

# NATURAL LAW

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Oliver Wendell Holmes, the legal philosopher and judge whom Richard Posner has, with admiration, dubbed “the American Nietzsche,”<sup>1</sup> established in the minds of many people a certain image of what natural law theories are theories of, and a certain set of reasons for supposing that such theories are misguided and even ridiculous. While I have my own reasons for admiring some of Holmes’s work—despite, rather than because of, the Nietzscheanism that endears him to Judge Posner—I think that everything Holmes thought and taught about natural law is wrong. I have elsewhere set forth a detailed critique of Holmes’s thought,<sup>2</sup> which I will not repeat here. Rather, this Article offers a constructive account of what natural law theories are in fact theories of, explains why the idea of natural law and natural rights is far more plausible than people influenced by Holmes have supposed, and shows how natural law theories are similar to and different from leading compet-

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1. Richard A. Posner, *Introduction* to *THE ESSENTIAL HOLMES: SELECTIONS FROM THE LETTERS, SPEECHES, JUDICIAL OPINIONS, AND OTHER WRITINGS OF OLIVER WENDELL HOLMES, JR.*, at xxviii (Richard A. Posner ed., 1992) (citing his comparison of the two in *RICHARD A. POSNER, THE PROBLEMS OF JURISPRUDENCE* 239–42 (1990)).

2. See Robert P. George, *Holmes on Natural Law*, in *NATURE IN AMERICAN PHILOSOPHY* 127 (Jean De Groot ed., 2004).

ing accounts of practical reasoning and of moral judgments that provide the justificatory basis of positive law as well as standards for its critical evaluation.

Theories of natural law are reflective critical accounts of the constitutive aspects of the well-being and fulfillment of human persons and the communities they form. The propositions that pick out fundamental aspects of human flourishing are directive (that is, prescriptive) in our thinking about what to do and refrain from doing (our practical reason)—they are, or provide, more than merely instrumental reasons for action and self-restraint. When these foundational principles of practical reflection are taken together (that is, integrally), they entail norms that may exclude certain options and require other options in situations of morally significant choosing. Natural law theories, then, propose to identify principles of right action—moral principles—specifying the first and most general principle of morality, namely, that one should choose and act in ways that are compatible with a will towards integral human fulfillment.<sup>3</sup> Among these principles is a respect for rights people possess simply by virtue of their humanity—rights which, as a matter of justice, others are bound to respect and governments are bound not only to respect but, to the extent possible, also to protect.

Theorists of natural law understand human fulfillment—the human good—as variegated. There are many irreducible dimensions of human well-being. This is not to deny that human nature is determinate. It is to affirm that our nature, though determinate, is complex. We are animals, but rational. Our integral good includes our bodily well-being, but also our intellectual, moral, and spiritual well-being. We are individuals, but friendship and sociability are constitutive aspects of our flourishing. We form bonds with others not only for instrumental purposes, but because of our grasp of the inherent fulfillments available in joining together in a wide variety of formal and informal types of association and community. In ways that are highly relevant to moral reflection and judgment, man truly is a social animal.

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3. On the first principle of morality and its specifications, see JOHN FINNIS, JOSEPH M. BOYLE, JR. & GERMAIN GRISEZ, *NUCLEAR DETERRENCE, MORALITY AND REALISM* 281–87 (1987).

By reflecting on the basic goods of human nature, especially those most immediately pertaining to social and political life, natural law theorists propose to arrive at a sound understanding of principles of justice, including those principles we call human rights. In light of what I have already said about how natural law theorists understand human nature and the human good, it should be no surprise that natural law theorists typically reject both strict individualism and collectivism.

Individualism overlooks the intrinsic value of human sociability and tends to view human beings atomistically. It reduces all forms of human association to the instrumental value they possess. To criticize this reductionism is not to deny that some forms of association are indeed purely instrumentally valuable or that virtually all forms of human association have instrumental value in addition to whatever intrinsic value they may have, but instead to remember that sociability is an intrinsic aspect of human well-being and fulfillment.

Similarly, collectivism compromises the dignity of human beings by tending to instrumentalize and subordinate their well-being to the interests of larger social units. It reduces the individual to the status of a cog in the wheel whose flourishing is merely a means rather than an end to which other things—such as government, systems of public and private law, and other institutions created by members of human communities for the sake of their common good—however noble and important (or, to use Aristotle's description, "great and god-like"<sup>4</sup>), are ultimately merely means.

Individualists and collectivists both have theories of justice and human rights, but they are highly unsatisfactory. They are rooted in grave misunderstandings of human nature and the human good. Neither can do justice to the concept of a human *person*—that is, a rational animal who is a locus of intrinsic value (and, as such, an end-in-himself who may never legitimately be treated as a mere means to others' ends), but whose well-being *intrinsically* includes relationships with others and membership in formal and informal communities in which he or she has, as a matter of justice, both rights and responsibilities.

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4. ARISTOTLE, NICOMACHEAN ETHICS 1094b10.

I am sometimes asked whether natural law theorists suppose that rights are “hard-wired into our nature.” Unfortunately, this metaphor is more likely to mislead than to illuminate. There are human rights if there are principles of practical reason directing us to act or abstain from acting in certain ways out of respect for the well-being and the dignity of persons whose legitimate interests may be affected by what we do. I certainly believe that there are such principles. They cannot be overridden by considerations of utility. (So a complete defense of any account of natural law and natural rights must include a telling critique of utilitarian and other consequentialist or aggregative accounts of moral reasoning.)<sup>5</sup> At a very general level, they direct us, in Kant’s phrase, to treat human beings always as ends and never as means only. When we begin to specify this general norm, we identify important negative duties, such as the duty to refrain from enslaving people.

Although we *need* not put the matter in terms of “rights,” it is perfectly reasonable, and I believe helpful, to speak of a *right* against being enslaved, and to speak of slavery as a violation of human *rights*. It is a moral right that people have—one that every community is morally obliged to protect by law—not by virtue of being members of a certain race, sex, class, or ethnic group, but simply by virtue of our humanity.<sup>6</sup> In that sense, it is a *human* right. But there are, in addition to negative duties and their corresponding rights, certain positive duties. We can articulate these too in the language of rights, though here it is especially important that we be clear about by whom and how a given right is to be honored. Some say, for example, that education or health care is a human right. It is not unreasonable to speak this way, but much more needs to be said if it is

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5. For such a critique by an eminent contemporary theorist of natural law, see JOHN FINNIS, *FUNDAMENTALS OF ETHICS* 80–108 (1983).

