

APA Newsletters

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APA NEWSLETTER ON

Philosophy and Law

Theodore Benditt, Editor

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FROM THE EDITOR

David Luban (Law, Georgetown) is now the chair of the Committee on Philosophy and Law, whose other current members are Professor Julie van Camp (Philosophy, Cal State-Long Beach), Claire Finkelstein (Law, U. Penn), Bill Edmundson (Law, Georgia State), Lester Hunt (Philosophy, Wisconsin), and Joan McGregor (Philosophy, Arizona State). All of us extend our thanks to Stefan Baumrin, who has ably chaired the Committee for the past several years.

The Committee on Philosophy and Law regularly sponsors special meetings in conjunction with regular regional APA meetings. In this issue there is a listing of recent programs, including topics and speakers.

The Current Issue of the Newsletter

The current issue of the Newsletter is entitled “Natural Law Update.” Natural law theories are among the oldest approaches to both ethics and law. Skeptical challenges, however, have brought about modifications of the natural law approach. In the minds of some, furthermore, the natural law approach to law has been eclipsed by other approaches, most notably legal positivism. Recent years, though, have seen a renewed interest in natural law theory, particularly with the publication of John Finnis’s *Natural Law and Natural Rights*. It is in light of this renewed interest that it seems appropriate for the Newsletter to take note of some recent developments in natural law thinking.

In “An Outsider’s Guide to Natural Law Theory” Brian Bix (Philosophy/Law, University of Minnesota) surveys the natural law landscape, providing an overview of ideas about, and uses of, natural law—“what natural law is, what its connection is with religious belief, what it has to say about wicked governments, its relationship with legal positivism, and its prescriptions for constitutional adjudication.” Bix observes, for example, that classical natural law theory was primarily concerned with moral or political matters, whereas in more recent times the focus has been on some of the narrower concerns of social and legal theory, especially in contradistinction to positivism. He observes too that different writers have different ideas about the role of the ‘natural’ in natural law thinking, and that even within a particular framework of thought there are further divisions and subcategories. Bix’s overview is a useful antidote to too-easy references to “natural law theory,” as if it is a clear and well understood category.

Robert P. George (Jurisprudence, Princeton), in “Reason, Freedom, and the Rule of Law: Their Significance in the Natural Law Tradition,” argues that the rule of law cannot be understood, as it is frequently in legal positivism, merely as a nonmoral good—that is, as a way of achieving governmental efficiency. Instead, the rule of law has *moral* value; not only does it diminish a ruler’s capacity for evil-doing, but also achieves an element of justice even when the laws being enforced are substantively unjust. More to the point, though, it treats people with the dignity appropriate to human beings in that it respects the fact that human beings are capable of deliberating, acting on reasons, and making free choices. This, George maintains, is a spiritual power—the “power to be an ‘uncaused causing’”—and it morally requires that human beings be ruled in ways that are compatible with it. It is this aspect of human nature that places the rule of law at the center of natural law thinking.

In his “Judaism and Natural Law,” David Novak (Jewish Studies, Toronto) is concerned to show that natural law thought is compatible with, and is indeed a philosophical presupposition of, Judaism—“it [natural law] is required for the intelligibility of the theological claim (certainly in Judaism) that God’s revelation is of immediate normative import.” How, Novak asks, could people “possibly accept the fuller version of God’s law that comes with the historical revelation in the covenant” if they “could not discover at least some of that law for themselves before revelation?” In his discussion Novak advances ten propositions that investigate the role that natural law theory plays in Jewish thought.

Future Issues of the Newsletter

Topics and editors for the next three issues of the *Newsletter* are:

Spring, 2002

THE RULE OF LAW

Submission Deadline: January 15, 2002

Editor: Theodore M. Benditt

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The rule of law is a central ideal in our thinking about government. It proposes, at a minimum, that people should be governed by means of general rules promulgated in advance, so that they may know what is expected of them and conform their behavior appropriately. The point of the ideal is to eliminate official despotism and even to minimize the need for discretion on the part of government officials.

Ambiguity and arbitrariness are the evils to be avoided. The rule of law is said to require that the state and its officials be subject to law and that the law and its application be public, general, and regular. The rule of law, it is sometimes said, is the law of rules.

It is less clear, though, what the rule of law requires in judicial decision-making. What does the ideal have to say when it comes to so-called particularized justice (equity) that may not be strictly in accord with a legal rule? What does it say with regard to any of a variety of exercises of discretion by judges? Jurists and philosophers across the spectrum are advocates of the ideal, though there are different ideas of what it requires. And for some, on both sides of the fence, Election 2000 seriously tested the idea of the rule of law. Proposals are welcome; please send to tbenditt@uab.edu.

Fall, 2002

FEMINIST JURISPRUDENCE

Submission Deadline: June 15, 2002

Editor: Patricia Smith

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Feminist jurisprudence is the analysis of law from the perspective of obtaining justice and equal treatment for women. It contains many different facets, focus points, and theories. Recently some feminists have been focusing on global issues and the idea of women's rights as human rights. It is interesting that the subordination and even the overt persecution of women is always a civil internal matter, unsuited to intervention by other nations. The horrors of Afghanistan poses a warning to concerned men and women everywhere. In the face of emerging militant fundamentalist sects, economic exploitation, and domestic violence women are widely at risk, but national sovereignty apparently precludes intervention. Globalism itself poses interesting debates. If you are interested in submitting feminist work in any of these areas, please send abstract to: patricia_smith@baruch.cuny.edu.

Spring, 2003

LEGAL ETHICS

Submission Deadline: January 15, 2003

Editor: David Luban

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ARTICLES

An Outsider's Guide to Natural Law Theory

Brian H. Bix*

Introduction

For reasons best known to others, I have in recent years been asked to write a series of articles on natural law theory, mostly for general reference works.¹ I come to the topic as an outsider—if pressed, I would state that my affiliation was (and is) closer to legal positivism, the school of thought usually thought of as natural law theory's opposite. Writing about that tradition without being a believer may allow me a better perspective on natural law theory, or at least a useful view on how the tradition has been treated within jurisprudence...or, it just may blind me to some things that are obvious to insiders. Optimistically assuming that it is more the former than the latter, I will share some of what I have learned in being an outsider trying to learn about natural law theory, and in trying to explain natural law theory to outsiders. This article will offer a brief overview of the questions and disputes that seem to arise most often: what natural law is, what its connection is with religious belief, what it has to say about wicked governments, its relationship with legal positivism, and its prescriptions for constitutional adjudication

Natural Law Theory—What is It?

There are few topics or approaches in jurisprudence which are the object of greater misunderstanding than natural law theory. Natural law theory is a mode of thinking systematically about the connections between the cosmic order, morality, and law, which, in one form or another, has been around for thousands of years. Different natural law theories can have quite disparate objectives: e.g., offering claims generally about correct action and choice (morality, moral theory); offering claims about how one comes to correct moral knowledge (epistemology, moral meta-theory); and offering claims about the proper understanding of law and legal institutions (legal theory). Natural law has also played a central role in the development of modern political theory (regarding the role and limits of government and regarding natural rights) and international law. While that tradition has been forced to the margins of moral and political thought, it has retained (or re-assumed) a prominent position within jurisprudential debates.²

One can find important aspects of the natural law approach in the ancient works of Plato, Aristotle, and Cicero; however, it is not given systematic form until Thomas Aquinas in the 13th century. In the medieval period and through the Renaissance, with the work of writers such as Francisco Suárez, Hugo Grotius, Samuel Pufendorf, John Locke, and Jean-Jacques Rousseau, natural law and natural rights theories were integral parts of theological, moral, legal, and political thought. The role natural law played in broader religious, moral and political debates varied considerably. Sometimes it was identified with a particular established religion, or more generally with the status quo, while at other

times it was used as a support by those advocating radical change. Similarly, at times, those writing in the natural law tradition have seemed most concerned with the individual-based question, how is one to live a good (“moral,” “virtuous”) life?; at other times, the concern has been broader—social or international: what norms can we find under which we can all get along, given our different values and ideas about the good?

Some of the modern legal theorists who identify themselves with the natural law tradition seem to have objectives and approaches distinctly different from those classically associated with natural law. Most of the classical theorists were basically moral or political theorists, asking: How does one act morally? Or, more specifically, what are one’s moral obligations *as* a citizen within a state, or as a state official? And, what are the limits of legitimate (that is, moral) governmental action? By contrast, some (but far from all) of the modern theorists working within the tradition are social theorists or legal theorists, narrowly understood.

Natural law theory, is not, in modern parlance, primarily a theory of law. That is, its primary focus, its label notwithstanding, was *not* the proper understanding of (positive) law, of people’s moral obligations within a legal system. Natural law, at its core, is an approach to morality, and to the meta-theoretical questions of the source of moral truth, and how one comes to know such truths. It is also an approach with ties to theology, as many of the theories within the tradition had, as integral elements, divine revelation, divine command, or the way in which humanity or nature reflect the divine plan or divine creation. As a moral system, natural law has often spoken to the implications of its approach to the ethical questions facing lawmakers and facing citizens in both just and unjust societies.

Some of the modern theorists who carry the “natural law” label are social theorists or legal theorists, narrowly understood. Their primary dispute is with other approaches to explaining or understanding society and law. In fact, much of modern natural law theory has developed in reaction to legal positivism, an alternative approach to theorizing about law. This is how theorists like Lon Fuller,³ Theodore Benditt,⁴ Ronald Dworkin,⁵ and Michael Moore⁶ can end up with the label “natural law” (in Dworkin’s case, reluctantly⁷) even though they are far from the Thomistic tradition.⁸

What makes a theory a “natural law” theory? There are almost as many answers to the question as there are theorists writing about natural law theory, or calling themselves “natural law theorists.” Some of the proffered definitions are quite broad. According to some commentators, all that seems to be required for a theory to fit into that category is that it views values as objective and accessible to human reason.⁹ Such a view might exclude very little: almost every moral theory could qualify as a natural law theory, give or take the most hardened moral relativism, skepticism, or noncognitivism. (Of course, in the cases of John Finnis and many others self-described as natural law theorists, their claim for inclusion in the category is supported by their consciously working within a particular tradition, citing, discussing, and elaborating the views of prominent predecessors.)

Many commentators define the category more narrowly, by offering more content to the word “natural.”¹⁰ Even here,

though, the explanations of “natural” can diverge radically: e.g., (1) moral principles can be read off of “Nature” or a normatively charged universe; (2) that moral principles are tied to human nature—and “nature” here is used to indicate either the search for basic or common human characteristics or (to the extent that this is different) some discussion of human teleology, our purpose or objective within a larger, usually divine, plan; and (3) that there is a kind of knowledge of moral truth that we all have by our nature as human beings.

A further sharp division exists within the classical or Thomistic natural law tradition, among those who purport to be interpreting and applying Aquinas’s ideas. One side claims that we come to know what is right and good by investigating human nature, while the other side argues that knowledge of the good and the right comes by another path (usually a combination of rationality and empirical observation), even if the “basic human goods and moral norms *are* what they are because human nature *is* what it is.”¹¹ (One obvious advantage of *not* trying to derive moral truths from descriptive claims about human nature is that one need not confront the objection that this involves an inappropriate derivation of “ought” from “is.”¹²)

One might sense a broad, perhaps metaphoric notion that unites the various forms of traditional natural law, and may even tie natural law moral/political theories to natural law legal/social theories. The focus within natural law is away from conventional law, from civil law, to something higher or (to change the image) more basic that rules or guides, perhaps teleologically. In the voluntarist forms of traditional natural law, it is divine commands creating moral standards; in some forms of Thomistic natural law, it is an ideal towards which humans, by their nature, strive; in recent natural law legal theories, it is the sense to which conventional legal rules are approximations of what law really is (Ronald Dworkin) or what law must try to be (Lon Fuller). Also, in most traditional natural law theories, natural law is not understood by analogy to (or as an imperfect version of) positive law, but rather the other way around: that it is natural law which is the primary focus, and positive law which should be understood by analogy to, or as an imperfect version of, natural law.¹³

What is the Connection Between Natural Law and (Belief in) God?

The great Western tradition of natural law theory¹⁴ has, for many centuries, and to some extent even today, been closely associated with one theological tradition, that of the Catholic Church, but there are theories within the natural law tradition associated with thinkers from other religions as well.¹⁵ Also, most of the important writers within this tradition have gone to some lengths to dissociate the principles of natural law from belief in a particular religious tradition or from any kind of belief in a (certain kind of) deity. Grotius may have been the first to make the statement plainly: “What we have been saying would have a degree of validity even if we should concede that which cannot be conceded without the utmost wickedness, that there is no God, or that the affairs of men are of no concern to Him.”¹⁶

The context of 17th and 18th century writing on natural law may help to explain the diminished role of God in natural law theories from that time, and since. Some of the writers of that period were reacting against and trying to escape the theological disputes and wars (particularly, though not

exclusively, Protestant vs. Catholic) of the time, and were searching for a way to ground a moral or political philosophy that could avoid such disputes. Similarly, some theorists were searching for principles from which an international law could be constructed, principles which could be accepted by nations and peoples of very different faiths. Finally, political theorists were looking for a basis to justify and limit government, but in a way more favorable to individual liberty, and these theorists feared that a religious grounding would tend towards theocratic, authoritarian rule. All three developments within natural law theory required a reduced role of God—reduced, but usually not eliminated altogether, for God was often a handy basis for grounding ultimate duties and rights.

