarily presumes the existence of a “nature” that grounds the moral rights prior to any legal recognition by any community, even the legal recognition of a basic law, such as a constitution, let alone subsequent legislation.
  2. The justification of judicial review, even in its restricted form as limited to the conformity of judicial decisions and statutory law to some constitution, has regularly invoked the presence of a higher unwritten law that is not merely customary in origin.
- B.** These principles of right and justice are thought to be eternal and immutable, even if the particular ways in which a society institutionalizes them may vary considerably.

**Suggested Reading:**

Heinrich A. Rommen, *The Natural Law: A Study in Legal and Social History and Philosophy*, esp. chapter 7: “The Reappearance of Natural Law.”

**Questions to Consider:**

1. Why do you suppose that some writers on the subject of natural law theory hold that, even if the idea of natural law theory is forgotten or falls into disgrace, it will surely at some point in the future return?
2. The more general principles of natural law ethics seem so commonsensical as to be undeniable, but the more specific one gets, the more controversial they become. What would you need to know about human nature to make a cogent ethical argument in such areas as crime and punishment, taxation, sexuality, and freedom of speech?

## Timeline/Biographical Profiles

- c. 1850 B.C. .... Abraham, patriarch of Israel.
- c. 1280 ..... Usual date for the Exodus of Israel from Egypt under Moses's leadership; Moses is also the author of the first books of the Bible.
- c. 1010–970 ..... David, King of Israel.
- c. 970–931 ..... Solomon, King of Israel.
- fl. c. 580 ..... Thales, founder of the Ionian school of natural philosophy and the first of the Pre-Socratics; he claimed that the first principle of the universe was water.
- 610–546 ..... Anaximander, another early Milesian physicist-philosopher; he took the first principle of the universe to be *apeiron* (the indefinite).
- fl. c. 545 ..... Anaximenes, one of the early Milesian physicist-philosophers; he took the first principle of the universe to be air.
- fl. c. 530 ..... Pythagoras, leader of an extremely ascetic school of philosophy convinced of the presence of numbers and harmonies at the essence of everything.
- ?540–480? ..... Heraclitus, a Pre-Socratic philosopher most known for stressing that everything in the universe is constantly subject to change according to the *logos*.
- c. 515–455? ..... Parmenides, the most original philosopher before Socrates; he distinguished between the appearance of change and the reality of eternal being.

c. 500–430 .....	Empedocles, a pluralist who postulated love and strife as the prime causes of change among the four elements, earth, air, fire, and water.
496–406 .....	Sophocles, one of the greatest of Greek tragedians; author of <i>Antigone</i> .
490–421 .....	Protagoras, the most famous of the Sophists; best known for his insistence on the relativism suggested by the phrase “man is the measure.”
460–370 .....	Democritus, an atomist who worked out the details of the physical theory of the slightly earlier atomist Leucippus.
c. 460–390 .....	Hippias, a Sophist polymath who championed the notion of individual self-sufficiency.
? .....	Callicles, a Sophist of unknown dates who appears in Plato’s <i>Gorgias</i> .
? .....	Thrasymachus, a Sophist of unknown dates who appears in Plato’s <i>Republic</i> .
469–399 .....	Socrates; by trade a stonemason, by vocation a philosopher, and in many respects, the founder of philosophy; put to death by Athens on charges of corrupting the youth and practicing atheism.
427–347 .....	Plato; devoted follower of Socrates, whom he makes the central character in the philosophic dialogues he composed for the school he founded, the Academy.
387–321 .....	Aristotle; a student under Plato before he founded his own Lyceum to pursue a more empirical and inductive approach

	to philosophy; the author of many formal treatises.
336–265 .....	Zeno of Citium, the founder of Stoicism.
279–206 .....	Chrysippus, a prolific Stoic philosopher who constantly preached a reason-based therapy for those enslaved to their emotions.
185–110 .....	Panaetius, the founder of Roman Stoicism, who stressed that virtue is knowledge.
106–43 .....	Cicero, Roman orator and statesman who took an interest in philosophy throughout his life; although personally an academic skeptic, he faithfully transmitted much Stoic doctrine in his writings.
b.?–d. 64 or 67 A.D. ....	Paul of Tarsus, a convert from Pharisaic Judaism to Christianity, he wrote a number of letters crucial to the emerging Christian church.
c.3 BC–65 A.D. ....	Seneca, a Stoic playwright and moralist who saw wisdom as the key to goodness.
205–270 .....	Neoplatonism, the Platonic school of philosophy that developed from Plotinus.
d. 228 .....	Ulpian, Roman jurist and imperial official whose writings supplied about a third of Justinian’s massive <i>Digests</i> .
354–430 .....	Augustine, a key figure in the transition from classical antiquity to the middle ages; with the help of various insights from neoplatonism, he fashioned a thoroughgoing Christian philosophy