6. By the phrase “our humanity,” I refer more precisely to the nature of humans as rational beings. The nature of human beings is a rational nature. So in virtue of our human nature, we human beings possess a profound and inherent dignity. The same would be true, however, of beings other than humans whose nature is a rational nature, if indeed there are such beings. In the case of humans, even individuals who have not yet acquired the immediately exercisable capacities for conceptual thought and other rational acts, and even those who have temporarily or permanently lost them, and, indeed, even those who do not possess them, never possessed them, and (short of a miracle) never will possess them, possess a rational nature.

to be a meaningful statement. Who is supposed to provide education or health care to whom? Why should those persons or institutions be the providers? What place should the provision of education or health care occupy on the list of social and political priorities? Is it better for education and health care to be provided by governments under socialized systems or by private providers in markets? These questions go beyond the application of moral principles. They require technical (for example, economic) and prudential judgments, including judgments of the sort that can vary depending on contingent circumstances people face in a given society at a given point in time. There is rarely a single, uniquely correct answer. The answer to each question, moreover, can lead to further questions, and the problems can be extremely complex, far more complex than, for example, the issue of slavery, in which once a right has been identified its universality and the basic terms of its application are fairly clear. Everybody has a moral right not to be enslaved, and everybody an obligation as a matter of strict justice to refrain from enslaving others; governments have a moral obligation to respect and protect the right and, correspondingly, to enforce the obligation.<sup>7</sup>

The discussion thus far provides an idea of how we ought to go about identifying human rights. The argument must be made with regard to each putative right, however, and in many cases complexities arise. For example, one basic human right that almost all natural law theorists would recognize is the right of an innocent person not to be directly killed or maimed (including by torture). This is a right that is violated when someone makes the death or injury of another person the

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7. Having said this, I do not want to suggest a sharper difference than can be justified between positive and negative rights. Even in the case of negative rights, it is sometimes relevant to ask how a right should be honored and who, if anyone, has particular responsibility for protecting it. Moreover, it can be the case that there is not a uniquely correct answer to questions about what place the protection of the right should occupy on the list of social priorities. Consider, for example, the right not to be subjected to assault or battery. Although it is obvious that individuals have an obligation to respect this right, and equally obvious that governments have an obligation to protect persons within their jurisdiction from those who would violate it, different communities reasonably differ not only as to the means or mix of means that are used to protect persons from assault and battery, but also as to the level of resources they allocate to protect people against violations of the right. I am grateful to Allen Buchanan for this point.

precise object of his action. It is the right that grounds the norm against targeting non-combatants, even in justified wars, and against abortion, euthanasia, the killing of hostages, and the torturing of prisoners, even for the sake of preventing disasters. When we examine these norms individually, however, complexities emerge. In the case of abortion, some argue that human beings in the embryonic or fetal stages of development do not yet qualify as persons and so do not possess human rights. Similarly, in the case of euthanasia, some argue that permanently comatose or severely retarded or demented people do not (or no longer) qualify as rights-bearers. I think that these claims are mistaken,<sup>8</sup> but for present purposes I will say only that people who do not share with me the conviction that human beings in early stages of development and in severely debilitated conditions are rights-bearers may nevertheless agree that *whoever* qualifies as a person is protected by the norm against direct killing of the innocent.

This natural law understanding of human rights is connected with a particular account of human dignity. Under this account, the natural human capacities for reason and freedom are fundamental to the dignity of human beings—the dignity that is protected by human rights. The basic goods of human nature are the goods of a rational creature—a creature who, unless impaired or prevented from doing so, naturally develops and exercises capacities for deliberation, judgment, and choice. These capacities are God-like (albeit, of course, in a limited way). In fact, from the theological vantage point they constitute a certain sharing—limited, to be sure, but real—in divine power. This is what is meant, I believe, by the otherwise extraordinarily puzzling Biblical teaching that man is made in the very image and likeness of God.<sup>9</sup>

Whether or not one recognizes Biblical authority or believes in a personal God, however, human beings possess a power traditionally ascribed to divinity—namely, the quite literally

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8. For a more detailed explanation of the reasons for holding that the moral status of a human being does not depend on his age, size, stage of development, or condition of dependency, see ROBERT P. GEORGE & CHRISTOPHER TOLLEFSEN, *EMBRYO: A DEFENSE OF HUMAN LIFE* (forthcoming 2008).

9. See *Genesis* 1:26 (New International Version) (“Then God said, ‘Let us make man in our image, in our likeness . . .’”).

awe-inspiring power to be an uncaused causing. This is the power to envisage a possible state of affairs, to grasp the value of bringing it into being, and then to act by choice (not merely by impulse or instinct) to bring it into being. That state of affairs may be anything from the development of an intellectual skill or the attainment of an item of knowledge, to the creation or critical appreciation of a work of art, to the establishment of marital communion. Its moral or cultural significance may be great or—as is far more common—quite minor. What matters is that it is a product of human reason and freedom. It is the fruit of deliberation, judgment, and choice. We may, if we like, consider as a further matter whether beings capable of such powers could exist apart from a divine source and ground of their being. I do not, however, think it makes sense to say that beings whose nature is to develop and exercise such powers are lacking in dignity and rights and may therefore be treated as mere objects, instruments, or property. On this point, I share common ground with my atheist colleague and friend Jeffrey Stout, who argues on something closely akin to this basis that unbelievers, too, can affirm human dignity and fundamental human rights.<sup>10</sup>

Now, what about the authority for this view of human nature, the human good, human dignity, and human rights? Natural law theorists are interested in the intelligible *reasons* people have for their choices and actions. We are particularly interested in reasons that can be identified without appeal to any authority apart from the authority of reason itself. This is not to deny that it is often reasonable to recognize and submit to religious or secular (for example, legal) authority in deciding what to do and not do. Indeed, natural law theorists such as Yves Simon have made important contributions to understanding why and how people can sometimes be morally bound to submit to, and be guided in their actions by, authority of vari-

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10. Professor Stout made this point most clearly at a conference at Princeton University in 2003. See Jeffrey Stout, Comment on Secularism, Law and Public Policy at the James Madison Program in American Ideals and Institutions Conference on Faith and the Challenges of Secularism (Oct. 11, 2003), available at <http://web.princeton.edu/sites/jmadison/calendar/video/Faith%20&%20Challenges.html>; see also Jeffrey Stout, *Truth, Natural Law, and Ethical Theory*, in *NATURAL LAW THEORY: CONTEMPORARY ESSAYS* 71 (Robert P. George ed., 1992).

ous types.<sup>11</sup> Even here, however, the special concern of natural law theorists is with the *reasons* people have for recognizing and honoring claims to authority. We do not simply appeal to authority to justify authority.

