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Understanding Natural Law

Christopher Wolfe

Natural law is a term that has been used with a multitude of incompatible meanings, and this certainly has not helped its cause. In this paper I would like to sort through some of the meanings of natural law in an effort to bring some more clarity to contemporary discussions of the subject. In particular, I want to try to identify four different forms or levels of "natural law" thought. They range from the very broad—highly abstract and formal—to the relatively concrete and specific, and can be differentiated partly by the range of thinkers that are comprehended within each level.

Natural Law as Objective Value

The first and most abstract notion that can be called "natural law" is that human beings are a certain kind of being, and the features of that being should direct our understanding of how human beings should live. This approach implies the existence of some sort of objective moral law knowable through reason. It is implicit in what are perhaps the most basic intuitions giving rise to natural law, namely, the sense that there must be some general standard in light of which it is possible to judge human laws or conventions. The classic instance of this idea is found in Sophocles' Antigone, in which a sister disobeys a law by burying her brother, and claims a warrant in higher law for so doing.

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At the same time, the understanding of natural law at this level of generality is very formalistic. Almost any thinker would fall in this category, except for those who resist the temptation to think that there are any norms or standards independent of human will that govern human action.

This understanding of natural law is described well by Russell Hittinger in his broad-ranging and insightful article, "Liberalism and the American Natural Law Tradition."[1] Hittinger points out that some contemporary uses of "natural law" identify it with the position that "values are woven into the fabric of the world" and thus, "value judgments and the moral prescriptions derived from them are not regarded as merely subjective statements of approval or disapproval; nor is the binding quality of the judgment about objective goods simply a function of the standards which we invent."[2] In this view, virtually "any account of morality—whether personal, moral, or political—that grounds at least some reasons for action in objective values, or at the very least, anthropological values" qualifies as natural law. "Natural law, then turns out to be any understanding of the relationship between law and morals which is neither positivistic nor nihilistic" and "formulated at this level of generality, natural law theory of one sort or another represents the great tradition of the West."[3]

Hittinger cites a classic discussion of "higher law" by Edward Corwin, an influential constitutional scholar in the first half of the twentieth century:

> There are, it is predicated, certain principles of right and justice which are entitled to prevail of their own intrinsic excellence, altogether regardless of the attitude of those who wield the physical resources of the community. Such principles were made by no human hands; indeed, if they did not antedate deity itself, they still express its nature as to bind and control it. They are external to all Will as such and interpenetrate all Reason as such. They are eternal and immutable. In relation to such principles, human laws are, when entitled to obedience save as to matters indifferent, merely a record or transcript, and their enactment an act not of will or power but one of discovery and declaration.[4]

Hittinger goes on to point out that this definition of natural law includes many thinkers who would never have used the term of their own work and who are ambivalent, or hostile, to the "epistemological ideal of attunement to an evident order of being"[5]: for example, Kant and his descendants, including John Rawls and Alan Gewirth, and contemporary legal thinkers such as H.L.A. Hart, Lon Fuller, Lawrence Tribe, Ronald Dworkin, David A.J. Richards, and various Supreme Court justices.

This definition of natural law is interesting in its recognition of a common feature that such a wide variety of opposing thinkers hold in common—the principle of objective value—but its very breadth also limits its usefulness.

Natural Law Rooted in Human Nature

A second form of natural law, still at a very high level of generality, is what classic natural law (e.g., Thomas Aquinas), classic natural right (e.g., Aristotle), and modern natural rights (e.g., Locke) thinkers have in common: the idea that there is a stable

human nature that at least sets limits to how men should act in order to maximize the conditions for achieving a satisfactory existence.[6]

Paul Sigmund's *Natural Law in Political Thought* offers an account which identifies some common elements in these various thinkers. Despite the apparent variety of content attributed to natural law, he says:

> There seems to be a central assertion expressed or implied in most theories of natural law. This is the belief that there exists in nature and/or human nature a rational order which can provide intelligible value-statements independently of human will, that are universal in application, unchangeable in their ultimate content, and morally obligatory on mankind.
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> Besides deriving different substantive principles from natural law, . . . [different] theorists . . . attribute a variety of meanings to nature, which is their source. They have equated the natural with the rational; the divine; the distinctively human; the normally operating; the frequently recurring; the primitive; the elements not subject to human artifice or control; the self-evident; and the nonhistorical. It is therefore necessary in analyzing these theories, to determine in which sense natural law is being used in a given case.
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> . . . [I]n all its diverse forms, the theory of natural law represents a common affirmation about the possibility of arriving at objective standards, and a common procedure for doing so—looking for a purposive order in nature and man.[7]

Given the diversity of conceptions of "nature" in this account, very different philosophies may count as "natural law," which explains why it can include Plato and Aristotle, Roman law, Thomas Aquinas, Hobbes and Locke, and perhaps even Rousseau and Burke, Hume, Bentham and Mill, and Kant and Marx.