	and theology and wrote such works as the <i>Confessions</i> and <i>On the City of God</i> .
480–524 .....	Boethius, a Roman statesman and philosopher whose writings include the <i>Consolation of Philosophy</i> and various theological treatises.
483–565 .....	Justinian, emperor in Byzantium who was responsible for commissioning a team of scholars to produce a thorough collection of the body of Roman law.
560–636 .....	Isidore of Seville, Spanish theologian, author of the <i>Etymologies</i> .
Twelfth century .....	Gratian, monk of Bologna who produced a massive collection of canon law between 1139 and 1150.
1224–1274 .....	Aquinas, a Dominican friar who integrated the thought of Aristotle with the Christian faith and produced an enduring theological synthesis, including a wonderful treatise on natural law.
1290–1349 .....	William of Ockham, an English Franciscan at Oxford who took the position of metaphysical nominalism and denied real essences.
1401–1464 .....	Nicholas of Cusa, theologian, philosopher, and mathematician.
1468–1534 .....	Thomas de Vio, Cardinal Cajetan, a Dominican scholar responsible in part for the Renaissance revival of Thomistic scholasticism.
1478–1535 .....	Thomas More, British statesman, author of <i>Utopia</i> .

1492–1546 .....	Francisco de Vitoria, a Dominican legal philosopher who argued that political society is natural, not conventional, and who defended the rights of Indians in the New World as persons.
1528–1604 .....	Dominic Banez, a Spanish Dominican who assisted in the Baroque revival of Thomism.
1542–1621 .....	Robert Bellarmine, Italian Jesuit philosopher who argued for the distinction between civil and ecclesiastical authority.
1548–1617 .....	Francisco Suarez, a learned Spanish Jesuit whose philosophy of law contributed to the transition from the medieval to the modern understanding of natural law.
1552–1634 .....	Edward Coke, British jurist, a strong advocate of the common law.
1553–1600 .....	Richard Hooker, an Anglican theologian who held a traditional view of natural law.
1583–1645 .....	Hugo Grotius, a Dutch (Arminian Calvinist) Protestant who used natural law for a secular non-theological purpose: the establishment of an international legal system that includes both natural law and human positive law.
1588–1679 .....	Thomas Hobbes, a prolific British thinker who articulated the idea of social contract as a way to understand the relation of individuals to the new nation-states.

1596–1650 .....	Rene Descartes, French philosopher and mathematician.
1632–1694 .....	Samuel von Pufendorf, a German legal philosopher who produced an elaborate theory of culture and devised practical ways to implement the ideas of Grotius and Hobbes.
1632–1704 .....	John Locke, a British empiricist who transformed the notion of the social contract by combining it with the notion of natural rights.
1712–1778 .....	Jean Jacques Rousseau, French essayist, novelist, and philosopher who offered his own version of social contract theory.
1723–1780 .....	William Blackstone, influential British jurist, author of the <i>Commentaries</i> .
1724–1804 .....	Immanuel Kant, an extremely influential German idealist philosopher.
1743–1826 .....	Thomas Jefferson, the third president of the United States and an Enlightenment political theorist in his own right; author of the Declaration of Independence.
1748–1832 .....	Jeremy Bentham, a British utilitarian philosopher extremely interested in legal reform.
1755–1835 .....	John Marshall, Chief Justice of the U.S. Supreme Court; a strict constructionist in his interpretation of the U.S. Constitution.
1770–1831 .....	Georg Wilhelm Friedrich Hegel, German idealist philosopher; a proponent of a philosophy of right.