Contemporary writers within this tradition are often equally insistent about being able to offer “a theory of natural law without needing to advert to the question of God’s existence or nature or will.”¹⁷ Yet one can still find theorists within the tradition who take the opposite position: that one cannot understand the notion of natural *law* without positing a supernatural being who is ordering compliance.¹⁸

The role of God within various natural law theories also allows one to differentiate such theories along the lines of the relative prevalence of “will” or “reason.”¹⁹ At one extreme is “voluntarism,” a sub-category of natural law theories in which God—and, in particular, God’s will—plays an important role. Voluntarism of one type or another appears regularly in the history of natural law theory. The opposite extreme, a reason-based approach, would equate virtue with reasonableness rather than tying it to the “will” or orders of any entity.²⁰

Was Nazi Law “Law”?

Strongly influenced by the debate between H.L.A. Hart and Lon Fuller²¹ (which in turn was a discussion of some work by the German legal-positivist-turned-natural-lawyer, Gustav Radbruch), many students (and probably some academics as well) think that natural law theory, and its disagreement with legal positivism, is all about whether to call the official actions and enactments of Nazi officials (and the officials of other evil regimes) “law” or not.

This is a strange question, and the answer might be straight-forward if the inquiry is untangled. We understand what people mean when they assert that the Nazis *did* have law—in that the regime had institutions and procedures that resemble, at least on the surface, the institutions and procedures to which we give that label. On the other hand, we also understand those who assert that the Nazis *did not* have law—in that the regime was both procedurally and substantively so unjust that the officials’ actions and enactments did not create the kind of *moral* obligations that laws usually create.²² Modern Thomists tend, in any event, not to speak in terms of a wicked governments “not having law”; they more precisely, and more helpfully, argue that such governments “do not have law *in the fullest sense of the word*.”²³ It is a combination of the two views just mentioned: that the rules have the appearance of law, but, because they are not sufficiently just, they do not carry the same moral weight that laws usually do.

A somewhat more subtle variation of the same theme, which also derives (or can be fairly read into) the Hart-Fuller-Radbruch debate, views the argument between natural law

theory and legal positivism as being all about which approach would make it easier for citizens in the future to withstand evil regimes.²⁴ However, for those of us either disinclined to take a fully pragmatist approach to evaluating legal theories (considering only their “usefulness” and never their “truth” or “explanatory power”) or skeptical about the ability of legal theory to have a significant effect on social progress, this is an unproductive way to approach natural law theory—or legal positivism.

What is the Disagreement Between Natural Law and Legal Positivism?

What is the disagreement between natural law theory and legal positivism? This is a trickier question than may at first appear. There is no lack of assertions on this topic, but there seems to be more misunderstanding than insight. This is because there is relatively little real interchange between the camps; mostly theorists on one side (mis-)characterize what they think advocates on the other side believe in.

There is no problem finding legal positivists who believe that natural law theories reduce to the belief that “only just rules can be called ‘law’.”²⁵ The caricature in the other direction usually involves the portrayal of legal positivism as being that all law should be applied as written,²⁶ or that it should be evaluated and applied without any concern for justice.²⁷

Recently, there has been a realization by major figures from both camps that there are more grounds for agreement than for disagreement. H.L.A. Hart,²⁸ Neil MacCormick,²⁹ Joseph Raz,³⁰ and John Finnis³¹ have each recognized that much of what the “opposing” camp has been asserting is not in fact incompatible with the core of his own theory. When legal positivists are (as a matter of legal positivism) agnostic on the questions of moral objectivity and moral epistemology that concern traditional natural law theory, and as natural law theory can accept that “law,” broadly understood, has no necessary moral content, the points of disagreement become harder to discern.

This apparent lack of fundamental disagreement may not be that surprising. The two theories are basically orthogonal: legal positivism is a narrow conceptual approach to the nature of law, with some overtones of the social sciences; while natural law theory is a broad approach to morality (and theology), with implications for law—and everything else as well.

This does not mean, however, that there are no points of difference. One place to look for substantive disagreement is in the project of theorizing about (the nature of) law.³² Legal positivism can be seen as arguing for a morally neutral descriptive or conceptual theory of law, while natural law theory (or at least a number of theorists within that tradition) can be seen as denying that possibility. Here I would include the “procedural natural law” theorist Lon Fuller as well as the traditional natural law theorist John Finnis. (If one includes Ronald Dworkin in a broad reading of “natural law theory,” he would be included as well, though for somewhat different reasons.³³)

Finnis and Fuller can both be seen as arguing that one cannot properly understand law except in the context of what it aspires to. For Finnis,³⁴ this aspiration would be to justice in the fullest sense of the term, while for Fuller it would likely be the procedural aspects of justice—what he calls the

“internal morality of law.”³⁵ Thus, there is basic disagreement here, if no place else, between natural law theory and legal positivism: on whether it is valuable, or even viable, to create a purely descriptive or purely conceptual theory of law.

Does Natural Law Require a Radically Different Approach to Constitutional Adjudication?

American legal scholars, at least in recent decades, have become fixated on judging, particularly constitutional adjudication. This may be understandable, given the centrality of constitutional law to current legal practice, and, to some extent, to American political life generally. However, the focus on adjudication and constitutional adjudication has caused American scholars to misunderstand, or at least distort, theorists from countries or traditions where adjudication is not as central.³⁶ It is not surprising that American commentators have sometimes misunderstood natural law theory in a similar way: as a (radical) set of instructions to judges.³⁷

When Clarence Thomas was nominated to be a Justice on the United States Supreme Court, much was made of Thomas’ apparent endorsement, in some of his writings, of natural law as relevant to constitutional interpretation.³⁸ Thomas removed much of the debate about natural law theory from his nomination hearing by renouncing any prior adherence to natural law theory as a central aspect of constitutional adjudication. However, this has not stopped other theorists from assuming that natural law theory requires an activist approach to adjudication.

However, there is no reason to believe that natural law theory would be particularly activist about constitutional adjudication, or about adjudication generally.³⁹ Traditional natural law theories are basically moral theories (they also often have theological aspects, but these aspects do not affect the present inquiry). A follower of a particular natural law theory might have views about what is morally right and wrong, and also about how one should come to such judgments, but people who come to their moral judgments from other traditions and using other approaches would be no differently placed when considering problems of adjudication. The basic question remains the same: how should judges act when the law seems to require a result that is contrary to what is right?

(There is one type of moral theory that *might* have a more direct effect on one’s theory of adjudication: one that has a skeptical or nihilistic view about morality. Those who do not believe in moral truth will never be bothered by the question of legal truths conflicting with moral truths. Some people believe that much of Oliver Wendell Holmes’ approach to constitutional adjudication can be explained by his skepticism: as he did not believe in grand foundational truths, he saw no justification for judges to stop popular majorities from whatever plans they chose to enact through the legislature.⁴⁰)

There are contrary views. In the rich and varied world of natural law theory, it is not difficult to find theorists whose natural law beliefs do seem to be the central justification for advocating a more activist approach to constitutional adjudication.⁴¹ However, this seems to be the exception rather than the rule.

Conclusion

The natural law tradition has a long and interesting history—of which most of us who talk about “natural law” in legal philosophy are, to put the matter mildly, under-informed. We outsiders, accustomed to speaking in terms of prescriptions for judges, or analytical claims, may take a while to feel at home amid the meta-ethical and teleological claims of the natural law tradition. However, greater familiarity with this tradition may, one hopes, increase our understanding of what is, and is not, at stake in the jurisprudential debates.

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Endnotes

1. See Brian Bix, “Natural Law Theory,” in Dennis Patterson, ed., *A Companion to Philosophy of Law and Legal Theory* (Oxford: Blackwell Publishers, 1996): 223; “On the Dividing Line Between Natural Law Theory and Legal Positivism,” *Notre Dame Law Review* 75 (2000): 1613; Brian Bix, “Natural Law Theory,” in Jonathan Michie, ed., *Reader’s Guide to the Social Sciences* (London: Fitzroy Dearborn, 2001), 1100; “Natural Law Theory: The Modern Tradition,” in Jules L. Coleman & Scott Shapiro, eds., *Handbook of Jurisprudence and Legal Philosophy* (Oxford: Oxford University Press, forthcoming, 2002). Portions of this article are taken, in modified form, from Bix (2002).
2. The modern resurgence of natural law thinking within English-language legal theory is usually traced to John Finnis, *Natural Law and Natural Rights* (Oxford: Clarendon Press, 1980). Among other recent works of interest are Robert P. George, ed., *Natural Law Theory: Contemporary Essays* (Oxford: Clarendon Press, 1992); Robert P. George, ed., *Natural Law, Liberalism, and Morality* (Oxford: Clarendon Press, 1996); David F. Forte, ed., *Natural Law and Contemporary Public Policy* (Washington, D.C.: Georgetown University Press, 1998); and Robert P. George, *In Defense of Natural Law* (Oxford: Clarendon Press, 1999).
3. Lon L. Fuller, *The Morality of Law* (rev. ed., New Haven: Yale University Press, 1969).
4. Theodore M. Benditt, *Law as Rule and Principle: Problems of Legal Philosophy* (Stanford: Stanford University Press, 1978).
5. Ronald Dworkin, *Law’s Empire* (Cambridge: Harvard University Press, 1986).
6. Michael Moore, *Educating Oneself in Public: Critical Essays in Jurisprudence* (Oxford: Oxford University Press, 2000).
7. See Ronald Dworkin, “Natural’ Law Revisited,” *University of Florida Law Review* 34 (1982): 165.
8. As mentioned later in this section, there is a sense in which one can see the two different types of natural law—natural law as moral/political theory and natural law as legal/social theory—as connected at a basic level: as both exemplifying a view of (civil) law not merely as governing, but also as being governed. I discuss this connection in greater detail in Bix (2002).
9. See Finnis (1980), 23-25.
10. See, for example, Lloyd L. Weinreb, *Natural Law and Justice* (Cambridge: Harvard University Press, 1987), 15-42.
11. George (1999), 85.
12. See Finnis (1980), 33-36.
13. See, for example, Russell Hittinger, “Natural Law as ‘Law’: Reflections on the Occasion of ‘Veritatis Splendor,’” *American Journal of Jurisprudence* 39 (1994): 1.
14. There also appear to be non-Western traditions comparable to the Western natural law tradition discussed in this article, see, e.g., Surya Prakash Sinha, *Jurisprudence: Legal Philosophy* (St. Paul: West Publishing, 1993), 84-6 (discussing natural law theories of ancient China and India). However, those schools of thought are beyond the scope of this article.

15. There is a long tradition of natural law thinking among Protestant theorists, e.g., with Hugo Grotius, Samuel Pufendorf, and Francis Hutcheson. On the tradition's roots within Judaism, see David Novak, *Natural Law in Judaism* (Cambridge: Cambridge University Press, 1998).
16. Hugo Grotius, *De Jure Belli Ac Pacis Libri Tres* (Francis W. Kelsey, trans., Oxford: Clarendon Press, 1925) (1625), 13 ("Prolegomena," para. 11). The position can probably be traced back to earlier writers, including Gregor of Rimini, Francisco de Vitoria, and Francisco Suárez. See Finnis (1980), 54.
17. Finnis (1980): 49; see also Michael S. Moore, "Good Without God," in Robert P. George, ed., *Natural Law, Liberalism, and Morality* (Oxford: Clarendon Press, 1996), 221.
18. See, for example, Ronald R. Garet, "Natural Law and Creation Stories," in J. Roland Pennock & John W. Chapman, eds., *Religion, Morality, and the Law: NOMOS XXX* (New York: New York University Press, 1988), 236-37; John T. Noonan, Jr., "The Natural Law Banner," in David F. Forte, ed., *Natural Law and Contemporary Public Policy* (Washington, D.C.: Georgetown University Press, 1998), 382.
19. On using the dichotomy of "will" and "reason" to understand aspects of jurisprudence generally, see, for example, Vernon J. Bourke, *Will in Western Thought: An Historico-Critical Survey* (New York: Sheed & Ward, 1964); Brian Bix, *Jurisprudence: Theory and Context* (2nd ed., Durham: Carolina Academic Press, 1999), 121-26.
20. There is also a form of natural law theory that seems to take a compromise between a "will" approach and a "reason" approach: this form asserts that actions are intrinsically good or bad, but we are only obligated to pursue the good because God so commands us; this was Francisco Suárez's view. See Francisco Suárez, *On Law and God the Lawgiver*, Book II, Chapter VI, excerpted in J. B. Schneewind, ed., *Moral Philosophy from Montaigne to Kant*, vol. I, (Cambridge: Cambridge University Press, 1990), 76-79.
21. H.L.A. Hart, "Positivism and the Separation of Law and Morals," *Harvard Law Review* 71 (1958): 593; Lon L. Fuller, "Positivism and Fidelity of Law—A Reply to Professor Hart," *Harvard Law Review* 71 (1958): 630.
22. Ronald Dworkin, "Legal Theory and the Problem of Sense," in Ruth Gavison, ed., *Issues in Contemporary Legal Philosophy* (Oxford: Clarendon Press, 1987), 15-17.
23. See, for example, Norman Kretzmann, "Lex Iniusta Non Est Lex: Laws on Trial in Aquinas' Court of Conscience," *American Journal of Jurisprudence* 33 (1988): 99.
24. See, for example, Frederick Schauer, "Fuller's Internal Point of View," *Law and Philosophy* 13 (1994): 313.
25. See, for example, Jules L. Coleman & Brian Leiter, "Legal Positivism," in Dennis Patterson, ed., *A Companion to Philosophy of Law and Legal Theory* (Oxford: Blackwell, 1996), 244.
26. See, for example, Anthony Sebok, *Legal Positivism in American Jurisprudence* (Cambridge University Press, 1998), 104-12, and Lon Fuller's embodiment of legal positivism, as he saw it, in "Judge Keen" in Lon L. Fuller, "The Case of the Speluncean Explorers," *Harvard Law Review* 62 (1949): 631-37.
27. Gustav Radbruch's characterization of legal positivism in this way is summarized in Stanley L. Paulson, "Lon L. Fuller, Gustav Radbruch, and the 'Positivist' Theses," *Law and Philosophy* 13 (1994): 329-31.
28. H.L.A. Hart, *Essays in Jurisprudence and Philosophy* (Oxford: Clarendon Press, 1983), 10.
29. Neil MacCormick, "Natural Law and the Separation of Law and Morals," in Robert P. George, ed., *Natural Law Theory: Contemporary Essays* (Oxford: Clarendon Press, 1992), 105.
30. Joseph Raz, "The Morality of Obedience," *Michigan Law Review* 83 (1985): 739.
31. John Finnis, "The Truth in Legal Positivism," in Robert P. George, ed., *The Autonomy of Law: Essays on Legal Positivism* (Oxford: Clarendon Press, 1996), 195.
32. I consider this question and response at greater length in Bix (2000).