One might then ask whether human beings are in fact rational. Can we discern any intelligible reasons for human choices and actions? Everyone recognizes that some ends or purposes pursued through human action are intelligible at least insofar as they provide means to other ends. For example, people work to earn money, and their doing so is perfectly rational. Money is a valuable means to a great many important ends. No one doubts its instrumental value. Even skeptics do not deny that there are instrumental goods. The question, rather, is whether some ends or purposes are intelligible as providing *more than merely instrumental* reasons for acting. Are there intrinsic, as well as instrumental, goods? Skeptics deny that there are intelligible ends or purposes that make possible rationally *motivated* action. Natural law theorists, by contrast, hold that friendship, knowledge, virtue, aesthetic appreciation, and certain other ends or purposes are intrinsically valuable.<sup>12</sup> They are intelligibly “choice worthy,” not simply as means to other ends, but as ends-in-themselves. They cannot be reduced to—nor can their intelligible appeal be accounted for exclusively in terms of—emotion, feeling, desire, or other subrational motivating factors. These basic human goods are constitutive aspects of the well-being and fulfillment of human persons and the communities they form, and they thereby provide the foundations of moral judgments, including our judgments pertaining to justice and human rights.

Of course, there are many today who embrace philosophical or ideological doctrines that deny the human capacities I maintain are at the core of human dignity. They adopt a purely instrumental and essentially non-cognitivist view of practical reason—for example, Hume’s view that reason is nothing more than “the slave of the passions”<sup>13</sup>—and argue that the human

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11. YVES R. SIMON, *A GENERAL THEORY OF AUTHORITY* (1962).

12. See, e.g., JOHN FINNIS, *NATURAL LAW AND NATURAL RIGHTS* 59–127 (2d prt. 1982).

13. DAVID HUME, *A TREATISE OF HUMAN NATURE*, bk. II, pt. III, § III, at 415 (Clarendon Press 1888) (1739).



experience of deliberation, judgment, and choice is illusory. The ends people pursue, they insist, are ultimately given by nonrational motivating factors, such as feeling, emotion, or desire. “[T]he thoughts are to the desires,” Hobbes has taught them to suppose, “as scouts and spies, to range abroad and find the way to the things desired.”<sup>14</sup> Truly rationally motivated action is impossible for creatures like us. There are no more-than-merely-instrumental reasons for action—no basic human goods.

If proponents of this non-cognitivist and subjectivist view of human action are right, then the entire business of ethics is a charade and human dignity is a myth. But I do not think they are right. Indeed, they cannot give any account of the norms of rationality to which they must appeal in attempting to make a case against reason and freedom that is consistent with the denial that people are capable of more-than-merely-instrumental rationality and true freedom of choice. Germain Grisez and Joseph Boyle, together with the late Olaf Tollefsen, make a powerful argument along these lines against skepticism and the denial of free will in a book entitled *Free Choice: A Self-Referential Argument*.<sup>15</sup> They, and I, do not deny that emotion figures in human action; it does, and on many occasions it (or other subrational factors) does the main work of motivation. We hold that people can have, and often do have, basic reasons for their actions—reasons provided by ends they understand as humanly fulfilling and desire precisely as such. These ends, too, figure in motivation.<sup>16</sup>

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14. THOMAS HOBBS, *LEVIATHAN*, pt. 1, ch. viii, at 41 (Edwin Curley ed., Hackett Publ'g Co. 1994) (1651).

15. JOSEPH M. BOYLE, JR., GERMAIN GRISEZ & OLAF TOLLEFSEN, *FREE CHOICE: A SELF-REFERENTIAL ARGUMENT* (1976).

16. See, e.g., Christine M. Korsgaard, *The Normativity of Instrumental Reason*, in *ETHICS AND PRACTICAL REASON* 215 (Garrett Cullity & Berys Gaut eds., 1997). Although she identifies herself with the Kantian (rather than the Aristotelian) tradition in ethics, the distinguished Harvard moral philosopher Christine Korsgaard makes a similar point when she argues that there can be no true practical rationality—not even an instrumentalist one composed of hypothetical imperatives—unless there are “some rational principles determining which ends are worthy of preference or pursuit,” *id.* at 230, some “normative principles directing us to the adoption of certain ends,” *id.* at 220, and “something which gives normative status to our ends,” *id.* at 250, by providing (what she describes as) “unconditional reasons for having certain ends, and, it seems, unconditional principles from which those reasons are derived,” *id.* at 252.

Now, if I am correct in affirming that human reason can identify human rights as genuine grounds of obligation to others, rights which people possess as a matter of natural law (what have been termed “natural rights”), how can we explain or understand widespread failures to recognize and respect human rights and other moral principles? As human beings, we are rational animals, but we are imperfectly rational. We are prone to making intellectual and moral mistakes and capable of behaving grossly unreasonably, especially when deflected by powerful emotions that run contrary to the demands of reasonableness. Even when following our consciences, as we are morally bound to do, we can go wrong. A conscientious judgment may nevertheless be erroneous. Some of the greatest thinkers who ever lived failed to recognize the human right to religious liberty. Their failure, I believe, was rooted in a set of intellectual errors about what such a right presupposes and entails. The people who made these errors were neither fools nor knaves. The errors were not obvious, and it was only with a great deal of reflection and debate that the matter was clarified.