1801–1890 .....	John Henry Cardinal Newman, British churchman and philosopher of religion.
1805–1859 .....	Alexis de Toqueville, French sociologist and historian.
1806–1873 .....	John Stuart Mill, a British utilitarian, author of <i>On Liberty</i> .
1809–1882 .....	Charles Darwin, British naturalist, responsible for the theory of evolution.
1889–1974 .....	Walter Lippman, American political theorist.
1899–1961 .....	Ernest Hemingway, American novelist.
1901–1978 .....	Margaret Meade, cultural anthropologist.
1905–1980 .....	Jean-Paul Sartre, French existentialist.
1929–1968 .....	Martin Luther King, American civil rights figure, author of “Letter from Birmingham Jail.”

## Glossary

**abortion:** A procedure for ending the life of the unborn, whether by chemical or surgical means.

**accidental change:** The process in which a given substance undergoes some sort of modification, such as a difference in size, location, or activity.

***arche:*** The Greek term for a “first principle” in the sense of an origin or a beginning (and, hence, the etymological origin of a term such as *archeology*).

**authority:** A general term for the person or office charged with being a witness to truths that are earlier, higher, or logically prior to the authority itself and with making certain decisions for those under its jurisdiction; authorities have various “powers” by which to enforce their decisions but remain distinct from the powers at their disposal.

***b’rith:*** The Hebrew term for “covenant.”

**canon law:** Ecclesiastical law, laws made by the church.

**categorical imperative:** For Kant, the basic form of any moral obligation; the task of ethical reflection is to determine whether a proposed moral rule is truly universalizable and, thus, able to be reasonably asserted “categorically” as imposing the same duty on me as on everyone else to whom I think it should apply and, likewise, as allowing everyone else the same liberties that I myself want to claim.

**causality:** The factors that explain how and why things are what they are or have come to be; Aristotle distinguished four types of causality: material, formal, efficient, and final.

**ceremonial law:** A general term to describe those laws found in the Bible that are not universal matters of morality but deal with such issues as specific ways to worship or to observe ritual purity.

**change:** The process in which some underlying substrate receives a new form or structure that it lacked; hence, the process by which things become different, whether “substantial change” or “accidental change.”

**civil law:** A general term for human law in the sense of formally promulgated legislation.

**civil rights:** Entitlements that come from being a citizen, a member of a political community, for example, the right to vote.

**common good:** A general term for those goods that are only possible by common effort and that belong to no one exclusively but in which each may participate, for example, freedom under law or the security made possible by an adequate national defense.

**conscience:** The inner seat of moral authority within a person; for natural law theory, this term generally refers to the power of reason by which one evaluates an action being planned or an action already performed to determine its conformity to moral principles.

**consent:** In political theory, the approval required from those being governed.

**covenant:** A category of biblical and religious thought for a sacred contract or agreement between God and his people; in the covenants described in the Bible, one tends to find a set of divinely given laws or stipulations about what the people must do and must avoid.

**creature:** A category of biblical and religious thought somewhat akin to the philosophical idea of a being with a specific nature but considered specifically as the product of a divine mind that has made the entire universe.

**crimes against humanity:** The category used at the Nuremberg trials for prosecuting various war crimes where the international tribunals otherwise lacked jurisdiction.

**cultural relativism:** The ethical theory in which morality is determined by the culture in which one lives.

**definition:** The expression in language by which we identify what “kind” of thing something is; the classical approach to definition requires that we name some larger group to which all individuals of this kind belong (the genus), then some trait that is particular to this kind (the specific difference).

**demarcation point:** In general, a nonarbitrary dividing line; when trying to establish when an individual begins (ends) existence as a member of a given species, it refers to that moment when the basic structure starts (stops) being in place, such that all the changes and developments in between are differences in degree rather than differences in kind.

**development:** The changes in an individual by which it matures according to the pattern characteristic of this type of being.

**divine command ethics:** A theory of morality that finds explicit commands by God to be the source of moral obligation.

**divine law:** God's explicit commands, for instance, in the Decalogue as found in Exodus and Deuteronomy and in the Two Great Commandments of Jesus in the Gospels.

**double effect:** A principle of natural law analysis designed to analyze the permissibility of doing an action whose good effect alone we desire, but whose evil side effect we can also foresee but in no way desire.