33. For Dworkin, morality becomes part of a theory of law because a theory of law should be a constructive interpretation of legal practice, an interpretation that reads past official actions in the morally best way possible. See Dworkin (1986).
34. The most recent summary of Finnis' critique of legal positivism occurs in John Finnis, "On the Incoherence of Legal Positivism," *Notre Dame Law Review* 75 (2000): 1597.
35. Fuller (1969). Fuller also seemed to assume, or believe, that societies that met the procedural requirements of justice would likely also be substantively just. See Fuller (1958), 626. This belief has been regularly refuted by the evidence. However, I do not think that the belief is in any way important to Fuller's basic claim.
36. I think part of the way that H.L.A. Hart and Ronald Dworkin consistently talked past one another in their critical exchanges can be attributed to this different set of concerns.
37. In Anthony Sebok's otherwise excellent recent book, Sebok (1998), he at times misreads both the legal positivists and the natural law theorists by construing them as (primarily) offering instructions to judges on how to decide cases. Brian Bix, "Positively Positivism: Reviewing *Legal Positivism in American Jurisprudence*," *Virginia Law Review* 85 (1999): 903-15 & n. 131.
38. See, e.g., Clarence Thomas, "The Higher Law Background of the Privileges and Immunities Clause of the Fourteenth Amendment," *Harvard Journal of Law and Public Policy* 12 (1989): 63; Christopher Wolfe, "Judicial Review," in David F. Forte, ed., *Natural Law and Contemporary Public Policy* (Washington, D.C.: Georgetown University Press, 1998), 169-70.
39. See, for example, George (1999), 110-11.
40. See, for example, G. Edward White, "Revisiting Substantive Due Process and Holmes's *Lochner* Dissent," *Brooklyn Law Review* 63 (1997): 127.
41. See, for example, Michael S. Moore, "Justifying the Natural Law Theory of Constitutional Interpretation," *Fordham Law Review* 69 (2001): 2087.

Reason, Freedom, and the Rule of Law: Their Significance in the Natural Law Tradition

Robert P. George*

The idea of law, and the ideal of the rule of law, are central to the natural law (and, more generally, the western) tradition of thought about public (or "political") order. St. Thomas Aquinas went so far as to declare that "it belongs to the very notion of a people [ad rationem populi] that the people's dealings with each other be regulated by just precepts of law."¹ In our own time, Pope John Paul II has forcefully reaffirmed the status of the rule of law as a requirement of fundamental political justice.² For all the romantic appeal of "palm tree justice" or "Solomonic judging," and despite the sometimes decidedly unromantic qualities of living by pre-ordained legal rules, the natural law tradition affirms that justice itself requires that people be governed in accordance with the principles of legality.

Among the core concerns of natural law theorists and other legal philosophers in recent decades has been the meaning, content, and moral significance of the rule of law. The renewal of interest in this very ancient question (or set of questions) has had to do above all, I think, with the unprecedented rise and fall of totalitarian regimes. In the aftermath of the defeat of Nazism, legal philosophers of every religious persuasion tested their legal theories by asking, for example, whether the Nazi regime constituted a *legal* system in any meaningful sense. In the wake of communism's

collapse in Europe, legal scholars and others are urgently trying to understand the role of legal procedures and institutions in creating and sustaining decent democratic regimes. It has been in this particular context that Pope John Paul II has had occasion to stress the moral importance of the rule of law.

One of the signal achievements in legal philosophy in the Twentieth Century was Lon L. Fuller's explication of the content of the rule of law.³ Fuller unhesitatingly availed himself of the resources of the natural law tradition in developing what he referred to as a "procedural natural law theory." Reflecting on law as a "purposive" enterprise—the subjecting of human behavior to the governance of rules—Fuller identified eight constitutive elements of legality. These are (1) the prospectivity (i.e., non-retroactivity) of legal rules; (2) the absence of impediments to compliance with the rules by those subject to them; (3) the promulgation of the rules; (4) their clarity; (5) their coherence with one another; (6) their constancy over time; (7) their generality of application; and (8) the congruence between official action and declared rule. Irrespective of whether a legal system (or a body of law) is good or bad, that is to say, substantively just or unjust, *to the extent* that it truly is a legal system (or a body of law) it will, to some significant degree, exemplify these elements.

It was a mark of Fuller's sophistication, I think, that he noticed that the rule of law is a *matter of degree*. Its constitutive elements are exemplified *to a greater or lesser extent* by actual legal systems or bodies of law. Legal systems exemplify the rule of law *to the extent* that the rules constituting them are prospective, susceptible of being complied with, promulgated, clear, etc.

Even Fuller's critics recognized his achievement in explicating the content of the rule of law. What they objected to was Fuller's claims—or, in any event, what they took to be Fuller's claims—on its behalf. Provocatively, Fuller asserted that, taken together, the elements of the rule of law, though in themselves procedural, nevertheless constitute what he called an "internal morality of law." (Hence, the title of Fuller's major work on the subject of the rule of law: *The Morality of Law*.) Moreover, he explicitly presented his account of the rule of law as a challenge to the dominant "legal positivism" of his time. According to Fuller, once we recognize that law, precisely as such, *has* an internal morality, it becomes clear that the "conceptual separation of law and morality" which forms the core of the "positivist" understanding of law, legal obligation, and the practical functioning of legal institutions cannot be maintained.

These claims drew sharp criticism from, among others, Herbert Hart, the Oxford legal philosopher whose magisterial 1961 book *The Concept of Law*⁴ both substantially revised and dramatically revitalized the legal positivist tradition in analytical jurisprudence. In a now famous review essay in the *Harvard Law Review*, Hart accused Fuller of, in effect, engaging in a semantic sleight of hand.⁵ According to Hart, there isn't the slightest reason to suppose that the constitutive elements of legality which Fuller correctly and very usefully identified should be accounted as a "morality" of any sort. As Fuller himself seemed to concede, unjust (or otherwise morally bad) law can exemplify the procedural elements of legality just as fully as just law can. But if that is true, then it is worse than merely tendentious to claim that these elements constitute an "internal morality of law."

Indeed, Fuller's critics have observed that even the most wicked rulers sometimes have purely self-interested reasons to put into place, and operate strictly in accordance with, legal procedures. Yet even the strictest adherence to the forms of legality cannot ensure that the laws they enact and enforce will be substantively just or even minimally decent. Replying to Hart and other critics, Fuller argued that the historical record shows that thoroughly evil regimes, such as the Nazi regime, consistently fail to observe even the formal principles of legality. In practice, the Nazis, to stay with the example, freely departed from the rule of law whenever it suited their purposes to do so. So Fuller defied Hart to provide "significant examples of regimes that have combined a faithful adherence to the [rule of law] with a brutal indifference to justice and human welfare."⁶

Now, it is important to see that Fuller's claim here is not that regimes can never perpetrate injustices—even grave injustices—while respecting the desiderata of the rule of law. It is the weaker, yet by no means trivial, claim that regimes that respect the rule of law do not, and cannot so long as they adhere to the rule of law, degenerate into truly monstrous tyrannies like the Nazis.

Still, Fuller's critics were unpersuaded. My own esteemed teacher, Joseph Raz, one of Hart's greatest students and now his literary executor, pursued a more radical line of argument to deflate Fuller's claim that the elements of the rule of law constitute an internal morality. Raz suggested that the rule of law is a purely instrumental, rather than any sort of *moral*, good. He analogized the rule of law to a sharp knife—an *efficient* instrument, and, in that nonmoral sense "good," but equally serviceable in morally good and *bad* causes.⁷ Indeed, according to Raz, insofar as the institution and maintenance of legal procedures improves governmental efficiency, they increase the potential for evil doing of wicked rulers.

Fuller's arguments have, however, won some converts. Most notably, perhaps, Neil MacCormick, who had once shared Raz's view that the requirements of the rule of law "can in principle be as well observed by those whose laws wreak great substantive injustice as by those whose laws are in substance as just as they can possibly be," eventually revised his opinion to give some credit to Fuller's claim that the elements of the rule of law constitute a kind of internal morality.

There is always something to be said for treating people with formal fairness, that is, in a rational and predictable way, setting public standards for citizens' conduct and officials' responses thereto, standards with which one can judge compliance or non-compliance, rather than leaving everything to discretionary and potentially arbitrary decision. That indeed is what we mean by the "Rule of Law." Where it is observed, people are confronted by a state which treats them as *rational agents due some respect as such*. It applies fairly whatever standards of conduct and of judgment it applies. This has real value, and independent value, even where the substance of what is done falls short of any relevant ideal of substantive justice.⁸

MacCormick's revised understanding strikes me as sounder than the contrary understanding of Hart and Raz who refuse to accord to the requirements of the rule of law any of

the sort of more-than-merely-instrumental value that MacCormick labels “independent,” and I would bite the bullet and call “moral.” Plainly it is the case that well-intentioned rulers who genuinely care for justice and the common good of the communities they govern will strive for procedural fairness—and will do so, in part, because they understand that people, as rational agents, are due the respect that is paid them when officials eschew arbitrary decisionmaking and operate according to law. And we can understand this without the need for sociological inquiry into the way things are done by officials in more or less just regimes. Rather, it is the fruit of reflection on what such officials *ought* to do because they *owe* it to those under their governance. But if I am right about this, then respect for the requirements of the rule of law *is not a morally neutral matter*—despite the fact that the elements of the rule of law are themselves procedural. Rather, rulers or officials have *moral reasons*, and, inasmuch as these reasons are generally conclusive, a *moral obligation*, to respect the requirements of the rule of law.

Of course, respect for the rule of law does not exhaust the moral obligations of rulers or officials towards those subject to their governance. Nor, as Fuller’s critics such as Hart and Raz correctly observe, does respect for the rule of law guarantee that the substance of the laws will be just. If Raz went too far in one direction by treating the rule of law as a morally neutral “efficient instrument,” boosters of the rule of law can easily go too far in the other direction by supposing that the achievement and maintenance of the rule of law immunizes a regime against grave injustice and even tyranny.

Here historical and sociological inquiry is the antidote to overblown claims. Apartheid and even slavery have coexisted with the rule of law. And those legal positivists who claimed that even the Nazi regime worked much of its evil through formally lawful means were not without evidence to support their view. I would therefore venture on behalf of the rule of law only the following modest claim when it comes to the question of its alleged incompatibility with grave substantive injustice: An unjust regime’s adherence to preannounced and stable general rules, so long as it lasts, has the virtue of limiting the rulers’ freedom of maneuver in ways that will generally reduce, to some extent, at least, their capacity for evil-doing. Potential victims of injustice at the hands of wicked rulers will generally benefit, if only to a limited extent, from their rulers’ willingness, whatever its motivation, to respect the requirements of the rule of law.