While Sigmund mentions "reason" as only one possible understanding or aspect of "nature," I think that virtually all of the thinkers that he puts in the category of natural law place some emphasis on some understanding of reason. At the same time, "reason" is a protean concept, which can have very diverse meanings. In particular, there is a fundamental difference between "instrumental rationality," which takes human ends as somehow given and then focuses on the means to achieve them, and the broader, classical sense of reason as a capacity to grasp or perceive human ends as well as the capacity to devise means to achieve them.

Considering classical (natural right and Thomistic natural law) and modern (natural rights) political philosophy as falling within the category of natural law requires a broad definition of the essential features of natural law—only a shade narrower than the first definition above. The first concept of natural law focused on the idea of objective value, while the second concept adds that this objective value is rooted, somehow, in human nature, which also suggests that the value is permanent and universal. (It therefore excludes not only the positivistic and nihilistic approaches Hittinger considered excluded from the first concept, but also notions of objective value rooted in essentially malleable notions of human nature, and especially modern or post-modern approaches that view human beings as characterized above all by the capacity for self-definition, and hence as not bound by any fixed nature.) Objective value rooted in nature need not entail a full or well-developed theory of the human good; it could simply be an identification of certain substantive evils to be avoided, as in natural rights theories that make self-preservation the fundamental desideratum.

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But, as in the case of the first concept of natural law, the use of the term to encompass such a wide range of fundamentally differing philosophies limits its utility.

Natural Law and a Natural Order of Ends

A third notion of natural law, which has much more substantive content, is what classic natural law and natural right thinkers have in common: an idea of a natural order, with various kinds of beings whose fulfillment or realization consists in developing and perfecting immanent capacities. This order is discovered, not created, by human beings. Human beings achieve a good life by living in accord with the natural order, and specifically by developing the capacities inherent in and distinctive of human nature. (While pleasure is recognized as good, it is always a derivative or secondary good attached to some more basic human good—good as a means, not an end—and it can be the source of disorder when it becomes an end in itself, as it often does for many human beings.) A flourishing human life is one of intellectual virtue (such as wisdom, developed in the philosophic life of dialectic and contemplation) and moral virtue (such as the cardinal virtues of prudence, justice, fortitude, and temperance). Preeminent among the moral virtues is practical wisdom, whereby men, guided by a general perception of human goods and by right desire (through proper habituation), choose the practical good, the right way of acting here and now. The common good (the good of the self-sufficient community—the polis, a broader political community, or even a universal Church) has a special eminence.

Natural right and classical natural law are both based on epistemological realism; human knowledge is not merely of appearances, much less a mere mental construction, but goes to natures

or essences. These approaches do, of course, recognize the plethora of obstacles to accurate human perception of reality, including the limits of the human intellect per se (for example, its dependence on sense and imagination, which makes knowledge of immaterial realities more difficult), the weaknesses of individuals' intellects, cultural blinders, and the distortion of perception by disorder in the will (for example, the tendency of human beings to "see" what they want to see). But, despite all these obstacles, natural right and natural law maintain that the human mind is capable of grasping reality itself.

Natural right and classic natural law share a similar philosophical anthropology. This understanding of human nature includes first, an internal ordering of the human faculties: reason-spirit-desire in the earlier, natural right tradition, or intellect-will-passions, in the Thomistic tradition, with reason or intellect exercising a directive function in well-developed human beings. Second, it views human beings as an integrated mind-body, so that it is neither reductionist (reducing mind to body as, for example, materialists do) nor dualist (separating them, and thereby viewing body and mind as "the ghost in the machine").

"Nature" in natural right and classical natural law is understood as the full development of the inherent capacities of a being. The nature of a being is what it is when it is fully developed.

Natural law is not (as it is sometimes misperceived) simply an identification of "typical patterns of behavior in nature," such as might be divined by a survey of the way animals (or at least the higher animals) act, or by description of how human beings most commonly act. Nor is it a theory based primarily on biological impulses or drives.[8] "Nature" in natural right and classical natural law is understood as the full development of the inherent capacities of a being. The nature of a being is what it is when it is fully developed. So, for example, we would look at adults, rather than children, to see what fully developed "human nature" is, and, among adults, we would look to those who have developed distinctive human capacities, especially reason, more fully.