**efficient causality:** The causal agent that gives matter some form, that imposes structure on some type of stuff.

**equity:** The principle of natural justice by which a judge corrects an injustice that would be done by the strict application of the law to a situation that the legislator did not foresee.

**essence:** What something is, that is, the nature of a being (for example, the type of matter and the type of form that together constitute a being with a physical existence, such as a human being).

**eternal law:** God's providential ordering of the natures of all types of being to their ends, including the design of human nature.

**ethics:** The philosophical discipline for discussing morality.

**euthanasia:** The practice of putting individuals, such as the aged, the senile, or the deformed, to death; utilitarian grounds are usually cited in attempts to justify this practice.

**evolution:** A theory of the development of the various species of plants and animals. The classical formulation by Charles Darwin and subsequent refinements by later theorists call for explanation entirely in terms of: (1) random variation (caused by natural forces rather than by any designing intelligence) and (2) natural selection (the winnowing of species under the pressure of various environmental challenges).

**fallen nature:** In Christian theology, the notion that all human nature was wounded by the effects of the original sin of Adam and Eve; for natural law theory, this is the explanation of why all natural inclinations are not

completely trustworthy but must be given careful scrutiny if they are to be valid sources of knowledge about our natural end.

**final causality:** The causal factor that consists of the end or goal of action or development; the final cause may be natural in the sense of already present (built in) in a being of a certain type (for instance, the directedness of a tadpole to mature into an adult frog), or it may be imposed from outside (for instance, when a sculptor makes a clay statue of a frog).

**form:** In the explanation of change, the structure or arrangement that makes something what it actually is.

**formal causality:** The structural principle that gives arrangement to matter so that it belongs to one or another type of being and gives it certain typical activities and operations.

**free choice of the will:** The deliberate decision to act in one way or another, or even not to act at all, that comes from the deepest center of a person.

**freedom:** Self-determination; the state of being independent of external control, whether the control of physical or psychological causality, and thus, able to determine one's own course of action.

**function:** An activity or operation typical of some type of being.

**grace:** In Christian theology, a general term for a free gift of God, whether in the form of a supernatural virtue (such as faith, hope, or charity), a share in God's own life (called *sanctifying grace*), or merely some special help needed for life (called *actual grace*).

**higher law:** The unwritten moral law that is superior to all forms of human law.

**human being:** A rational animal, a political animal (Aristotle).

**human dignity:** The intrinsic value of human life that deserves moral respect and protection.

**human law:** A general term for all forms of law made by human beings, including constitutions, statutory law, administration law, judicial precedent, and custom.

**human nature:** The principle in human beings by which they come to have the bodily and psychic structures typical of human beings.

**human rights:** Entitlements that come from being human, whether or not these rights are respected by a political regime or by legislation, such as the right to life or liberty.

**inalienable rights:** Entitlements that cannot be taken away or removed but are always present, whether or not respected by any given regime or legislation.

**inclination:** A proclivity to act in a certain way; natural law theorists consider our natural “inclinations” to be a source of data that needs to be tested by prudent reasoning but that can thereby disclose important aspects of the natural law. This view is based on the belief that God has providentially built into our nature various inclinations to act for the end that will genuinely fulfill us as human beings.

**individual:** Any one being as distinct from another, whether another of the same basic type or a being of some other type.

**infanticide:** The practice of putting defective newborns to death.

**intellect:** A general term for the power of human thinking; in the Aristotelian tradition, it can also refer to the intuitive appreciation for the truth about things and, in this sense, it is contrasted with *reason*.

**intelligibility:** Ability to be known.

***in vitro* fertilization:** The generation of a new life in a test tube by bringing together the gametes (the sex-cells egg and sperm) in such a way that they can fuse and a genetic rearrangement of DNA can take place so that a new living being is formed.

***ius:*** A Latin term that may be translated as “law” or “right” and that refers to a general system of law as that which it is right to do.

***ius civile:*** A Latin term for “civil law.”

***ius gentium:*** The Latin phrase for “the law of nations.” In one sense, this term refers to that part of the natural law that recurrently appears in the laws of various nations and cultures; in another sense, this term refers to international law in the positivistic sense of what various nations have decided on as the legal rules that will bind them.