Thinkers in the natural law tradition from Plato to John Finnis have warned that wherever the rule of law enjoys ideological prestige ill-intentioned rulers will find it necessary to—and will—adhere to constitutional procedures and other legal forms as a means of maintaining or enhancing their political power.⁹ Plato himself had no illusions that adherence to such procedures and forms would *guarantee* substantively just rule. Nevertheless, he noticed that even apart from the self-interested motives of evil rulers sometimes to act in accordance with principles of legality, decent rulers always and everywhere have reason to respect these principles; for procedural fairness is itself a requirement of substantive justice—one that is always desirable in human relations and, in particular, in the relationships between those exercising political power and those over whom such power is exercised.

Where the rule of law is respected, there obtains between the rulers and the ruled a certain reciprocity. Now,

this reciprocity will certainly be useful in securing certain desirable ends to which it is a means. I have in mind, for example, various elements of social order, including efficiency in the regulation and/or delivery of public services, and political stability, particularly in times of stress. But Plato’s point, and I see no reason to doubt it, is the moral philosophical one that, given the dignity of human beings, this sort of reciprocity is more than *merely* a means to other ends. As such, it ought to be protected and advanced wherever possible, and it may not lightly be sacrificed even for the sake of other important goods.

Now, there is a lot packed into my little phrase—more Kantian in flavor, I suppose, than Platonic—“given the dignity of human beings.” Although most people have moral objections to cruelty toward animals, we do not consider that pets or farm animals are to be governed in accordance with the requirements of the rule of law. Within the bounds of decency, we hope, the farmer resorts rather to Pavlovian methods, or, indeed, to whatever it takes to get the chickens to lay and the cows into pasture. Indeed, it would be pointless to attempt to rule nonhuman animals by law since laws cannot function for chickens and cows as *reasons* for their actions. The farmer, rather, causes (or, at least, attempts to cause) the animal behavior he desires. Humans, by contrast, can be governed by law because legal rules can function in their practical deliberation as what Herbert Hart described—in an important break with his positivist predecessors, Bentham and Austin, who conceived of legal rules as *causes* of human behavior, rather than as *reasons*—as “content-independent, peremptory reasons for action.”¹⁰

Virtually all philosophical accounts of human dignity stress the moral significance of human rationality. People are, in the phrase of Neil MacCormick’s which I’ve already quoted, “due some respect, as rational agents.” But if this is true, as I believe it is, then perhaps it is worth pausing to consider why and how governance in accordance with the requirements of the rule of law treats people with some of the respect that they are due as *rational* agents. What is it about human rationality that entails a dignity which is violated when rulers treat those subject to their rule the way farmers treat livestock?

Today, when one speaks of human rationality (in virtually any context) one will be understood to be referring to what Aristotle labeled “theoretical” rationality. (Theoretical, as opposed to what Aristotle labeled “practical,” rationality inquires into *what is, was, or could be the case* about the natural, social, or supernatural world; practical rationality identifies possibilities for choice and action and inquires into *what ought to be done*.) *Merely* theoretically rational beings, however, could not be ruled by law and would, in any event, no more deserve to be ruled by law than computers deserve such rule. It is hard to see how even theoretically rational agents who, *unlike computers*, were capable of (i) experiencing feelings of desire, and (ii) bringing intellectual operations to bear in efficiently satisfying their desires, could be due the respect implied by the rule of law or other requirements of morality. (This is why instrumentalist theories of practical reason such as Hobbes’s¹¹ or Hume’s¹²—not to mention the various contemporary reductionist accounts of human behavior which understand human beings as computers with emotions—have difficulty providing an even

remotely plausible account of human dignity, and only rarely offer to do so.) Such agents would not be capable of exercising *practical* reason and making *moral* choices. Their behavior could only be caused—ultimately either by external coercion or internal compulsion.¹³ Lacking the capacity ultimately to understand and act on the basis of more-than-merely-instrumental *reasons*, they would literally be beyond freedom and dignity.

My proposition is that the rationality which entitles people to the sort of respect exemplified in the principles of the rule of law is not primarily the rationality that enables people to solve mathematical problems, or understand the human neural system, or develop cures for diseases, or inquire into the origins of the universe or even the existence and attributes of God. It is, rather, the rationality that enables us to judge that mathematical problems are to be solved, that the neural system is to be understood, that diseases are to be cured, and that God is to be known and loved. It is, moreover, the capacity to distinguish fully reasonable possibilities for choice and action from possibilities that, while rationally grounded, fall short of all that reason demands.¹⁴

In short, the dignity that calls forth the respect due to rational agents in the form of, among other things, governance in accordance with the rule of law flows from our nature as *practically* intelligent beings, that is, beings whose nature is to understand and act on more-than-merely-instrumental reasons. The capacity to understand and act on such reasons stands in a relationship of mutual entailment with the human capacity for free choice, that is, our capacity to *deliberate and choose* between or among open possibilities (i.e., options) that are provided by “basic human goods,” i.e., more-than-merely-instrumental reasons.

Free choice *exists* just in case people have, are aware of, and can act upon such reasons; people have, are aware of, and can act upon such reasons just insofar as they have free choice. But if it is true that people possess reason and freedom, then they enjoy what can only be described as *spiritual* powers,¹⁵ and, it might even be said, a certain sharing in divine power—viz., the power to bring into being that which one reasonably judges to be worth bringing into being (something “of value”), but which one is in no sense compelled or “caused” to bring into being.

What is God-like, albeit, of course, in a very limited way, is the human power to be an “uncaused causing.” This, I believe, is the central meaning and significance of the (otherwise extraordinarily puzzling) Biblical teaching that man (unlike other creatures) is made in the very “image and likeness of God.”¹⁶ This teaching expresses in theological terms (and proposes as a matter of revealed truth) the philosophical proposition I have been advancing about the dignity flowing from the nature of human beings as *practically* intelligent creatures. Its upshot is not that human beings may not legitimately be ruled, but that they must be ruled in ways that accord them the respect they are due “as rational agents.” Among other things, it requires that the rule to which human beings are subjected is the *rule of law*.

Reflection on the relationship of human reason and freedom helps, I believe, to make sense of the centrality of law, and the rule of law, in natural law thought about political morality. In particular, it helps to explain the stress laid upon the ideal of the rule of law as a fundamental principle of

political justice in a tradition stretching from classical and medieval thinkers to John Paul II.

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Endnotes

1. St. Thomas Aquinas, *Summa theologiae*, I-II, q. 105, a. 2c.
2. See the encyclical letter of Pope John Paul II, *Sollicitudo Rei Socialis* (1987).
3. See especially Lon L. Fuller, *The Morality of Law* (New Haven: Yale University Press, 1964).
4. H.L.A. Hart, *The Concept of Law* (Oxford: Clarendon Press, 1961).
5. H.L.A. Hart, “Review of Lon L. Fuller, *The Morality of Law*,” *Harvard Law Review*, Vol. 78 (1965), pp. 1281-1296.
6. Fuller, *The Morality of Law* (2nd edition, with “Reply to Critics,” 1969), p. 154.
7. See Joseph Raz, “The Rule of Law and Its Virtue,” *Law Quarterly Review*, Vol. 93 (1977) at p. 208.
8. Neil MacCormick, “Natural Law and the Separation of Law and Morals,” in Robert P. George (ed.), *Natural Law Theory: Contemporary Essays* (Oxford: Clarendon Press, 1992), pp. 105-133, at 123 (emphasis supplied).
9. See Plato, *Statesman*, 291a-303d; John Finnis, *Natural Law and Natural Rights* (Oxford: Clarendon Press, 1980), p. 274.
10. See H.L.A. Hart, *Essays on Bentham* (Oxford: Clarendon Press, 1983), ch. 10. For a particularly illuminating account of the differences between reasons and causes, see Daniel N. Robinson, *Philosophy of Psychology* (New York: Columbia University Press, 1985), pp. 50-57.
11. See Thomas Hobbes, *Leviathan* (1651), pt. 1, ch. 8.
12. See David Hume, *A Treatise of Human Nature* (1740), bk. 2, pt. 3, sec III.
13. See Germain Grisez, Joseph M. Boyle, Jr., and Olaf Tollefsen, *Free Choice: A Self-Referential Argument* (South Bend: University of Notre Dame Press, 1976).
14. For an explanation of this point, see Robert P. George “Natural Law Ethics,” in Philip L. Quinn and Charles Taliaferro (eds.) *A Companion to Philosophy of Religion* (Oxford: Blackwell Publishers, Ltd., 1997), ch. 58. See also, Robert P. George, *Making Men Moral: Civil Liberties and Public Morality* (Oxford: Clarendon Press, 1993), pp. 8-18.
15. On the status of free choices as “spiritual” entities, see Germain Grisez, *The Way of the Lord Jesus, Vol. 1: Christian Moral Principles* (Chicago: Franciscan Herald Press, 1983), pp. 50-52.
16. “[M]an is said to be made in God’s image, insofar as the image implies an intelligent being endowed with free-will and self-movement: now that we have treated of the exemplar, i.e., God, and those things which come forth from the power of God in accordance with his will; it remains for us to treat of His image, i.e., man, inasmuch as he too is the principle of his actions, as having free-will and control of his actions.” St. Thomas Aquinas, *Summa theologiae*, I-II, Prologue (emphasis in the original).

Judaism and Natural Law

David Novak*

There are two basic assumptions about natural law that have prevented many from seeing how Judaism affirms it, and how thinkers working within the Jewish tradition have and still do construct theories about it. These assumptions must be rejected at the outset in order for a discussion of “Judaism and Natural Law” to have the seriousness any discussion of either Judaism or natural law or both must have to be worthy of its object.

The first assumption to be rejected is that the true matrix of natural law theory can only lie in classical Greek philosophy. As such, any subsequent attempts to graft natural law theory onto another way of thinking, especially onto any theology of revelation, are ultimately incoherent. That was the view of the late Leo Strauss, who famously said:

The idea of natural right must be unknown as long as the idea of nature is unknown. The discovery of nature is the work of philosophy. Where there is no philosophy, there is no knowledge of natural right as such. The Old Testament, whose basic premise may be said to be the implicit rejection of philosophy, does not know “nature.”¹

If Strauss is right (and I think he is wrong), Catholic natural law theory is ultimately as incoherent as Jewish natural law theory since both Judaism and Catholicism (indeed, all Christianity) base their respective claims on the Hebrew Bible or “Old Testament.”² If Strauss is right, then that basis becomes an abyss (an *Abgrund* rather than a *Grund*) for any philosophically cogent construction of natural law theory. Hence, in order for either Jewish or Catholic natural law theory to be authentic theologically, it must find a Hebraic foundation for its enterprise inasmuch as both Judaism and Christianity are two traditions basing themselves, often quite differently, on the same book.³ Then it must assume that there is a philosophy consistent with that foundation and develop it.

The second assumption to be rejected is that natural law theory can only be constructed in a Roman Catholic context, or can only be fully constructed there, because the idea of natural law is far more endemic to Catholicism than to any other religious tradition. Unlike the first assumption, it is assumed here that philosophy can indeed be taken up into theology as its “handmaiden” (*ancilla theologiae*).⁴ But like the first assumption, it assumes that natural law theory’s matrix lies in classical Greek philosophy. If one sees that matrix to be most specifically the political philosophy of Aristotle, then the best appropriation of that philosophy is thought to be in the moral theology of Thomas Aquinas. Most recently, that is the position of Alasdair MacIntyre.⁵

MacIntyre is right if we accept the assumption of natural law’s matrix being in Aristotelian teleology. There is little doubt that no one ever developed Aristotle’s thought better and more comprehensively than did Thomas Aquinas, and precisely as a Catholic theologian. But I deny that natural law theory must take its beginning from Aristotle. In fact, when one thinks of the precepts of natural law that both Judaism and Catholicism have affirmed, such as the equal claim to life of all persons from conception to natural death, or the exclusively heterosexual marital claim on human libido, I find Aristotle (and Plato even more so) much more of a hindrance than a help. His views on both human personhood and human community vary greatly from biblical views. The problem is

much more than just the fact that Aristotle’s teleology does not go far enough to include the ultimate human reconciliation with God taught by Judaism and Christianity.⁶ There are also real philosophical problems with Aristotelian moral and political teleology, which seems to presuppose a by now irretrievable teleological natural science.⁷ When both the present theological and philosophical inadequacy of Aristotelian teleology is understood, Catholic natural law theory has no advantage over Jewish natural law theory. Both require radically renewed work, both theological and philosophical, in order to counter the charge leveled against both of them in our time by Strauss and his disciples. And both of them require a much more eclectic use of philosophy’s methods and history to be able to present themselves as more than merely apologetic rationalizations for the commandments of God directly given in revelation and tradition.

Along the lines of this more radical theological and philosophical investigation of the role natural law theory plays in Jewish thought, I would like to offer ten propositions about natural law along with a brief explication of each of them.⁸ In this way, I hope to avoid Bernard Lonergan’s putdown of those who pass ideas from book to book without having them first go through a mind.⁹ Natural law theory in our time requires very radical reconstruction from *everyone* committed to its reality.

1. Natural law is that which lies at the junction of theology and philosophy.

It has long been a matter of some debate whether natural law is a theological doctrine or a philosophical idea. Theology is a method devised to understand the basic notions of revelation, which can be called “doctrines” (*torah*). Philosophy is a method devised to understand basic notions about the world, which can be called “ideas” (*eidos*). Each version of natural law, the theological or the philosophical, is problematic. Perhaps the best solution possible for these respective problems is to see natural law lying at the junction of theology and philosophy rather than in the court of one or the other exclusively.