Of course, sometimes people fail to recognize and respect human rights because they have self-interested motives for doing so. In most cases of exploitation, for example, the fundamental failing is moral, not intellectual. In some cases, though, intellectual and moral failures are closely connected. Selfishness, prejudice, partisanship, vanity, avarice, lust, ill-will, and other moral delinquencies can, in ways that are sometimes quite subtle, impede sound ethical judgments, including judgments pertaining to human rights. Whole cultures or subcultures can be infected with moral failings that blind large numbers of people to truths about justice and human rights, and ideologies hostile to these truths will almost always be both causes and effects of these failings. Consider, for example, the case of slavery in the antebellum American South. The ideology of white supremacy was both a cause of many people’s blindness to the wickedness of slavery, and an effect of the exploitation and degradation of its victims.

Let us now turn in a more focused way to the question of God and religious faith in natural law theory. Most, but not all, natural law theorists are theists. They believe that the moral order, like every other order in human experience, is what it is because God creates and sustains it as such. In accounting for

the intelligibility of the created order, they infer the existence of a free and creative intelligence—a personal God. Indeed, they typically argue that God’s creative free choice ultimately provides the only satisfactory account of the existence of the intelligibilities humans grasp in every domain of inquiry.

Natural law theorists do not deny that God can reveal moral truths, and most believe that God has chosen to reveal many such truths. Natural law theorists, however, also affirm that many moral truths, including some that are revealed, can also be grasped by ethical reflection apart from revelation. They assert, with St. Paul, that there is a law “written [on the] hearts” even of the Gentiles who did not know the law of Moses<sup>17</sup>—a law the knowledge of which is sufficient for moral accountability. So the basic norms against murder and theft, for example, though revealed in the Decalogue, are accessible and knowable even apart from God’s special revelation.<sup>18</sup> The natural law can be known by us, and we can conform our conduct to its terms, by virtue of our natural human capacities for deliberation, judgment, and choice.

The absence of a divine source of the natural law would be a puzzling thing, just as the absence of a divine source of any and every other intelligible order in human experience would be a puzzling thing. An atheist’s puzzlement might well cause him to reconsider the idea that there is no divine source of the order we perceive and understand in the universe. Such a reconsideration figures in the accounts given by some eminent modern thinkers of their conversions from one or another form of secularism to religious faith; examples among Anglophone philosophers include Elizabeth Anscombe, Michael Dummett, John Finnis, Alasdair MacIntyre, Peter Geach, and Nicholas Rescher. It is far less likely to cause someone to conclude that our perception is illusory or that our understanding is a sham, though that is certainly logically possible. Of course, puzzlement may not necessarily lead to religious faith, even for those who accept our perception of reason and freedom as epistemically warranted. Consider, for example, Michael Moore, a distinguished contemporary natural law theorist for whom it is

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17. *Romans* 2:15 (New International Version).

18. See ST. THOMAS AQUINAS, *SUMMA THEOLOGICA* I-II, Q. 91, art. 2, Q. 100, art. 1.

“obvious . . . that nothing exists answering to a personal conception of God and that the human needs to create such a fictional creature are the only explanation why so many people have come out the other way on the question.”<sup>19</sup>

The question then arises: can natural law—assuming that there truly are principles of natural law—provide the basis for a regime of human rights law without consensus on the existence and nature of God and the role of God in human affairs? In my view, anybody who acknowledges the human capacities for reason and freedom has good grounds for affirming human dignity and basic human rights. These grounds remain in place whether or not one adverts to the question whether there is a divine source of the moral order whose tenets we discern in inquiry regarding natural law and natural rights. I happen to think that the answer to this question is yes, and that we should be open to the possibility that God has revealed himself in ways that reinforce and supplement what can be known by unaided reason. But we do not need agreement on the answer, so long as we agree about the truths that give rise to the question—namely, that human beings, possessing the God-like (literally *awesome*) powers of reason and freedom, are bearers of a profound dignity that is protected by certain basic rights.

If there is a set of moral norms, therefore, including norms of justice and human rights, that can be known by rational inquiry, understanding, and judgment even apart from any special revelation, these norms of natural law can provide the basis for an international regime of human rights. Of course, we should not expect consensus. There are moral skeptics who deny that there are moral truths. There are religious fideists of various faiths who hold that moral truths cannot be known apart from God’s special revelation. And, even among those who believe in natural law, there will be differences of opinion about its content and implications for certain issues, including important ones. Thus, it is our permanent condition to discuss and debate these issues, both as a matter of abstract philosophy and as a matter of practical politics. I have elsewhere criticized certain inferences for political morality drawn by the late John

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19. Michael S. Moore, *Good Without God*, in *NATURAL LAW, LIBERALISM, AND MORALITY* 249, 259 (Robert P. George ed., 1996).

Rawls from what he labeled “the fact of reasonable pluralism,” but I do not deny that it is a fact; rather, I affirm it as such.<sup>20</sup> There are burdens of judgment; ethical questions can be difficult. In circumstances of political liberty, reasonable people of goodwill can be expected to develop divergent views, even about some profoundly important moral matters and even extending to questions of who is to count as a member of the human community and, as such, someone to whom obligations of justice are due.

It is sometimes regarded as an embarrassment to natural law thinking that some great ancient and medieval figures in the natural law tradition failed to recognize—indeed, have even denied—human rights that are affirmed by contemporary natural law theorists and others, and even regarded as fundamental. Consider, for example, the basic human right to religious liberty, or what the Constitution of the United States refers to as the right to the free exercise of religion.<sup>21</sup> This right was not widely acknowledged in the past and was even denied by some prominent natural law theorists. They wrongly believed that a wide conception of liberty in matters of faith presupposes religious relativism or indifferentism, entails that religious vows are immoral or nonbinding, or the comprehensive subservience of ecclesial communities to the state.<sup>22</sup> It is interesting that when the Catholic Church put itself on record firmly in support of the right to religious freedom robustly conceived in the document *Dignitatis Humanae* of the Second Vatican Council, it presented both a natural law argument and an argument from specifically theological sources. The natural law argument for religious liberty is founded on the obligation of each person to pursue the truth about religious matters and to live in conformity with his conscientious judgments.<sup>23</sup> This

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20. See ROBERT P. GEORGE, *THE CLASH OF ORTHODOXIES: LAW, RELIGION, AND MORALITY IN CRISIS* 52–53 (2001); see also Robert P. George & Christopher Wolfe, *Natural Law and Public Reason*, in *NATURAL LAW AND PUBLIC REASON* 51, 52–53 (Robert P. George & Christopher Wolfe eds., 2000).