***ius naturale:*** A Latin term for “natural law.”

**judicial legislation:** The power by which the judiciary changes existing law or determines what the law will be by the precedents it establishes; this power may be a part of judicial practice, as it often was in Roman law, or may be considered an abuse of judicial authority.

**judicial review:** The power of the judiciary to supervise legislation and to nullify anything inconsistent with more basic law, such as a constitution or, in some cases, natural law.

**just war:** A general term for the use of military force in a morally approved fashion; among the conditions usually cited: a just cause, such as response to unwarranted aggression; the exhaustion of all other means of resolving the dispute, such as negotiation; and the restriction of the means employed, such as refusal to use the force at one's disposal against civilian targets.

**knowledge:** Justified true belief; although in a broad sense, *knowledge* can refer to all sorts of cognition, in the strict sense, it refers to what we have reason (justification) to assert (belief) as genuinely the case (truth).

**language:** A general name for the distinctively human form of communication that in some ways resembles the communication of other animal species but that remains different in kind precisely because of its capacity for abstraction, negation, flexibility, and similar attributes.

**law:** An ordering of reason, promulgated by the person in charge of a community, for the common good (Aquinas).

**legal justice:** What is fair and right according to what has been set down in law.

**legal positivism:** The philosophy of jurisprudence in which the only law that is binding is that law that has been formally promulgated by human beings in a given jurisdiction.

**lex:** A Latin term for "law" that generally refers to a particular piece of legislation or a particular legal principle in the general system of *ius*.

**material cause:** That which receives form (structure); hence, the principle of potency, capacity for change, for realization within any physical being.

**mean:** In Aristotle's ethics, the peak of excellence (not the average or the mediocre) that is just right, whether it be in regard to one's emotions and desires (such as courage and temperance) or in regard to the giving and taking of goods and services (justice).

**morality:** The body of truths about good and bad; right and wrong; the obligatory, the permissible, and the forbidden.

**natural function:** In Aristotle's ethics, the operation or activity that is particularly characteristic of a given species or natural kind.

**natural justice:** What an impartial and reasonable person will discern to be fair and right (and, thus, "just") by reflecting on the objective relations among individuals (whether or not any human legislation covers the relationship in question).

**natural kind:** A species, a type of being; things are said to be different in "kind" when all members of that group have (albeit in varying degrees) some property or characteristic that the remainder of the larger group (the genus) lacks altogether.

**natural law:** The moral law that comes to be known by human participation in God's eternal law as regards the providential ordering of human life; the use of human reason to reflect on what our common human nature is and what is required to respect that nature as found in all human beings.

**natural rights:** The entitlements that an individual may claim by virtue of human nature; for John Locke, for instance, we have natural rights to life, liberty, and property.

**natural theology:** That part of philosophy that attempts to prove the existence of God and to describe the nature of God without the benefit of revelation; instead, it uses the powers of reason to reflect, for instance, on the need for a divine cause in order to explain the existence of the universe or to grasp what the nature of the cause must include given the effects of the cause that can be observed in the universe.

**naturalism:** In philosophy, an effort to provide an account that uses only factors intrinsic to this material universe and that foregoes recourse to such factors as a divine mind or will.

**nature:** The inner principle in any type of being that directs the development of that being according to a certain pattern so that the being will have the structure and activities characteristic of that type of being.

**neoplatonism:** The group of philosophies (pagan and religious) in the tradition of Plotinus; these philosophies tend to follow the tradition of Plato in content but use the logically precise categories of Aristotle.



**nominalism:** The philosophical theory that denies the reality of universals and insists instead that universals are merely terms (in Latin, *nomina*) that human beings devise to make classifications.

**normative:** What is required, obligatory; natural law theory contends that analysis of human nature shows us what is “normative” for human existence.

**objectivity:** In an attempt to describe how things are, a quality of realism used to express the way in which things do really exist and, thus, independent of any contribution or distortion by a human mind trying to think about them.

**Ockham’s razor:** A principle of parsimony in explanation according to which we should never posit any hypothetical entity when we can explain the phenomena in question in some simpler way. On the other hand, the principle also allows us to postulate hypothetical entities for which we do not have direct evidence when we cannot otherwise explain them.