If natural law is a theological doctrine, then it seems to be basically a form of apologetics. For one of the central doctrines of Judaism, indeed one so central that it has been legally designated a dogma which may not be denied, is that the Torah is the revealed law of God.¹⁰ Aside from whatever ends one might think the various norms of that law intend, the law itself is to be obeyed because God is God. To deny that would be to deny what Maimonides rightly called “the foundation of all foundations.”¹¹ Furthermore, this law is taken to be fully sufficient for every question of human practice and thought.¹² That being the case, natural law would seem to be a rather indirect and partial way of learning what revelation can teach more directly and completely. Therefore, natural law type arguments only seem to be after the fact as it were. At best, they can be taken as useful for deflecting criticism of the revealed law of God, coming from those who have been influenced by worldly wisdom, whose epitome is philosophy with its rational persuasiveness.¹³ Short of banning the study of this and other forms of worldly wisdom (which has been unsuccessfully tried from time to time in Jewish history), rhetorical deflection seems to be called for when philosophy rears its critical head.¹⁴ According to this line of theology, natural law in essence says too little about which the Torah

can always say much more. It only offers silver when gold is readily at hand.¹⁵ As one passage in the Talmud puts it, “let our complete (*shlemah*) Torah not be like your empty conversation (*seehah betelah*)!”¹⁶

If natural law is a philosophical idea, it seems to be saying too much. In the realm of ethics, the idea of human nature as some sort of universal datum to which our thoughts can readily correspond has been very difficult to maintain, especially in the face of the growing anthropological evidence, from archaeology diachronically and sociology synchronically, of the vast variety of human political experience and practice. Thus, much of modern philosophy of law has tried to discover the necessary procedures of systems of law rather than any overarching ontological scheme into which they must fit in order to be valid *per se*.¹⁷ To do any more than that seems to be a surreptitious claim of universality for what often turns out to be some principles a particular human culture happens to have decided to be normatively indispensable.¹⁸ Indeed, to then assume ready universality for such a particular normative outlook can often be exposed as a form of cultural imperialism. That would seem to be the case even in the attempt of some modern Western philosophers to postulate (rather than discover) certain natural rights as the necessary requirement of any normative order.¹⁹ Furthermore, because when one goes down deep enough in any historical culture, one finds some god or other, many philosophers have always been suspicious that natural law is really a theological intrusion into philosophy’s realm. That suspicion is buttressed by the fact that many of the great natural law thinkers in history happen to have been theologians as well. That is why natural law *qua* law seems to require the assumption of a universal divine lawgiver. And that is something most philosophers take to be beyond the realm of rational demonstration.²⁰

If natural law lies at the junction of theology and philosophy, it must be shown to be able to answer the charges of theologians who reject it because of its defects and philosophers who reject it because of its excesses.

What the proponent of natural law should say to its detractors among the theologians is that it is required for the intelligibility of the theological claim (certainly in Judaism) that God’s revelation is of immediate normative import. That can only be accepted by the intended recipients of that revelation when they already have an idea of why God is to be obeyed. God is to be obeyed because law is a necessity of human life in community. The most basic human questions are the practical one: What am I to do?, and the theoretical one: Why am I to do it? Since human life in community is created *de novo* by God and not by humans themselves, it is God who rules *ab initio* for that order. Creation itself is the paradigm for all lawgiving. All other lawgiving is secondary. Minimally, all other law must not contradict the prior law of God; maximally, it must enhance it. If humans could not discover at least some of that law for themselves before revelation, how could they possibly accept the fuller version of God’s law that comes with historical revelation in the covenant? This type of normative revelation would be meaningless if presented to either a lawless mob or a community that had convinced itself that its highest law is something of its own making. That can be seen by the fact that much of the law governing interhuman relationships found in the Torah is law that has been elevated into the covenant, not introduced by it. Much of that law can only be

discovered by human reason, which is philosophy, ultimately if not immediately. Natural law shows that theology cannot do an end run around philosophy without appearing absurd in the process.²¹ That absurdity appears in both practice and theory. Theology need only object to the attempt of some philosophers to present natural law as the sufficient ground rather than the necessary condition of the founding of the covenant and the revelation of the Torah that fully governs it.

What the proponent of natural law should say to its detractors among the philosophers is that human cultures can only avoid the question of natural law when they identify themselves alone with humankind *per se* and regard all outsiders as devoid of humanity. But to accept anything like that would ultimately turn philosophy into some sort of national ideology. Accordingly, thinkers in every culture have to speculate about the human nature that enabled their culture as a normative entity to emerge in history. Without an affirmation of that nature as a *sine qua non* of any culture worthy of human beings, it would seem to become unworthy of a human choice to live by it. Hence natural law functions as a philosophical corrective within a culture, holding it to the conditions that made its very emergence morally possible. And without that affirmation, intercultural relations inevitably become some sort of struggle between different national ideologies for superiority rather than the quest for truly common ground. Hence natural law functions as the bridge between cultures, enabling none of them to claim it alone as synonymous with authentic humanity. The discovery of the basic norms of natural law, then, has to be much more than proposing postulates for any particular system of law and morals. Being much more than a matter of procedure, it requires the quest for an ontological foundation that might be different from that presented by theology, but which cannot falsify theology, nonetheless.

In this way, maximally, theology and philosophy can fructify each other; minimally, they can at least stay out of each other’s way when considering the question of natural law. The difference between the two is that in theology natural law is constituted from ontology down to ethics, whereas in philosophy it is constituted from ethics up to ontology. Maximally, they work best in tandem when their respective trajectories cross each other in motion, tarrying awhile together, each recognizing the value of the other.²² That happens when theology recognizes the ethical value of philosophy for its work, and philosophy recognizes the ontological value of theology for its work.

2. Natural law is that which makes Jewish moral discourse possible in an intercultural world.

The interest in natural law throughout Jewish history has been in proportion to the worldly involvement of Jews at any particular time and place. In those times and places when Jews have either not been participants in an intercultural world, or have not wanted to participate in one, the interest in natural law has been negligible or dormant. The best and most persistent example of this worldview has been that of almost all the kabbalists. For them, any world outside of Israel and the Torah is unreal or demonic.²³ The converse of this worldview has been that type of Jewish theology that has seen affinities between some doctrines from the classical sources of the Jewish tradition and some ideas of Western philosophers.

In the Middle Ages, which could be termed the golden age of Jewish philosophical theology (roughly, from Saadiah in the ninth century to Abrabanel in the fifteenth century), the worldliness of Jews in a cultural sense was largely an academic matter. Indeed, it was more a matter of the exchange of thoughts through books than in actual person-to-person discourse. One thinks of Aquinas in thirteenth-century France learning for his constitution of natural law from the writing of Maimonides in twelfth-century Egypt, and of Joseph Albo in fifteenth-century Spain learning for his constitution of natural law from the writing of Aquinas in turn.²⁴ When it came to social interaction, however, the vast majority of Jews lived in their own world.

The three great historical events (or, perhaps, periods) that have determined so much of modern Jewish life have, in effect, catapulted Jews personally into an intercultural world, which has been much more than one whose prime activity was the cross referencing of different writings. As such, they have been thrown into a world of real political interaction. Here natural law has had to play an even greater role in Jewish life than it did when it was more academically confined, although that role has not benefitted nearly enough from the philosophical insights of the medieval Jewish theologians. These three great events have been the emancipation of West European Jews from being noncitizens of the larger societies in which they lived (the key date being the French Revolution of 1789); the murder of at least half of European Jewry in the Holocaust (the key date being the beginning of the Second World War in 1939); and the establishment of the State of Israel in 1948.

With respect to the political emancipation of the Jews, natural law was at the heart of arguments for the enfranchisement of Jews as individuals in modern, secular nation-states. The qualification for citizenship was to be a human right dependent on the acceptance of a universally valid moral law. The price Jews paid for this rescue from political (and economic) marginality was the loss of the rights of the semiautonomous Jewish communities, separated by religion from the majority religion of host societies. Although this was the result of historical processes beyond the power of the choice of the Jews, most Jews welcomed it anyway. It was only a small minority who hoped that modernity and its emancipation would somehow or other miraculously go away and the *ancien régime* would return instead. Since that time, all Jewish claims to be free of any kind of discrimination or persecution have been made in the language of natural (later human) rights, even when conceptually obtuse. What a natural law perspective does for Jews at this level is to enable them to make rights claims, but without having to adopt the type of all-embracing secularism that is antithetical to the covenantal basis of traditional Jewish life and thought.

Concerning the Holocaust, natural law enables Jews to present the mass murder of European Jewry by the Nazis and their cohorts as a genuine crime against humanity.²⁵ This saves the need many Jews feel to remind the world about the agony of the Holocaust and its victims from being dismissed as an example of special pleading. (That in no way diminishes the uniquely Jewish aspects of the Holocaust; it simply sees those aspects being more properly the subject of special discourse among Jews themselves.) Universal moral (as distinct from sensationalistic) interest in the Holocaust should be because it is probably the worst example to date

of the violation of the basic human right to life. Here again, in order to have its full moral weight, this right must be seen as much more than a mere postulate of some system of law or morals. It is only a natural law type understanding of the meaning of mass murder that can make it a matter of truly universal concern. Those thinkers who eschew natural law type reasoning when discussing the Holocaust are often tempted by or even succumb to the sort of racist typology that was employed by the very perpetrators of the Holocaust themselves.

Finally, when it comes to the establishment and development of a Jewish polity in the ancestral land as the State of Israel, the most fundamental question of all is just what sort of polity it is to be. Heretofore, it has been designated as both a Jewish and a democratic state. Yet many have seen an inherent paradox in that dual designation. Some religious thinkers have argued that an authentically Jewish state cannot possibly be the same as a Western-style democracy, and many Jewish secularists have argued, conversely, that a democracy cannot be allowed to be hampered by, what in their eyes is, a necessarily antidemocratic traditional, theocracy (which for them turns out to be a dictatorship of clerics). Here a natural law perspective can perhaps begin to solve this paradox and move Israeli political theory forward. For the main point of difference between the two divergent views of the Jewish polity of the State of Israel is the question of human rights.

When human rights are merely postulated as being a necessity for a democratic polity, then the whole religious assumption that all valid law is ultimately God's law is bracketed, if not actually denied. Conversely, when the idea of human rights is simply denied because of an assumption that it necessarily presupposes a totalizing secularism, then the question of what sort of polity a Jewish state is to be in the present is left unanswered. For beginning with the adoption of the admittedly non-Jewish type of polity of monarchy early in the history of ancient Israel, it became clear that a covenantal community who had accepted the law of God for herself could function under almost any type of regime.²⁶ That is because, unlike so much political theory both ancient and modern, in Judaism the authority of the law does not follow from any sort of political sovereignty in the world. Quite the contrary, the legitimacy of any regime is determined by how consistent it is with the law of God.²⁷ As long as a regime does not explicitly substitute its own authority for that of God and demand total compliance by everyone within its power to that usurpation (idolatry), Jews can live under it in good faith. No type of polity that Jews have lived under, either as a community or even as individuals, is essentially Jewish. Essential Jewish polity will only come with the irrefutable arrival of the Messiah. But until that time, when Jews have the chance to actually choose their own type of polity, it would seem that they should choose that option which is most respectful of their prior law rather than those less respectful toward it. The classical Jewish sources as well as the recent experience of the Jewish people in the world should be the guides for that political choice.

For Jews, especially in their own state, to reject Western-style democracy, with the recognition of human rights as its hallmark, is to opt for either the communist or fascist alternatives available in the world today. The fact that those societies that have been constituted by either of these two

ideological options have almost always been antagonistic to both Jews and Judaism, should be good enough reason for Jews to be suspicious of them for themselves and suspicious of Jewish thinkers who seem to be inclined toward them in either their thought or their rhetoric. The task for Jewish thinkers, then, is to recover the doctrine of natural law from within the Jewish tradition itself. For here natural law is seen as the law of God; hence, it must eschew the secularism that has accompanied so much natural or human rights talk since the Enlightenment. But by seeing at least the earliest and most general installment of God's law as being discoverable by human reason, much of what modern natural or human rights theorists have postulated can be more deeply affirmed by Jews.²⁸ And it can be critically affirmed in such a way that it rectifies the excessive individualism that has marred so much of liberal natural or human rights talk, which has been without an adequate ontology and anthropology behind it.

3. Natural law is the practical meaning of the doctrine of creation.

The doctrine of creation is not primarily an answer to the questions: When did the world begin? or How did the world begin? It is much more an answer to the question: Why does the world exist?²⁹ For whereas the former two questions can be confined to the level of theory alone, the question of the world's purposiveness is one that combines both practice and theory.³⁰ Since humans are the only creatures of whom we know who ask theoretical questions in connection with their practice, the intelligent question of why the world exists must be seen in the light of the human question: Why do we exist? The question is "why do we exist?" rather than "why do I exist?" because of the essentially communal nature of even individual human persons. Hence all sustained human questions are political, understanding "politics" in the broadest and the deepest sense.