In non-human beings, "their respective inclinations to their proper acts and ends" are simply "imprinted in their being," so to speak, and these ends are achieved without deliberation or choice (though some beings do not achieve their full natural development due to internal defects or external obstacles). Man, a rational creature, on the other hand, having a "natural inclination to its proper act and end," must undertake deliberation and choice to achieve his ends—he "partakes of a share of providence, by being provident both for itself and others."[9]

If the gap between the first two levels or concepts of natural law is fairly small, the differences between those two concepts and this one are very substantial. The common substantive content of classic natural law theories—the emphasis on natural teleology, virtue, and practical wisdom—on this understanding of natural law is much broader. This is not surprising, given that Aquinas's thought is, after all, characterized as "Christian Aristotelianism." The commentaries on Aristotle form an important part of his corpus of writing, and Aristotle is, for him, "the Philosopher." Still, there remain important differences between the philosophy of Aquinas and that of Aristotle. Some of these differences concern the role of revelation (for example, the inclusion of divine positive law in Aquinas's typology of law) and others are perhaps differences that can be argued about even within Aristotle's own framework of reason (e.g., the difference between Aristotle's Prime Mover and Aquinas's Creator).

Classical (Thomistic) Natural Law

The fourth and most determinate sense of natural law, strictly or properly speaking, is classical Thomistic natural law. On this view, human beings flourish and achieve such happiness as is possible in this life by living good lives, following a law inscribed in their being. The good life is understood, in particular, as a life of virtue and excellence, grounded in intellectual and moral virtue. They choose particular ways of living well, guided by the self-evident basic principles of natural law, which they grasp through practical reason and right desire (the fruit of proper habituation).

Thomas describes the natural law as the rational creature's "share of the Eternal Reason, whereby it has a natural inclination to its proper act and end; and this participation of the eternal law in the rational creature is called the natural law."[10] The precepts of the natural law are the first principles of the practical reason (paralleling the first principles of speculative reason, especially the principle of non-contradiction). The first precept of natural law is "that good is to be done and pursued, and evil is to be avoided. All other precepts of the natural law are based upon this; so that whatever the practical reason naturally apprehends as man's good (or evil) belongs to the precepts of the natural law as something to be done or avoided."[11] But since good has the nature of an end "all those things to which man has a natural inclination, are naturally apprehended by reason as being good, and consequently as objects of pursuit . . . Wherefore according to the order of natural inclinations, is the order of the precepts of the natural law."[12]

There are various inclinations in man. First, in accordance with the nature of all substances, we seek the preservation of our own being, according to its nature, so that "whatever is a means of preserving human life, and of warding off its obstacles,

belongs to the natural law." Second, (drawing on Ulpian) according to the nature we share with animals, things "which nature has taught to all animals, such as sexual intercourse, education of offspring and so forth" belong to the natural law. Third, according to man's own nature, man has "an inclination to the good, according to the nature of his reason" which includes a natural inclination "to know the truth about God and to live in society," so that the natural law includes whatever pertains to this inclination (e.g., shunning ignorance, avoiding offending those among whom one has to live).[13]

All virtuous acts as such belong to the natural law, since virtue is nothing other than acting according to reason. But specific virtuous acts may or may not be prescribed by the natural law, since nature inclines to some of them at first, while others are the result, not of immediate inclination, but of the "inquiry of reason" which shows them "to be conducive to well-living."[14]

The general principles of practical reason are universal, but conclusions from them about more particular matters admit of exceptions (e.g., it is a valid general rule that borrowed goods ought to be returned to their owner, but this might not be true where the property is being reclaimed to employ in treasonous acts).[15] The first, most general principles of the natural law are known to all, though their application to a particular action may be obscured (due to concupiscence or some other passion), but the secondary and more detailed principles of the natural law "which are, as it were, conclusions following closely from first principles" can be blotted out of the heart, by evil persuasions or vicious customs and corrupt habits.[16]

The ethical order described by Thomas is rooted in an ontological order, an order of being. It is important to emphasize, though, that this natural law is not known or understood by deducing moral norms from a theoretical understanding of that order; rather, it is grasped in the first instance by acts of the practical reason recognizing certain self-evident principles.

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Recently, traditional scholastic notions of classic natural law have been challenged by the "new natural law theory" of Germain Grisez, John Finnis, and Robert George. This theory claims, for the most part, to be an interpretation and explication of Thomistic natural law theory, though Grisez consciously departs from Thomas on some points. According to the new natural law theory, human beings act for reasons, which are supplied by basic human goods (e.g., life, knowledge, play, friendship). These intrinsic, self-evident, and indemonstrable goods are "grasped in non-inferential acts of understanding by the mind working inductively on the data of inclination and experience."[18] In choosing goods, men must act in accord with the first principle of morality. That is, they must act in ways consistent in principle with the integral human fulfillment of all persons. This principle is specified in various ways by intermediate moral principles or requirements of practical reasoning that prevent a person from being deflected from fully reasonably choosing (e.g., the "Golden Rule," and the "Pauline principle" that evil not be done to attain a good).