**ordo amorum:** A Latin term used often by Augustine for “the order of loves” in the sense of the hierarchy that ought to be observed in our choices, such that we love the highest thing (God) most, the next level (human beings as images of God) next, and everything else in the universe in some lesser way that corresponds to their rank among beings.

**original sin:** The sin of Adam and Eve in disobeying God in the Garden of Eden. Christian theology holds that the effects of this first (hence, “original”) sin are inherited by all of humanity as the descendants of Adam and Eve. Whatever the precise means of its transmission from one generation to the next, the effect is some degree of darkening of intellect and some weakness of will.

**patristic:** A general term in Christian theology for the period of the Church Fathers, that is, those thinkers from the period just after the Apostles until the rise of the medieval universities.

**person:** An individual substance with a rational nature (Boethius); all human beings are persons, but there are personal beings, such as God and angels, that are not human.

**persona:** The Latin term for “person”; originally it referred to a mask, a role, or a character in a drama and only later came to have the metaphysical sense of an individual with a rational nature.

**physician-assisted suicide:** The practice of having medical professionals provide the technical means for a person who wants to commit suicide.

***polis*:** The Greek term for a “city-state.”

**positive law:** Whether a duty to act or a prohibition on acting, any law that is laid down or “posited” by a legitimate authority.

**Pre-Socratic:** A general term intended to cover philosophical thinkers before Socrates.

**privation:** In the explanation of change, that which is lacking from the range of forms possible but not actually present in something at a given time.

**privilege of the normal case:** In realist philosophy, the willingness to consider the mature and healthy adult individual in any given species as the benchmark for knowing the basic features of that species and for measuring such characteristics as illness and defect.

***proposon*:** The Greek term for “person” (originally a mask, a role, a character in a drama).

**providence:** Foresight; in natural law theory, this term refers especially to the mind of God as planning the design of creatures with various natures, including an in-built natural end.

**rationalism:** A generic name for those philosophies that hold that knowledge of the truth about reality is somehow a product of human intelligence, whether by the use of innate ideas or by the combination and habitual association of the data received through the senses.

**rationality:** The ability to know (think, understand, assert) and to choose (to desire, deliberate, select); this is usually credited as the trait that distinguishes human beings from all other animal species.

**realism:** A generic name for those philosophies that hold that there is a universe of beings that are, in principle, accessible and intelligible to the inquiring mind through the basic receptivity of the senses and the mind to the forms inherent in objects that exist extra-mentally.

**reason:** A general name for the power of human mental activity; in the Aristotelian tradition, it can also refer more specifically to discursive, step-by-step thinking and, in this sense, it is contrasted with the *intellect*.

**recapitulation:** In patristic theology, the doctrine that the life of Christ is the key to understanding the Bible, because he “recapitulates” the entire life of Israel; that is, in his own lifetime, he passes through the entire life of Israel, completing what is incomplete, perfecting what is imperfect, and sanctifying what is sinful.

**relativism:** An ethical position that sees morality as customary or regional rather than universal.

**responsibility:** The state of being answerable (accountable) for what we have deliberately chosen to do or to refrain from doing; our moral responsibility is mitigated, or even removed, to the degree that we did not know (or could not have known) or were not free.

**right reason:** In natural law theory, the name for human reason operating well to discover the true natures of things and the norms that flow from the ends intrinsic to those natures; hence, a moral power by which human individuals can discern right from wrong, good from bad.

**rights:** Entitlements; claims to rights can be of various kinds, such as human rights, natural rights, civil rights, property rights, and so on.

**scholastic:** A general term in the history of Christian thought for individuals who participated in the medieval universities (“the schools” and, hence, “scholastic”), whether in the faculties of law, medicine, philosophy, or theology.

**separation of powers:** A constitutional strategy for dividing the governmental authority into distinct branches (executive, legislative, and judicial) in order to have a system of checks and balances and, thereby, the better to secure justice and avoid seizures of power.

**sin:** In religious thought, an offense against God by the deliberate violation of divine law; it is important to distinguish “original sin” (a debilitating defect inherited by all human beings but not anything for which we bear personal responsibility) from “actual sin” (some offensive deed we have done, however grave or light, for which we do bear responsibility because we have knowingly made a choice).