The truest political situation of the Jews is that they are in an everlasting covenant with God. The fact that this covenant is finally to include all humankind means that the purpose of human existence is to be in intimate relationship with God. "If your presence does go with us, do not take us up out of this place." (Exodus 33:15) "Every one called by my name, I have created for my glory." (Isaiah 43:7) And because that purposeful existence is communal, there has to be some interhuman understanding of what authentic human sociality means even before the revelation of the covenant and its law from God. In other words, before the revelation of the concrete realization of the final end of human existence to Israel, the people have to be living in an authentic, however rudimentary, communal way with themselves. That means they can discover by themselves penultimate ends in the world and their concrete realization. They can learn how to live in true peace with one another and be ready for the revelation of the highest end and its realization when it comes. This involves the discovery of natural law from creation itself, especially from created human existence in community. Thus, natural law contends with what makes authentic human community possible, both immanently and in its transcendent intention. Being law, it does so practically. It hears before it sees. And being intentional action, it calls forth the full measure of human intelligence operating theoretically. Hearing leads to seeing.

4. Natural law is the reasons for revealed commandments governing interhuman relationships.

Natural law emerges from the Jewish attempt to discover the "reasons of the commandments" (*ta 'amei ha-mitsvot*), especially reasons of the commandments in the area of interaction between humans themselves (*bein adam le-havero*). The discovery of these reasons is a specific pursuit. That is, it not only concerns the commandments in general as coming from God and that to be in relationship with God is their ultimate end. Rather, it concerns the more immediate ends these commandments intend. As such, it is part of that strand of the Jewish tradition which sees political philosophy as being useful for the interpretation of the Torah.

It is no accident that those concerned with the reasons of the commandments, reasons which are universally discernible by ordinary ratiocination, have tended to be those in touch with the philosophers and their ideas. The usual interpretation of this has been that Jewish thinkers have been externally challenged by philosophy and have had to adjust their understanding of Judaism accordingly by a synthesis of sorts.³¹ This seems to imply, though, that Judaism is really purer and more authentic when left in its original isolation from the world. Yet, one can see more profoundly that the problematic the Jewish philosophical theologians have concerned themselves with did not come from philosophy but from the Jewish tradition itself, even before it was exposed to philosophy. Exposure to and concern with philosophy have helped Jewish thinkers, especially in the area of political and ethical questions, sharpen and deepen their own development of the Jewish tradition. But they have done so because the world itself lies on Judaism's own horizon and is not, therefore, a foreign invader to be tamed through compromise. The discovery of natural law by means of this inherent Jewish rationalism enables political philosophy to become part of a Jewish search for truth rather than making the search for truth and the affirmation of Judaism to be some sort of antinomy.

Finally, an affirmation of natural law can be a coherent guide for making decisions of Jewish law for those in the State of Israel who are dedicated to bringing Jewish law to bear on what others consider to be purely "secular" matters. The whole movement of *mishpat ivri* (literally, "Hebrew jurisprudence") is an attempt to do that, but it has been hindered heretofore by the lack of an adequate philosophical foundation.³² Since theological agreement is most improbable at this point in Jewish and Israeli history, perhaps philosophical agreement can be more easily reached. In other words, perhaps in the area of political activity, we Jews might have to become (figuratively, that is) the mundane humans we were before being able to accept the covenant at Sinai.³³

5. Natural law is the precondition of the covenant.

In recent discussions about natural law in Judaism, especially among more tradition-oriented Jewish thinkers, the debate has been between those who deny there is any Jewish doctrine of natural law and those who affirm it. But, even among those who do affirm it, their affirmation seems to be one that sees natural law only as a supplement to the revealed law of Scripture and the traditional law of the Rabbis.³⁴ It would seem that they are somewhat fearful of ascribing any more fundamental role to natural law in Jewish law and

theology because, in principle even if not in actual practice, that would constitute a surrender of revelation to reason. And such a surrender is what they see to be the theological error of all liberal Judaisms. In my judgment, these thinkers have been seduced by the philosophical power of the constitution of Judaism by the great neo-Kantian philosopher, Hermann Cohen (d. 1918), who did just that, very persuasively.³⁵ (That is the case with even those who neither understand Cohen nor have even read him. They have been seduced by those who did understand him, or whose basic point of view was better thought out by Cohen than by themselves.) Cohen did Jewish natural law thinking brilliantly, but his way is not the only way (or even the best one, I think).³⁶

For natural law thinking to develop again among Jewish thinkers, the defective Scylla of fideism and the excessive Charybdis of modern rationalism will have to be avoided. That can be done best when natural law is seen as the precondition of the covenant. By “precondition,” I mean something quite similar to what Kant meant by the term *Bedingung* (literally, “what enables a thing to be”).³⁷ That *enabling*, though, does not function as a cause or a ground of what comes to be. What it does is make an opening in the world of our experience in order for an entity to appear in it. But because such a precondition is in place does not mean there is any necessity for that entity to appear. (The confusion of the condition of revelation with its ground is the error, and what an exalted error it is, of Hermann Cohen and all the lesser modern Jewish rationalists.³⁸) If that appearance is personal as surely God’s appearance reported by Scripture, epitomized by the theophany at Sinai where God speaks to the whole people, then God’s appearance can only be freely given and freely accepted as an interpersonal event. The careful analysis of the meaning of natural law as this kind of precondition for revelation and its law, and the location of this precondition at specific points within Jewish law itself, gives it a heuristic role richer than its more circumspect proponents can admit, but not as exaggerated as some of its enthusiasts would have us believe. As the Talmud puts it, “when one grasps too much, one grasps nothing; when one grasps something less (*mu’at*), something is indeed grasped.”³⁹ A true precondition always accompanies what it has enabled to appear; it can never be left behind as finished.

6. Natural law is the criterion for human legislation of interhuman relationships.

One of the things most of the opponents of natural law in Judaism forget is that the area of Jewish law pertaining to interhuman relationships, especially Jewish civil and criminal law, is one where, as the Mishnah puts it, “there is little from Scripture and much more from traditional law (*halakhah merubbot*).”⁴⁰ Now one can see much of the “traditional law” that was developed by the Rabbis and recorded in the Talmud as being based on ancient and inherited traditions, believed to go back to the time Moses was also receiving the parallel Written Torah from God. However, most of the literary evidence suggests otherwise. It presents much of this civil and criminal law as the development of human legislation by the Rabbis themselves. This point was best conceptualized by Maimonides. In his view, aside from those very few traditional laws, indisputably designated by the Rabbis as “Mosaic” (*halakhah le-Mosheh mi-Sinai*), all the rest are clearly devised by human minds.⁴¹ But did the Rabbis simply exercise their legislative authority arbitrarily as some sort of

expression of their own political power? Was not their political power, instead, to be justified by some objective criterion? In other words, did not the justification of their legal power have to be by persuasion? And can persuasion be anything but rational?⁴²

What Maimonides showed so well in his interpretation—aided but not inspired by his use of Aristotelian type teleology—of Jewish civil and criminal law is that it is based on what the Rabbis discerned as universalizable standards of justice. Since there is so little in this area specifically from Scripture itself, the reasoning of the Rabbis had to be far more conceptual than exegetical. Here is where the philosophical idea of natural law is needed for the coherent development of that type of conceptual reasoning in matters of human experience and practice that can hardly be taken as singularly Jewish. The two Jewish terms for this type of criterion seems to be *derekh erets* (literally, “the way of the earth”) and *tiqqun ha ‘olam* (literally, “the rectification of the world”).⁴³ They seem to more or less correspond to the philosophical concept of the “common good” (*bonum commune*). When this line of thinking is followed, one can learn much from the whole philosophical tradition of seeing natural law as a limit and corrective of positive law made by humans (*lex humana*).

7. Natural law is a cultural construct.

Perhaps the greatest vulnerability of natural law theory, both in ancient and modern times, is its seeming oblivion to and disrespect of cultural diversity, especially in normative matters. Natural law is taken as what is to be universally normative. But whence does one begin to constitute this universe? Those who take their natural law inspiration from Plato and Aristotle must also recall that they were speaking Greek to Greeks. It would seem that they mostly followed the assumption of their culture that non-Greeks, or at least non-Greek speakers, are really subhuman “barbarians.”⁴⁴ Consequently, they were, in effect, attempting to conceptualize what was regarded in their own culture as optimal human standards, when being “Greek” and being “human” were taken to be identical. (The Greek conquests of large numbers of barbarians during the time of Alexander the Great were an attempt to hellenize their captives both physically and culturally.⁴⁵) Moreover, the Roman concept of the “law of nations” (*ius gentium*), without which their concept of *ius naturale* cannot be understood, was originally an institution of Roman imperialism conceived for the rule over certain non-Romans living under Rome. And natural law as most famously conceived by Roman Catholic theorists is part of the teaching of a church that explicitly attempts to evangelize all humankind. Jews, too, must admit that much of what could be termed “Jewish universalism” is the hope of a kind of “judaizing” of the world, as it were.⁴⁶ All of this leads to a considerable credibility problem for a “universality” that is not, in effect, a reduction of many particularities to one particularity, which only becomes universal by a process of elimination.⁴⁷

In addition to this moral problem, there is an epistemological problem. Universal thinking by persons with particular identities and attachments seems to be an imaginative attempt to constitute a world that *would be the case if I were not part of the singular culture in which I now have been living concretely*. But does this world actually correspond to anything we have really experienced? Any attempt to locate some universal moral phenomena is so

vaguely general as to be normatively useless. Such attempts to transcend cultural particularity remind me of a judge instructing a jury to “disregard the statement you have just heard,” when a lawyer or a witness says something that is ruled “out of order” in court. Of course, such a judicial pronouncement is effective in preventing the introduction of such a statement from explicitly becoming an official point of reference during the actual deliberations of the jury. But it cannot be forgotten (and that is usually why it was made anyway, often with full awareness that a competent judge will most certainly rule it out of order in the trial). It will influence the thinking of the jurors who heard it, like it or not. Our imagination can tentatively abstract us from our own cultures from time to time, but we cannot transcend them by some nonculturally conceived Archimedean fulcrum in order to either escape them, destroy them, or recreate them.

Instead of an attempt to find some universal phenomenon to ground natural law, it seems more authentic and more useful to see it as the constitution of a universal horizon by a thinker *in* a particular culture for his or her own culture. Here is where the doctrine of creation comes in because it does not allow any member of the covenanted community to ignore the world beyond the community in which he or she is situated. It must be taken with utmost seriousness. (The minimization of that political reality correlates with a weak or nonexistent theology of creation.⁴⁸) As we have seen already, that imaginative project is one where a person conceives just what sort of a world revelation (the founding event of the culture) requires in order for the God who speaks to present himself in it. The coherence of that imaginative construction makes it plausible. The “construction” here is of the approach to the reality; it is not the reality itself that is constructed. It is like making a telescope, assuming there is something “out there” to be discovered, but which is unlike any object that could be seen by the naked eye. The object to be discovered must be believed to exist, even if there is no other way to see it except through the telescope. (Quantum Theory argues that such “telescopes” themselves are inseparable from the objects they telescope. That is a most useful analogue for natural law theory.) Only that belief, functioning as a regulative principle, saves this type of natural law thinking from becoming, in effect, an elaborate and unconvincing rationalization for a body of positive law (human or revealed) that is better presented authoritatively than by argument.

8. Natural law requires comparative law and ethics.

The coherent plausibility of natural law theory, when it is theoretically good, is complemented by work in comparative law and ethics. The fact is that there are commonalities *between* the universal normative constructions of a number of different cultures. That is especially the case when one looks at Jewish, Christian, Islamic, Greek, and Roman ways of thinking about natural law. These commonalities certainly do not verify natural law. They are themselves too general to do that, and their abstract speculation can never reach the level of the type of transcendental viewpoint Kant attempted to constitute for universal morality.⁴⁹ They do not directly correspond to a reality readily apprehended. But they do have correspondences among themselves, being what John Rawls has recently called “overlappings.”⁵⁰

Despite the minimal character of these overlappings, they do admit of further development, especially in a multicultural

context, where enough people want it to be intercultural as well. (Without, however, the ideal that it must become supercultural, which means one culture swallowing up all the rest.) And if this represents a desire on the part of persons and communities to discover criteria for living together in mutual justice and peace, then perhaps this type of natural law theory will have some sort of correspondence with the lives of the human subjects of natural law. In order for this type of correspondence to be valid, however, the test of its universality will be the extent it is able to be interculturally inclusive. Perhaps natural law thinking can save “multiculturalism” from the moral dead end of relativism; and perhaps multiculturalism can save natural law thinking from its all too frequent myopia.

9. Natural law is Noahide law.

Noahide law consists of seven areas of law, such as the prohibitions of murder, theft, and adultery, that the ancient Rabbis were convinced that all humans, Jews and gentiles, are held responsible by God to obey.⁵¹ To say that natural law is Noahide law is not to identify natural law with a concept constructed within the Jewish tradition. For natural law to be “natural,” namely, inherently *universal*, it must be recognized and developed throughout the world. If only Jews had conceived of it, that fact itself would falsify it. Instead, we should say that with the concept of Noahide law, Jewish thinkers have an authentically Jewish way to engage in thinking about natural law. And they can offer their thinking both inside and outside their own community, although the latter requires the additional intellectual work of translation.