21. U.S. CONST. amend. I.

22. For a brief but sound analysis and some useful citations, see JOHN FINNIS, *MORAL ABSOLUTES: TRADITION, REVISION, AND TRUTH* 26 & n.50 (1991).

23. SECOND VATICAN COUNCIL, *DECLARATION ON RELIGIOUS LIBERTY: DIGNITATIS HUMANAЕ* § 2–3 (1965), reprinted in *VATICAN COUNCIL II, THE CONCILIAL AND POST CONCILIAL DOCUMENTS* 800–01 (Austin Flannery, O.P., ed., rev. ed. 1988).

obligation is, in turn, rooted in the proposition that religion—considered as conscientious truth-seeking regarding the ultimate sources of meaning and value—is a crucial dimension of human well-being and fulfillment. It is among the basic human goods that provide rational motivation for our choosing. The right to religious liberty follows from the dignity of man as a conscientious truth-seeker.

Of course, people who reject the natural law understanding of human dignity and human rights will differ from natural law theorists on questions of what constitutes progress and decline. From a certain theological point of view, the type of religious freedom defended by contemporary natural law theorists will be regarded as licensing heresy and religious irresponsibility. Natural law ideas will be seen as a rhetorically toned down form of liberal secularism. By contrast, from a certain liberal secularist point of view, natural law ideas about abortion, sexuality, and other hot-button moral issues will be regarded as intolerant and oppressive—a philosophically gussied up form of religious fundamentalism. In the end, natural law ideas, like theocratic ideas or secularist liberal ones, must stand or fall on their merits. Anyone who wonders whether they are sound or unsound must consider carefully and dispassionately the arguments offered in their support and the counterarguments advanced by their critics.

Let me now turn to the ways in which natural law theories are both like and unlike utilitarian (and other consequentialist) approaches to morality, on the one hand, and Kantian (or deontological) approaches on the other. Like utilitarian approaches, and unlike Kantian ones, natural law theories are fundamentally concerned with human well-being and fulfillment and, indeed, take basic human goods as the starting points of ethical reflection. Unlike utilitarian approaches, however, natural law theories understand the basic forms of human good (as they figure in options for morally significant choosing) as incommensurable in ways that render senseless the utilitarian strategy of choosing the option that overall and in the long run promises to conduce to the net best proportion of benefit to harm (in whatever way “benefit” and “harm” may be understood and defined). Natural law theorists share the Kantian rejection of aggregative accounts of morality that regard the achievement of sufficiently good consequences or the avoidance of suffi-

ciently bad ones as justifying choices that would be excluded by application of moral principles in ordinary circumstances. Unlike Kantians, however, natural law theorists do not believe that moral norms can be identified and justified apart from a consideration of the integral directiveness of the principles of practical reason directing human choice and action towards what is humanly fulfilling and away from what is contrary to human well-being. Natural law theorists do not believe in purely deontological moral norms. Practical reasoning is reasoning about *both* the “right” and the “good,” and the two are connected. The content of the human good shapes the moral norms applied in judgments about right (and wrong) choices and actions. Moral norms themselves are entailments of the primary practical principles that direct us to basic aspects of human well-being or fulfillment. These primary practical principles’ integral directiveness is articulated in the master principle of morality and its specifications in morality’s norms.

Such a view presupposes the possibility of free choice—that is, choosing that is the pure product neither of external forces nor internal but subrational motivating factors, such as sheer desire. Accordingly, a complete theory of natural law will include an account of principles of practical reason, including moral norms as providing rational guidance for free choices, and a defense of free choice as a genuine possibility. This entails the rejection of strict rationalism, according to which all phenomena are viewed as caused. It understands human beings—some human beings, at least sometimes—as partially uncaused causings of those realities that they bring into existence *for reasons but by choices that are free because underdetermined by reasons and passions alike*. On the natural law account of human action, freedom and reason are mutually entailed. If people were not really free to choose among options—free in the sense that nothing but the choosing itself settles what option gets chosen—truly rationally motivated action would not be possible. If rationally motivated action were not possible, the experience we have of freely choosing would be illusory.

Philosophers in the natural law tradition, going all the way back to Aristotle, have emphasized the fact (or, in any event, what we believe to be the fact) that by our choices and actions we not only alter states of affairs in the world external to us, but also at the same time determine and constitute ourselves—

for better or worse—as persons with a certain character.<sup>24</sup> Recognition of this self-shaping or “intransitive” quality of morally significant choosing leads to a focus on *virtues* as habits born of upright choosing that orient and dispose us to further upright choosing, especially in the face of temptations to behave immorally. People sometimes ask: is natural law about rules or virtues? The answer is that it is about *both*. A complete theory of natural law identifies norms for distinguishing right from wrong as well as habits or traits of character whose cultivation disposes people to choose in conformity with the norms and, thus, compatibly with what we might call—borrowing a phrase from Kant—a good will, a will towards integral human fulfillment.

Human beings live not as isolated individuals, but in families, kinship groups, clans, and various forms of political association. And, as previously discussed, natural law theorists hold that among the irreducible aspects of human flourishing are various forms of harmony or unity with others; so we propose accounts of the *common good* of communities, including political communities. The political common good is understood not as some additional human good alongside the others, but rather as the securing of conditions in which people can flourish by cooperating with each other as fellow citizens. There is a common good because (1) the basic human goods are aspects of the flourishing of each and every member of the human family; (2) many of these goods can be enjoyed, or enjoyed more fully, by common action to secure them; and (3) common action itself can be intrinsically fulfilling inasmuch as humans are indeed “political animals” whose integral good includes intrinsically social dimensions.