**skepticism:** In general, a philosophical position that denies that knowledge has been achieved and sometimes that knowledge is even possible; considered specifically with regard to ethics, this position offers theoretical objections to the very possibility of knowing universal moral truths.

**social contract:** A form of political theory that takes society and government to be the result of human agreement among individuals in the state of nature.

**society:** A unity of human individuals and groups that serves the purpose of satisfying their mutual needs and that relies on their capacity to provide such help.

**Sophists:** In ancient Greece, teachers of rhetoric and persuasion; they tended to be critical of conventional moral beliefs and political arrangements.

**state of nature:** In social contract theory, the original state of affairs prior to the agreements that found a social organization or government.

**stem-cell research:** The medical investigation on those cells that have not yet become differentiated in particular ways (such as nerve cells or muscle cells) in the effort to find ways to make them develop in such a manner as to counteract certain diseases or correct certain genetic malformations.

**stoicism:** The philosophical position that cultivates a life of peace and harmony by making oneself as indifferent as possible to that which is outside of one's control; the ancient Roman Stoics advanced an early form of natural law theory in terms of right reason.

**structure:** The form, the basic arrangement.

**subjectivism:** An ethical position that denies that there are objective moral standards and urges that if there are to be moral values, they need to be chosen by individuals.

**subsidiarity:** A principle of natural law analysis in social ethics according to which the power to make decisions is given to the lowest level of authority capable of rendering a prudent decision for the common good.

**substance:** The technical philosophical term for an individual being, whether that substance is natural (one that has an internal principle of unity) or artificial (one whose principle of unity has been imposed from without, e.g., a car, a table, or a computer).

**substantial change:** The process by which a new substance comes into being or goes out of being.

**substrate:** In the philosophical explanation of change, the factor that endures; that which is receptive to form or structure, what has a certain form at any given time but can be brought to take on other forms.

**teleology:** The end-directedness of a process of growth or maturation; the presence of a final cause in a being; in natural law theory, concern with teleology means appreciating the ethical normativity derived from the presence of an end within a being's nature.

**toleration:** Permitting something that one dislikes or disagrees with or simply finds to be different without necessarily giving it approval.

**Torah:** The Hebrew term for "law" (especially for the divine law revealed in the Decalogue, or Ten Commandments); also a name for the first five books of the bible: Genesis, Exodus, Leviticus, Numbers, and Deuteronomy.

**truth:** The relation by which the mind conforms to reality; the term is used primarily of our thoughts and assertions when they say about whatever is that it is the case and about what is not that it is not the case. By contrast, *falsity* is saying of what is that it is not or saying of what is not that it is.

**universality:** The quality of extending throughout an entire class of objects; ethical claims, for instance, are regarded as "universal" when they are thought to apply across the entire human race.

**universals:** A philosophical term for those words that apply to all members of a class. In the history of philosophy, there has been considerable debate about whether "universals" exist, because they seem indispensable if we are ever to know the nature common to things of the same type, yet the precise mode of their existence has been hard to fathom, especially for those who regard individual substances as what really exist.

**unnatural:** That which goes against, contradicts, violates, or injures something's nature; hence, this term needs to be distinguished from the "artificial" (as that which arranges or determines something in ways that are not prescribed by nature but that do not thereby violate that nature).

**utilitarianism:** An ethical theory whose basic principle is the maximization of pleasure and the minimization of pain; the moral worth of anything is calculated by weighing the likely consequences of an action to determine how useful it is in light of the basic principle.

**virtue:** The state of character by which one is well disposed and ready to choose the mean between the extremes of excess and deficiency with regard to feeling and action.

**virtue ethics:** A moral theory such as that championed by Aristotle, in which the central concern is with the development of human excellence (the virtues).

**voluntarism:** The philosophy of law that holds that laws are binding only because they have been willed by the authority (whether the appropriate authority in a given case is God or some human ruler).

**will:** The power of rational appetite, that is, the center within a person where one feels attractions and revulsions and where one can close off certain attractions (revulsions) in order to make a free choice.

**Wisdom literature:** The sapiential portion of the Bible that consists of the books of Proverbs, Job, Qoheleth (Ecclesiastes), Sirach (Ecclesiasticus), Song of Songs, Daniel, and the Wisdom of Solomon.

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