That Noahide law is the Jewish way of thinking about natural law is, of course, a highly disputed point, in ancient, medieval, and modern Judaism. But it is enough for any Jewish thinker to be able to connect himself or herself with a sustained subtradition within the overall tradition itself, even if that subtradition has a counter subtradition.⁵² Thinking within the context of a tradition is always an essentially normative pursuit, whether it advocates “do this” practically or “say this” theoretically. The direct implication, whether stated or only inferred, is always “don’t do that” or “don’t say that.” In the case of speech, there is more legal latitude than in the case of action. The coherence of communal life requires more conformity in behavior, the visible aspect of action, than it does in thought, the invisible aspect of speech.⁵³ Anything normative is always selective, which is the only appropriate method (both as *modus operandi* and as *modus cognescendi*) for anything finite and temporal and conscious of it like human creatures aware of their own condition. We are always here and not there, now and not then. Eternity is not a humanly attainable perspective. All human judgment is within history, even when made in relation to God, who can transcend history.⁵⁴ That selection is not only between what is just and unjust, between right and wrong in the practical sense, it is also a selection between what seems wise and unwise at the moment. The intelligent requirement of Jewish thinkers to think about natural law as Noahide law has enough traditional precedent to make it more than idiosyncratic. Moreover, it is a practical requirement for dealing with the new multicultural political setting most Jews now find themselves in; and it is a theoretical requirement for the development of philosophy within Judaism as a time when the most pressing philosophical questions seem to be those of political thought.

10. Natural law intends the unique dignity of humanness.

Natural law thinking seems to be best inspired by a sense of urgency about assaults on the inherent dignity of human persons and human community. In Greek culture, the need for it is best seen in Antigone's protest against the tyrannical abuse of human personhood by Creon's refusal to allow her dead brother Polynices decent burial.⁵⁵ In Scripture, the need for it is best seen in the cry to God from the innocent victims of the injustice of Sodom and Gomorrah.⁵⁶ It is a most urgent human need when one is confronted by abuses of political power by those who hold it. And those abuses are a temptation both for those who hold secular or religious power. "Those who hold the Torah do not know Me." (Jeremiah 2:8) It is also a most urgent human need when "every man does what is right in his own eyes" (Deuteronomy 12:8). In other words, we need it when human persons are abused by communities, and we need it when persons abuse human community. Natural law seems to be the best corrective for both the excesses of collectivism and the defects of individualism. It comes from the search for ourselves as the reflection of someone greater than that we can make ourselves or be made by anything in our world. It is truly a perennial need. By whatever name it happens to be called at any one time, like anything else that is natural it cannot be permanently repressed.

Natural law, then, is the necessary and perpetual critique needed by all culture and all positive law, even by that culture whose adherents are still conscious of its origin in revelation. Natural law is the essential limit on the pretensions of human action for the sake of human existence and its transcendent intention. It operates best when its rightful role is understood, when neither too much nor too little is expected of it. Whatever it has been called at various points in Jewish history, it has been functioning from the beginning of Judaism. But when natural law has been ignored, Judaism has often become distorted in the process, either by understating or overstating its own worldly dimension.

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Endnotes

1. *Natural Right and History* (Chicago: University of Chicago Press, 1953), 81. Strauss uses "natural right" in the sense of the German *Naturrecht*, viz., a normative order (e.g., *Rechtsordnung*) as distinct from any actually promulgated norm. "Right" for him is thus *ius* rather than *nomos* or *lex* or *Gesetz*, i.e., it is *ius naturale* rather than *lex naturalis*. Most fundamentally, it is *diké* in the classical Greek sense (see, e.g., Sophocles, *Antigone*, 365; also, Aristotle, *Nicomachean Ethics*, 1 134b30). There is little doubt that Strauss was trying to avoid the theological notion of natural law as universal law promulgated by God (see *Natural Right and History*, 7; cf. Thomas Aquinas, *Summa Theologiae*, 1/2, q. 90, a. 4 ad 1, and q. 94, a. 4 ad 1). And even more so, he was distinguishing "classical" natural right from the minimal "natural rights" proposed by such modern social contract thinkers as Hobbes and Locke (see *Natural Right and History*, 165-202). For a critique of Strauss's assertion as it pertains to Judaism specifically, see David Novak, *Jewish Social Ethics* (New York: Oxford University Press, 1992), 29-33.
2. Thus the first heresy rejected by the Church was that of Marcion, who advocated a total break with the God of Israel and the Torah of Israel. See Henry Chadwick, *The Early Church* (New York: Viking Penguin Books, 1967), 38-41.

- 3 See David Novak, *Jewish-Christian Dialogue* (New York: Oxford University Press, 1989), 64-67.
4. For the origin of this term and concept, see Harry A. Wolfson, *Philo* 1 (Cambridge, Mass.: Harvard University Press, 1947), 145-146.
5. See his *Whose Justice? Which Rationality?* (Notre Dame, Ind.: University of Notre Dame Press, 1988), 164-182.
6. Cf. *ibid.*, 192-193.
7. See Strauss, *Natural Right and History*, 8. Cf. Strauss, *What is Political Philosophy?* (Glencoe, Ill.: Free Press, 1959), 39, and John Finnis, *Natural Law and Natural Rights* (Oxford: Clarendon Press, 1980), 52. My critique of both Strauss's and Finnis's attempted solutions to this problem appears in *Covenantal Rights* (Princeton: Princeton University Press, 2000).
8. The remainder of this article is adapted from the conclusion of my book, *Natural Law in Judaism* (Cambridge: Cambridge University Press, 1998).
9. This is a slight paraphrase of what Lonergan actually said as reported by his student Frederick G. Lawrence in "Leo Strauss and the Fourth Wave of Modernity," *Leo Strauss and Judaism*, ed. David Novak (Lanham, Md.: Rowman and Littlefield, 1996), 134.
10. *Mishnah*: Sanhedrin 10.1; Maimonides, *Commentary on the Mishnah* thereon, principle no. 8.
11. *Mishneh Torah*: Yesodei ha-Torah, 1.1.
12. See *Mishnah*: Avot 5.22; *Palestinian Talmud*: Peah 1.1/15b re Deut. 32:47.
13. See *Mishnah*: Avot 2.14. This type of theology became known in the Middle Ages as *kalam*. Note Maimonides' characterization of it in *Guide of the Perplexed*, 1.71 (trans. Shlomo Pines, Chicago: University of Chicago Press, 1963, 177): ". . . the science of kalam [is] to establish premises that would be useful to them in regard to their belief and to refute those opinions that ruined the foundations of their law." Here he is speaking of *kalam* as it developed in Islam. But he also recognizes that there are versions of it in both Judaism and Christianity. Cf. *Commentary on the Mishnah*: Avot, introduction, beg.
14. See Fritz I. Baer, *A History of the Jews in Christian Spain* 1, trans. Lawrence Schoffman (Philadelphia: Jewish Publication Society, 1978), 236-242. Cf. Samuel D. Luzzatto, *Commentary on the Torah*: Deut. 6:5, ed. Pinhas Schlesinger (Tel Aviv: Dvir, 1965), 516-519; also, Bernard Lonergan, *Method in Theology* (New York: Herder and Herder, 1972), 24-25.
15. See *Babylonian Talmud*: Berakhot 33b.
16. *Babylonian Talmud*: Menahot 65b.
17. See, e.g., Lon L. Fuller, *The Morality of Law*, rev. ed. (New Haven and London: Yale University Press), 96-97; also, Ronald Dworkin, *Taking Rights Seriously* (Cambridge, Mass.: Harvard University Press, 1978), 160-163.
18. See MacIntyre, *Whose Justice? Which Rationality?*, chap. 1.
19. See, e.g., John Rawls, *A Theory of Justice* (Cambridge, Mass.: The Belknap Press of Harvard University Press, 1971), 11-17.
20. See, esp., Kant, *Critique of Pure Reason*, B847; *Critique of Practical Reason*, 1.2.2.5. Cf. Yves Simon, *The Tradition of Natural Law*, ed. Vukan Kuic (New York: Fordham University Press, 1992), 62-65.
21. See John Courtney Murray, *We Hold These Truths* (New York: Sheed and Ward, 1960), 298; also, most recently Pope John Paul II, *Fides et Ratio* (1998), esp. chap. 6.
22. See Leo Strauss, "The Mutual Influence of Theology and Philosophy," *Independent Journal of Philosophy* 3 (1979), 111-118.
23. See David Novak, *The Election of Israel* (Cambridge: Cambridge University Press, 1995), 16-18.
24. See Thomas Aquinas, *Summa Contra Gentiles*, 1.4, trans. Anton Pegis (Garden City, N.Y.: Image Books, 1955), p. 68, n. 2; Joseph Albo, *Sefer ha'Ikkarim* 1, trans. Isaac Husik (Philadelphia: Jewish Publication Society, 1929), 179, n. 1.
25. See Hannah Arendt, *Eichmann in Jerusalem*, rev. ed. (New York: Penguin Books, 1965), 277-298.
26. For a discussion of various Jewish political options, both ancient and modern, see David Polish, *Give Us a King* (Hoboken, N.J.: KTAV, 1989).

27. This point has been recently presented with great power by the Anglican theologian Oliver O'Donovan in *The Desire of the Nations* (Cambridge: Cambridge University Press, 1996), 65-73, 233-242.
28. In the scholarly debate over whether modern notions of natural rights are consistent or inconsistent with earlier natural law notions, I agree with the former view. Along these lines, see Brian Tierney, *The Idea of Natural Rights* (Atlanta, Ga.: Scholars Press, 1997), 343 and passim.
29. See Maimonides, *Guide of the Perplexed*, 2.19.
30. See *Babylonian Talmud*: Pesahim 54a quoting Prov. 8:22. Cf. *Beresheet Rabbah* 1.1.
31. See, e.g., Isaac Husik, *A History of Medieval Jewish Philosophy* (Philadelphia: Jewish Publication Society, 1940), xix.
32. See David Novak, "A Critical Review-Essay of Menachem Elon's Jewish Law" [4 vols., trans. Bernard Auerbach and Melvin I. Sykes (Philadelphia and Jerusalem: Jewish Publication Society, 1994)], *Vera Lex* 14 (1994) 51-54. Elon's magisterial work is totally inspired by the *mishpat ivri* project.
33. See David Novak, *The Image of the Non-Jew in Judaism* (New York and Toronto: Edwin Mellen Press, 1983), 66-73.
34. See, e.g., J. David Bleich, "Judaism and Natural Law," *Jewish Law Annual* 7(1988) 5-42. For a traditionalist view that seems to ascribe more centrality to natural law in Judaism, however, see Aharon Lichtenstein, "Does Jewish Tradition Recognize an Ethic Independent of Halakha?," *Modern Jewish Ethics*, ed. Marvin Fox (Columbus, Ohio: Ohio State University Press, 1975), 62-88. For the most famous traditionalist rejection of natural law in recent years, see Marvin Fox, *Interpreting Maimonides* (Chicago: University of Chicago Press, 1990), 124-151. For a critique of Fox, see Novak, *Jewish Social Ethics*, 24-29.
35. See his *Religion of Reason Out of the Sources of Judaism*, trans. Simon Kaplan (New York: Frederick Ungar, 1972), esp. 113-143.
36. Jewish thinkers were not the only ones who seem to have thought that natural law theory could only be done Cohen's neo-Kantian way or not at all. Thus Karl Barth, who himself had been Cohen's student at the University of Marburg, seems to have been so seduced also. See *Church Dogmatics* 2/2, trans. G. W. Bromiley et al. (Edinburgh: T. and T. Clark, 1957), 514.
37. See Kant, *Critique of Pure Reason*, B72; also, Novak, *Jewish-Christian Dialogue* 136-141.
38. See Novak, *The Election of Israel*, 72-77.
39. *Babylonian Talmud*: Rosh Hashanah 4b and parallels.
40. *Mishnah*: Hagigah 1.8.
41. See *Mishneh Torah*: Mamrim, chaps. 1-2.
42. See *Babylonian Talmud*: Gittin 14a and Avodah Zarah 35a.
43. Re *derekh erets*, see *Vayiqra Rabbah* 3.9 re Gen. 3:24. Re *tiqqun ha'olam*, see *Mishnah*: Gittin 4.5 re Isa. 45:18.
44. See Aristotle, *Politics*, 1252b5-15; also, Plato, *Republic*, 469B-C.
45. See I Maccabees, chap. 1
46. See Novak, *Jewish-Christian Dialogue*, 57-67.
47. See Hegel, *Lectures on the Philosophy of Religion*, trans. R. F. Brown et al. (Berkeley, Calif.: University of California Press, 1988), 202, 371-374.
48. See Novak, *The Election of Israel*, 16-18.
49. Cf. Kant, *Critique of Practical Reason*, preface.
50. See Rawls, *Political Liberalism* (New York: Columbia University Press, 1993), 133-172.
51. See Novak, *The Image of the Non-Jew in Judaism*, passim.
52. See *Tosefta*: Yevamot 1.12.
53. See *Babylonian Talmud*: Kiddushin 40a re Ps. 66:18 and *ibid.*, 49b and parallels.
54. See Novak, *The Election of Israel*, 200-207, 262-263.
55. See Sophocles, *Antigone*, 20-38.
56. See Gen. 18:20.a

RECENT LAW REVIEW ARTICLES OF INTEREST —ABSTRACTS—

Kamm, F. M. "Cloning and Harm to Offspring," 4 New York University School of Law Journal of Legislation and Public Policy 65-75 (2000/01).