The common good of any human society demands that governments be established and maintained to make and enforce laws. Law and government are necessary not merely because human beings sometimes treat one another unjustly and even behave in a predatory manner towards each other, but more fundamentally because human activity often must be coordinated by authoritative stipulations and other exercises of authority to secure common goals. Consider the simple case of regulating highway traffic. Even in a society of perfect saints,

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24. See, e.g., NICOMACHEAN ETHICS, *supra* note 4, at 1113b5–13.



law and government would be necessary to establish and maintain a system of traffic regulation for the sake of the common good of motorists, cyclists, pedestrians, and everyone who benefits from the safe and efficient transportation of goods and persons on the highways. Because often it is the case that there is no uniquely reasonable or desirable scheme of regulation, only different possible schemes with different benefits and costs, governmental authority must be employed to choose by stipulating one from among the possible schemes. Authority in such a case is necessary because unanimity is impossible. Authority serves the common good by making a stipulation and enforcing its terms. Assuming that there is no corruption or other injustice involved in the choice of a certain scheme of traffic regulation or the enforcement of its terms, we can regard this as a focal case of legal authority under a natural law account of the matter. Of course, the complete account would begin by identifying the human goods that schemes of traffic regulation are meant to advance and protect, including but not limited to the protection of human life and health and the evils they seek to allay. The account would observe that in the absence of a legally stipulated and enforced scheme of regulation these goods would be in constant jeopardy as motorists, even motorists of goodwill who were doing their best to exercise caution, crashed into each other or created traffic gridlock of the sort that could easily be avoided by the prudent stipulation of coordinated schemes of driving norms. It would then defend the legitimacy of governmental authority to make the required stipulations, not by referring to the unique desirability of the scheme it happens to choose, but rather by appealing to the need for *a* scheme to be given the standing of law.

Law making and law enforcement are central functions and responsibilities of legitimate political authority. The justifying point of law is to serve the common good by protecting the goods of persons and the communities of which they are members. Where the laws are just and effective, political authorities fulfill their obligations to the communities they exist to serve. To the extent that the laws are unjust or ineffective, they fail in their mission to serve the common good. As Aquinas said, the

very point of the law is the common good.<sup>25</sup> In that sense, law is as he defined it: “an ordinance of reason for the common good, made by him who has care of the community.”<sup>26</sup> Inasmuch as the moral point of law is to serve the integral good of human beings—people as they are—laws against many of the sorts of common wrongdoing are necessary and proper in human societies. Aquinas’s definition of law also requires that there be some individual, group, or institution exercising authority in political communities and fulfilling this authority’s moral function by translating certain principles of natural law into positive law and reinforcing these principles with legal sanctions—that is, the threat of punishment for law-breaking. In this sense, justified authorities derive the law they make (positive law) from the natural law or, equivalently, translate natural law principles of justice and political morality into the rules of positive law.

Following Aquinas, who was himself picking up a lead from Aristotle, natural law theorists hold that all just positive law, from schemes of traffic regulation to complex sets of rules governing, say, bankruptcy, is “derived” from natural law; still, there are two different types of derivation corresponding to different types of law.<sup>27</sup> In certain cases, the legislator, for the sake of justice and the common good, simply and directly forbids or requires what morality itself forbids or requires. For example, the legislator in making murder a criminal offense puts the force and sanctions of positive law behind a principle by which people are bound as a matter of natural law even in the absence of positive law on the subject—namely, the principle forbidding the direct or otherwise unjust killing of one’s fellow human beings. Aquinas noted that, in acting in this way, the legislator derives the positive law from the natural law in a manner akin to the deduction of conclusions from premises in mathematics or the natural sciences.

For other types of positive law, however, such a “deductive” approach is not possible. Here again the case of traffic regulation is illustrative. In choosing a scheme from among a possible range of reasonable schemes, each with its own costs and bene-

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25. AQUINAS, *supra* note 18, at Q. 96, art. 1.

26. *Id.* at Q. 90, art. 4.

27. *See id.* at Q. 95, art. 2.

fits, the legislator moves not by a process akin to deduction, but rather by an activity of the practical intellect that Aquinas called "*determinatio*."<sup>28</sup> Although, unfortunately, no single word in English captures all that the Latin term denotes and connotes, the concept is not difficult to understand. Aquinas explained it by analogy to the activity of a craftsman commissioned to build a house—what we would probably call an architect. There is, of course, no uniquely correct way to design a house. Many different designs are reasonable. Certain design features will be determined by the needs of the person or family that will occupy the dwelling, others are simply matters of style and taste, and others still are optional compromises between expense and risk. So, in most cases, the architect will exercise a significant measure of creative freedom within a wide set of boundaries. Consider the question of ceiling height. While some possibilities are excluded by practical considerations—for example, ceilings of only four feet in height would make living in the house impossible for most people and ceilings of forty feet in height would ordinarily be impractically expensive—no principle of architecture fixes ceiling heights at seven feet four inches, nine feet, anything in between, or anything a bit higher or lower. In executing his commission, the architect will endeavor to choose a height for the ceilings that harmonizes with other features of his design, including features (such as door heights) that are themselves the fruit of *determinationes*.

Like the architect, the lawmaker will in many domains exercise a considerable measure of creative freedom in working from a grasp of basic practical principles. He will direct actions towards the advancement and protection of basic human goods and away from their privations. Through his exercise of creative freedom, he will craft concrete schemes of regulation aimed at coordinating conduct for the sake of the all-around well-being of the community—that is, the common good. Among the considerations a good legislator will always bear in mind is the fairness of the distribution of burdens and benefits attending any scheme of regulation. Because, on the natural law account, all persons have a profound, inherent, and equal

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28. *Id.*

dignity, the interests—that is, the well-being—of each and every person must be taken into account and no one's interests may be unfairly or otherwise unreasonably favored or disfavored. The common good is not the utilitarian's "greatest net good" or "greatest good of the greatest number";<sup>29</sup> rather, it is the shared good of all, including the good of living in a community where the dignity and rights of all—including the right to have one's equal basic dignity respected—are honored in the exercise of public authority.

Although the natural law sets the derivation of positive laws from the natural law as the task of the legislator (and it is only through his efforts that the natural law can become effective for the common good), it is important to note that the body of law created by the legislator is not itself the natural law. Whereas the natural law is in no sense a human creation, the positive law is indeed created (posited, put in place)—not simply implemented—by humans. This point is telling about the metaphysical status of the positive law. Following Aristotle, we might say that the positive law belongs to the order of "making" rather than to the order of "doing." It is thus fitting that the positive law is subject to technical application and is analyzed by a sort of technical reasoning. Hence, law schools do not (or do not only) teach their students moral philosophy, but focus the attention of students on distinctive techniques of legal analysis, such as how to identify and understand legal sources and how to work with statutes, precedents, and the (often necessarily) artificial definitions that characterize any complex system of law. At the same time we must be careful to distinguish a different metaphysical order that attaches to the moral purpose of the law. It is in the order of "doing" (the order of free choice, practical reasoning, and morality) that we identify the need to create law for the sake of the common good. The legislator creates a cultural object—that is, the law—which is deliberately and reasonably subject to technical analysis, for a purpose that is moral and not merely technical.<sup>30</sup>

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29. On the incoherence of these Benthamite notions, see FINNIS, *supra* note 12, at 112–18.

30. See John Finnis, *Natural Law and Legal Reasoning*, in NATURAL LAW THEORY: CONTEMPORARY ESSAYS, *supra* note 10, at 134, 138–43.

That the law is a cultural object created for a moral purpose engenders much confusion about the role of moral philosophy in legal reasoning. For instance, a much debated question in American constitutional interpretation is the scope and limits of the power of judges to invalidate legislation under certain allegedly vague or abstract constitutional provisions. Some constitutional theorists, such as Professor Ronald Dworkin, defend an expansive role for the judge by arguing that the conscientious judge must bring judgments of moral and political philosophy to bear in deciding hard cases.<sup>31</sup> Others, such as Judge Robert Bork and Justice Antonin Scalia, fear such a role for the judge and hold that a sound constitution—at any rate, the Constitution of the United States—does not give the judge any such role.<sup>32</sup> They maintain that moral philosophy has little or no place in judging, at least within the American legal system. Where should natural law theorists stand on this complex issue?

Natural law theory treats the role of judge as itself fundamentally a matter for *determinatio* and not for direct translation from the natural law. Accordingly, it does not presuppose that the judge enjoys (or should enjoy) as a matter of natural law a plenary authority to substitute his own understanding of the requirements of the natural law for that of the lawmaker in deciding cases at law. On the contrary, the Rule of Law (ordinarily understood as a necessary but insufficient condition for a just system of government) morally requires—that is, obligates as a matter of natural law—the judge to respect the limits of his own authority as it has been allocated to him by way of an authoritative *determinatio*. This entails a hypothetical solution to the puzzle that confronts us: if the law of the judge's system constrains his law-creating power in the way that Justice Scalia believes American fundamental law does, then he is obliged—legally and, presumptively, morally—to respect these constraints, even where his own understanding of natural justice deviates from that of the legislators (or constitution makers and ratifiers) whose laws he must interpret and apply. Hence, the question of what degree of law-creating power a judge enjoys

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31. See RONALD DWORKIN, *LAW'S EMPIRE* (1986).

32. See, e.g., ROBERT H. BORK, *THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW* 251–59 (1990).

is itself a matter of the positive law of the Constitution and is not determinable by natural law alone.

I will conclude by briefly treating an issue, which I believe is actually a non-issue, that has exercised some influential modern critics of natural law theory, such as Hans Kelsen.<sup>33</sup> They have seized upon the slogan, found in St. Augustine and echoed by Aquinas, that “a law that is not just, seems to be no law at all.”<sup>34</sup> These critics claim the proposition expressed in this slogan, which they regard as being at the heart of natural law thinking, is utterly implausible because it either sanctifies injustice (by entailing that any law possessing validity by reference to the criteria of a positive system of law is morally good and therefore creates an obligation to obey), or because it contradicts plain fact (by suggesting that what everyone takes to be laws—that is, rules possessing validity by reference to the criteria of a positive system of law—are in fact not laws if they are unjust).

This line of criticism is misguided. Natural law theorists through the ages have taken note of the distinction between the systemic validity of a proposition of law, the property of belonging to a legal system, and the law’s moral validity and bindingness as a matter of conscience. These theorists have had no difficulty accepting the central thesis of what we today call legal positivism—that is, that the existence and content of the positive law depends on social facts and not on its moral merits. Indeed, it is hard to see how one would otherwise make sense of the locution “a law that is not just.”

Note, however, that accepting this thesis is independent of denying other modal connections between morality and the law. In particular, it is unlikely that we would be able to understand significant aspects of the law if we were unable to grasp moral reasons. This is so because the reasons people have for establishing and maintaining legal systems are often moral reasons that issue from normative practical deliberation aimed at the common good. Far from threatening the thesis of positivity, such explanatory connections are necessary to provide any

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33. See, e.g., Hans Kelsen, *The Natural-Law Doctrine Before The Tribunal of Science*, in *WHAT IS JUSTICE? JUSTICE, LAW, AND POLITICS IN THE MIRROR OF SCIENCE: COLLECTED ESSAYS* 144 (1957).

34. AQUINAS, *supra* note 18, at Q. 96, art. 4 (quoting ST. AUGUSTINE, *DE LIB. ARB. [ON FREE WILL]* bk. i, 5).

fine-grained descriptive account of the law.<sup>35</sup> How else would one locate the focal cases of the law or appreciate the standards by which laws are judged to be defective as laws (as we surely do, for example, in the case of laws that show unjustified partiality to certain groups)? A particularly fundamental connection in this vein is the way in which the normativity of practical reasoning and its directiveness towards human well-being and fulfillment explains the normativity and the action-guiding character of law's authority. Thus, while natural law theory preserves a descriptive characterization of the law, it does not commit the fallacy of explaining prescriptive features by reference to nothing but descriptive features.

Natural law theorists join with many self-described legal positivists, such as H.L.A. Hart and his great student (and my teacher) Joseph Raz, in deploying the concept of "law" in a way sufficiently flexible to take into account the differences between the demands of (i) intrasystemic legal analysis or argumentation (for example, in the context of professional legal advocacy or judging); (ii) what, following Hart, we might call "descriptive" social theory (for example, "sociology of law"); and (iii) fully critical (that is, "normative," "moral," conscience-informing) discourse. Aquinas, for example, made central to his reflections the question whether, and, if so, how and to what extent, unjust laws bind in conscience those subject to them.<sup>36</sup> It is clear enough that Aquinas believed that human positive law creates a moral duty of obedience even where the conduct it commands (or prohibits) would, in the absence of the law—that is, morally, as a matter of natural law—be optional. This critical-moral belief in the power of positive law to create (or, where moral obligation already exists, reinforce) moral obligation naturally suggests the question whether this power, and the duties that are imposed by its exercise on those subject to it, is absolute or defeasible. If defeasible, under what conditions is it defeated?