Kamm examines a variety of arguments in support of cloning and others against it. Her most valuable philosophical contribution is conceptual clarification of recent discussions of cloning. The first concerns the value of a person. She argues that this value is not affected by the way in which a person comes into existence. Nor would the existence of someone identical in every way (except for numerical identity) lessen the value of either person or mean that one was replaceable by the other. We value our survival, she argues, because of our numerical identity; the knowledge that another being with the same genotype and phenotype exists would provide no consolation if we were killed. Thus, she concludes, arguments centering on differences in phenotype are misplaced.

The second clarification concerns personal identity, and she offers support for worries that cloning poses a threat to our sense of human identity. Although the clones would not share all of one's essential properties, they still might constitute possibilities in life that one had not taken oneself but could have, and this, she suggests, is understandably of concern.

Kamm also considers practical issues in ethics. Parents who want to clone a second child like a first should perhaps be required to have the consent of the first offspring, and issues of responsibility for the second child need to be sorted out. She next presents arguments to support the view that a cloned child might have been wronged by being brought into existence, even assuming it will have a life worth living. Finally she supports the argument that a desire to have a closer genetic connection to a child would justify cloning over sexual reproduction.

Modak-Truran, Mark C. "A Pragmatic Justification of the Judicial Hunch," 35 University of Richmond Law Review 55-89 (2001).

Modak-Truran defends Judge Joseph Hutcheson's hunch theory of judicial decision-making as an underappreciated pragmatic and empirical solution to current issues, especially the now widely recognized indeterminacy of the law and the explosion of fact that judges must consider. Although proposed seventy years ago during what is now called the legal realist movement, Hutcheson confronted the same uncertainty in the law that judges do today in the aftermath of discredited strong legal formalism.

Modak-Truran defends Hutcheson against criticism that the use of such notions as “hunch” and “intuition” denigrate the judicial process. He argues that James’s pragmatism provides the epistemological framework for resuscitating “hunches” from arbitrariness. He also argues that Hutcheson is more properly characterized as a pragmatist than a legal realist.

Sunstein, Cass R. “Deliberative Trouble? Why Groups Go To Extremes,” 110 Yale Law Journal 71-119 (2000).

There is a very attractive political ideal that places great emphasis on group deliberation, on the idea that collective reflection and exchange of views yield superior decisions. This has been observed by Aristotle (“...each has his share of... practical wisdom... Some appreciate one part, some another, and all together appreciate all.”), Hamilton (“differences of opinion...often promote deliberation, and serve to check the excess of majority.”), and Rawls (“In everyday life the exchange of opinion with others checks our partiality... Discussion is a way of combining information and enlarging the range of arguments.”). But as so far stated, the observations are empirically naïve, for whether deliberation yields good outcomes depends on who is doing the deliberating.

There is a phenomenon, observed both in controlled and real-world settings, called “group polarization,” which means that “members of a deliberating group predictably move toward a more extreme point in the direction indicated by the members’ predeliberation tendencies.” For example, if a group favorable to affirmative action, or suspicious of feminism, meets to discuss their issue and perhaps plan action, they are likely to emerge more committed to affirmative action, or more conservative on gender issues, than they were individually prior to group deliberation. And juries, after deliberation, are likely to make larger awards than most or even all were inclined to make prior to deliberation. Given this, what case is there that group deliberation is beneficial?

Group polarization is explained in part by social influences—people’s desires to be perceived favorably by others in the group and to perceive themselves favorably. It is also explained in part by the size of the “argument pool”—the extent of the information and arguments that are put forward. Inevitably the impact of these factors (and others discussed in the article) is heightened when deliberation takes place in enclaves of like-minded people. “[P]olarization will likely occur among heterogeneous as well as homogeneous groups, so long as there is a determinate initial predisposition among members...” The phenomenon is exacerbated when group members identify themselves by contrast to some other group.

Sunstein observes that polarization occurs in certain legal institutions. Juries have already been mentioned, and there is evidence that it occurs on multimember courts all of whose members are from the same political party. On the other hand, the design of certain institutions actually militates against polarization—the requirement of bipartisan membership on independent regulatory commissions, and the bicameral legislature.

Polarization is not altogether bad, however; there can be value in certain groups isolating themselves from competing views, as in the development of the antislavery movement. Low-status groups, for example, are often quiet and ignored in larger, heterogeneous deliberating bodies; separating themselves provides opportunities for their arguments to develop and gain attention—at the cost, though, of increasing the dangers of extremism and instability. From the standpoint of institutional design, then (one case Sunstein is concerned about is the use of the internet), the goal should be “to create spaces for enclave deliberation without insulating enclave members from those with opposing views, and without insulating those outside of the enclave from the views of those within it.”

Nelson, Caleb. “Stare Decisis and Demonstrably Erroneous Precedents,” 87 Virginia Law Review 1-84 (2001).

How should judges deal with precedents that are mistaken—or at least believed to be mistaken? The prevailing view is that such cases cannot be overruled simply because they are (thought to be) wrong, for to overrule on this ground is to fail to give them weight *as precedent* and thereby to do damage to the rule of law. Overruling is thought to be proper only when such precedents have proved to be unworkable, have been left behind by “the growth of judicial doctrine or further action taken by Congress,” or are problematic in some other way. This is the ‘strong’ view of stare decisis, but there is a ‘weaker’ version which does not include the presumption that incorrect precedents must be followed absent special circumstances.

When a judge thinks a prior decision was mistaken, she might mean one of two things. She might mean that there is a range of permissible and defensible decisions that could have been reached even if none is absolutely required given the ambiguity of statutory (or constitutional) language, and that she would have chosen one of the alternatives if she had decided the case in the first instance. Or she might mean instead that the actual decision in the case was not even within the range of discretionary choice and thus was ‘demonstrably erroneous.’ In such cases, Nelson believes, a coherent doctrine of stare decisis need not presume that precedent must be followed unless there are special reasons against it. To the contrary, the presumption instead might be that the precedent is *not* to be followed *unless* there are positive reasons (for example, reliance) to do so.

Nelson argues for both the descriptive power and the normative desirability of the weaker version of stare decisis. The descriptive claim is that the weaker version accurately reflects the role of stare decisis in, for example, James Madison’s conception of the role of judges—when, for example, he distinguishes between the question of “whether precedents could expound a Constitution” and the question of “whether precedents could alter a Constitution.” Similarly, the weaker version is evident in antebellum case law, in which judges regularly indicate that while precedents are usually to be followed even if the judge would have decided otherwise, in some cases they are to be overruled simply because they are wrong. Here is a Connecticut judge in 1810: “I should consider myself bound by [the court’s past interpretation];

but as the statute, in my judgment, is perfectly plain, I am constrained to say that its obligations are paramount to any precedent, however respectable.” Nelson maintains that the same approach is detectable in common law as opposed to statutory cases, though the issue is complicated by the fact that conceptions of the common law have altered over time. Whereas we now tend to see common law judges as making decisions on the basis of policy considerations, the earlier view was that part of the common law had external sources such as custom and reason. On the latter view of the common law there was room to make the distinction between decisions within a range of permissibility, given the external sources of the common law, and decisions beyond permissible constraints.

Why might the weaker version be preferred? Do its benefits outweigh its costs? The main benefit claimed for the view is that it reduces the number of erroneous precedents. Is this realistic? Are there many demonstrably erroneous precedents? And if earlier judges made demonstrably erroneous judgments, are later judges more likely to avoid this pitfall? Nelson contends that some cases of first impression are likely to have been decided incorrectly owing in part to limited acquaintance with the topic and the arguments, and that over time the accretion of lawyers and judges thinking about the issues are likely to produce improved thinking about them. On the other hand, the weaker version has costs: more decisions will be overruled than on the strong version of *stare decisis*, generating “transition costs,” the costs of seeking refinement of the new rule and adapting to it. Nelson argues for the conclusion that “If one believes that most legal questions have a relatively narrow set of permissible answers, that courts will not always reach these answers, but that the existence of written opinions (and subsequent commentary and briefing about those opinions) tends to expose bad arguments and to perpetuate good ones, then one might rationally surmise that the weaker version of *stare decisis* will increase the accuracy of our case law enough to justify the costs of the extra changes it generates.”

As Nelson points out, the case for the weaker version of *stare decisis* rests on recognizing a distinction between law and judicial decision—that is, between the underlying basis of a judicial decision, and the decision that presumably rests on those underlying factors. Given the distinction it is possible to say that a judicial decision is beyond the range of permissibility and thus unacceptable, which is to say, demonstrably erroneous. Nelson observes that this distinction, though not universally accepted by legal theorists, “does have some continuing relevance on today’s Supreme Court. Of the Court’s current members, Justices Scalia and Thomas seem to have the most faith in the determinacy of the legal texts that come before the Court. It should come as no surprise that they also seem the most willing to overrule the Court’s past decisions.”

Finnis, John. “Propter Honoris Respectum: On the Incoherence of Legal Positivism,” 75 *Notre Dame Law Review* 1597-1611 (2000).

“The disputes between exclusive and inclusive legal positivists are...a fruitless demarcation dispute, little more than a squabble about the words ‘law’ or ‘legal system.’” “No truth about law...is systematically at stake in contemporary disputes between exclusive and inclusive legal positivists.” “Positivism is in the last analysis redundant.” Why? Because, as the author sees it, it does not matter whether, with the exclusivists, we sever the question of what the law is from what the moral obligation of officials, including judges, is; or instead, with the inclusivists, treat as law whatever it is the obligation of officials to do.

The ultimate question, which no form of positivism can answer, is how law becomes obligatory. It cannot become obligatory by any method of positing—by being commanded, by custom, or by being created in accordance with the socially recognized means for creating law—for this leaves unanswered the question of how *any* of these creates obligations. The only legitimate answer to the question is that law becomes obligatory by being the fulfillment of our *moral* obligations, the source of which is not commands, even divine ones, but “true and intrinsic values,” “basic human goods.”

The slogan “there is no necessary connection between law and morality,” often taken to define positivism, is threadbare, for, properly understood, it has always been affirmed by natural law theory. Natural law theory holds that a really bad law has no relevance to anyone’s moral responsibility, including a judge’s. Thus there is no connection between law and morality, for the only thing that could make such a law obligatory—namely, morality—does not. (Of course, this “really bad law” would still be a law, for whatever that is worth.)

Law is, in fact, a way of *creating* moral obligations. The common good calls for schemes of social coordination; the political system chooses among good but incompatible (non-compossible) schemes. Once selected, and because the scheme is for the common good, everyone is morally obligated to comply and judges to enforce. In this way a speed law, for example, which was not previously obligatory, becomes so. Its obligatoriness is largely independent of its content, though a sufficient degree of injustice in a law will defeat its bindingness.

Bell, Abraham and Parchomovsky, Gideon. “Takings Reassessed,” 87 *Virginia Law Review* 277-318 (2001).

Under the Fifth Amendment those whose property is taken by government for public purposes are entitled to compensation, but when property that is regulated under the police power loses value, no compensation is due. There are cases, however, which hold that compensation will be owed when the regulation strips property of virtually all its value; these are called ‘regulatory takings.’ There is, however, yet another problem with respect to takings that has not been addressed. When property is taken, even in the most straightforward case, for a public purpose, only the property

owner has a claim for compensation, even though adjacent owners may also experience losses. It has been judicially established that losses related to these 'derivative takings' are not compensable. This, the authors say, is neither fair nor efficient; it is inefficient because it permits the public to impose on others some of the costs of what it wants to achieve (which in the case of owners is exactly what the eminent domain provision is designed to prevent). "It is senseless and unjustifiable that a diminution of one dollar due to a physical taking is compensable per se, while a diminution of \$100,000 resulting from a derivative or regulatory taking can be effected with impunity. The source of the harm and the harm's effect on property owners are the same, irrespective of classification."

Assuming there is a case, based on fairness or efficiency, for compensation, the process of determining the level of compensation must itself be efficient; many commentators suspect that is the difficulty of administration that has led to rulings that derivative takings are not compensable. The authors argue that the problem of administrability can be overcome by self-assessment mechanisms—placing the burden of evaluating and reporting benefits and harms on the individual experiencing them. Those who believe they have been harmed by a taking file a report making claims as to the nature and magnitude of harm, for which the government compensates them. A system of audits and steep penalties for over-stating losses, the authors argue, will serve as a deterrent and cost far less than administrative or judicial determination of losses. And it is also superior to an insurance approach. The authors argue that the self-assessment mechanism can be used for physical and regulatory takings also.

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