To answer this question it is necessary to press the critical-moral analysis. What is the source of the power in the first place? Plainly, it is the capacity of law to serve the cause of justice and the common good by, for example, coordinating be-

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35. See FINNIS, *supra* note 12, at 12–18.

36. See AQUINAS, *supra* note 18, at Q. 96, art 4.

havior to make possible the fuller and fairer realization of human goods by the community as a whole. But, *from the critical-moral viewpoint*, laws that due to their injustice damage rather than serve the common good, lack the central justifying quality of law. Their law-creating power (and the duties they purport to impose) is thus weakened or defeated. Unjust laws are, Aquinas says, “not so much laws as acts of violence.”<sup>37</sup> As violations of justice and the common good, unjust laws lack the moral force of law; they bind in conscience, if at all, only to the extent that one is under an obligation not to bring about bad side effects that would, in the particular circumstance, likely result from one’s defiance of the law—for example, causing “scandal or disturbance”<sup>38</sup> by undermining respect for law in a basically just legal system or unfairly shifting the burdens of a certain unjust law onto the shoulders of innocent fellow citizens.<sup>39</sup> That is to say, unjust laws bind in conscience, if at all, not *per se*, but only *per accidens*. They are laws, not “*simpliciter*,” or, as we might say, “straightforwardly” or in the “focal” or “paradigmatic” sense, but only in a derivative or secondary sense (*secundum quid*, or, in a certain respect but not in all respects).

Nothing in Aquinas’s legal theory or in the thought of modern natural law theorists, such as myself, suggests that the injustice of a law renders it something other than a law (or “legally binding”) for purposes of intrasystemic juristic analysis and argumentation. It is true that Aquinas counseled judges, where possible, to interpret and apply laws in such a way as to avoid unjust results where the law makers did not foresee circumstances in which a strict application of the rule they laid down would result in injustice and where, had they foreseen such circumstances, they would have crafted the rule differently.<sup>40</sup> But, even there, he does not appeal to the proposition that the injus-

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37. *Id.*

38. *Id.* Note, however, that, according to Aquinas, one may never obey a law requiring one to do something unjust or otherwise morally wrong. And sometimes *disobedience* is required to avoid causing (or contributing to) “scandal or disturbance.” See *id.* at Q. 96, art. 5; see also *id.* at Q. 104, art. 6. On issues relevant to the translation of Aquinas’s phrase “*scandalum vel turbatio*,” see JOHN FINNIS, *AQUINAS: MORAL, POLITICAL AND LEGAL THEORY* 223 n.23, 273 n.112, 274 n.d (1998).

39. See *AQUINAS*, *supra* note 18, at Q. 96, art. 4.

40. *Id.* at Q. 96, art. 6.



tice likely to result from an application of the rule strictly according to its terms nullifies those terms from the legal point of view.

Nor does Aquinas say or imply anything that would suggest treating Augustine's comment that "a law that is not just, seems to be no law at all" as relevant to social-theoretical (or historical) investigations of what is (or was) treated as law and legally binding in the legal system of any given culture (however admirable or otherwise from the critical-moral viewpoint). Professor Hart was careful never to promote the sort of caricature of natural law one finds in the writings of Kelsen and Holmes. He had a real, if qualified, respect for the tradition of natural law theorizing and was, in fact, the person who commissioned for Oxford's Clarendon Law Series the book by John Finnis, *Natural Law and Natural Rights*, that revived interest in natural law among analytic legal philosophers in our time. Still, Hart was among those who misunderstood Aquinas and his stream of the natural law tradition on precisely this point. He seemed to think there was something antithetical to the principles of natural law theory in the "descriptive sociology" of law he proposed in his masterwork *The Concept of Law*.<sup>41</sup> This is the reverse of the truth.

Natural law theorists need not suppose that Hart erred by treating as laws (and legal systems) various social norms (and social norm-generating institutions) that fulfill the criteria or conditions for legality or legal validity of Hart's concept of law, despite the fact that his social-theoretical enterprise (reasonably!) prescind to a considerable extent (indeed, it seeks to prescind as far as possible) from critical-moral evaluations of laws

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41. Even before the appearance of *The Concept of Law*, Hart had sternly repudiated natural law theory, arguing that "in all its protean guises" natural law theory relies on the implausible descriptive sociological claim "that human beings are equally devoted to and united in their conception of aims (the pursuit of knowledge, justice to their fellow men) other than that of survival." H.L.A. Hart, *Positivism and the Separation of Law and Morals*, 71 HARV. L. REV. 593, 623 (1958). Of course, Hart was correct that such a claim is utterly implausible. The trouble is that no natural law theorist (or anyone else, so far as I am aware) has ever asserted any such thing. As John Finnis has remarked in criticizing Hart's attribution of the claim to natural law theorists, "[c]ertainly the classical theorists of natural law all took for granted, and often enough bluntly asserted, that human beings are not all equally devoted to the pursuit of knowledge or justice, and are far from united in their conception of what constitutes worthwhile knowledge or a demand of justice." FINNIS, *supra* note 12, at 29.

and legal systems. The criticism Hart's work invites from a natural law perspective has nothing to do with his willingness to treat unjust laws as laws; rather, it has to do with his unwillingness to follow through on the logic of his own method and his insight into the necessity of adopting or reproducing what he calls the *internal* point of view—a viewpoint from which (*pace* Hobbes, Bentham, and Austin) law is understood not as causing human behavior, but as providing people with certain types of reasons for action, what Hart described in his *Essays on Bentham* as “content-independent peremptory reason[s].”<sup>42</sup> Finnis and others have argued that a rigorous application of Hart's method will extricate legal philosophy from Benthamism altogether by identifying the focal or paradigmatic case of law as *just* law—law that serves the common good—and the focal or paradigmatic case of the internal (or what Raz calls the “legal”) point of view as the viewpoint of someone who understands law and legal systems as valuable to establish and maintain, and legal rules as ordinarily binding in conscience, insofar as they are just and, *qua* just, fulfill what natural law theorists contend is the justifying moral-critical point of law and legal systems—namely, to serve the common good.<sup>43</sup>

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42. H.L.A. HART, *ESSAYS ON BENTHAM: STUDIES IN JURISPRUDENCE AND POLITICAL THEORY* 256 (1982).

43. See FINNIS, *supra* note 12, at 12–18. On Hart's misinterpretation of Aquinas on these matters, see *id.* at 354–62.