The new natural law theory is (rightly, I think) critical of some traditional presentations of natural law that seem to suggest that human beings know the natural law through a theoretical examination of human nature. It emphasizes that practical reason has its own first principles, and that the first principles of natural law and moral norms themselves are self-evident or derived from principles of practical reason rather than being deduced from a theoretical knowledge of human nature. (This, they say, avoids the "naturalistic fallacy," which claims to derive an "ought" from an "is.")

The relationship between this new natural law theory and more traditional Thomistic natural law theory is hotly debated. The new natural law theory's fairly strict separation of theoretical and practical wisdom, and its denial that there is any hierarchy of human ends have been particularly controversial among traditional natural law scholars.[19] At the same time, it seems fair to say that the new approach has had a significant impact in attracting renewed attention to natural law in the contemporary world of Anglo-American moral and legal philosophy. For present purposes, I will focus on the core agreement between these approaches, without trying to resolve the differences.

Natural Law and Public Philosophy

Natural law of the "modern natural rights" variety was a major element of classical Lockean liberalism, the most important of several strands of the original American public philosophy. The

dominant form of contemporary liberalism, found especially in the work of John Rawls, on the other hand, pursues a strategy of winnowing out the natural law elements in liberal political theory, to achieve a kind of "liberal neutrality" towards the human good that is thought to facilitate social cooperation in a pluralist society.[20] "Anti-perfectionist liberalism" of this sort is, I believe, an inadequate foundation for a public philosophy. The most desirable alternative to it is what I would call "natural law liberalism." This public philosophy would provide solid foundations for society, by identifying and promoting a common good that recognizes the dignity and equality of all human beings, the rich plurality of human goods and the varied ways to pursue them, the importance of a large measure of personal liberty as an essential condition for living well, and the necessity of a moral framework (public as well as private) that supports and facilitates social and individual well-being.

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Endnotes

1. Russell Hittinger, "Liberalism and the American Natural Law Tradition" 25 *Wake Forest Law Review*, 429 (1990).
2. Ibid., p. 466.
3. Ibid, p. 466–67.
4. Ibid, p. 467.
5. Ibid, p. 479, quoting Richards.
6. The distinction between natural right, natural law, and natural rights doctrines is a prominent theme in the writings of Leo Strauss. See, for instance, *Natural Right and History* (University of Chicago Press, 1953).
7. Paul Sigmund *Natural Law in Political Thought* (Washington, D.C.: University Press of America, 1971), pp. viii–ix.
8. It includes biological drives, without being reduced to them. For example, Thomas Aquinas draws some of what he says about natural law from the Roman lawyer Ulpian, who says that "natural right is that which nature has taught all animals;" in this respect, Thomas points especially to "sexual intercourse, education of offspring and so forth" (*Summa Theologiae* I–II, Q. 94, Art. 2, resp.). But that is only part of natural law, for there is also the part that corresponds to the rational nature of man that distinguishes him from other animals: "there is in man an inclination to good, according to the nature of his reason, which nature is proper to him: thus man has a natural inclination to know the truth about God and to live in society" (Idem).
9. Thomas Aguinas *Treatise on Law*, Q. 91, art. 2 (p. 997).
10. I–II, Q. 91, art. 2.
11. I–II, Q. 94, art. 2.
12. Idem.
13. Idem.
14. I–II, Q. 94, art. 3.
15. I–II, Q. 94, art. 4.
16. I–II, Q. 94, art. 6. I confine myself to this brief discussion of natural law in the earlier parts of the *Treatise on Law*. It should be noted that much of what Thomas has to say about the natural law can be found in his comments on the moral precepts of the Old Law (which he treats as a statement of natural law precepts) in the latter part of the *Treatise* (especially Q. 100).
17. The fact of there being a lawgiver at the foundation of natural law does not imply a commitment to a "will" theory of law, however. Natural laws are not simply divine commands, nor are they principles antecedent to the deity (see the Corwin quotation above). They are principles that are a reflection, in the human rational order, of God's own being.
18. Robert George *Making Men Moral* (Oxford: Clarendon Press, 1993), p. 13.
19. See especially Russell Hittinger *A Critique of the New Natural Law Theory* (University of Notre Dame Press, 1987) and Ralph McInerney *Ethica Thomistica* (Catholic University of America Press, 1982).
20. A good account of this can be found in David A. J. Richards "Rights and Autonomy" *Ethics* Vol. 92 (1981), pp. 3–20, in which he looks back on earlier liberal thinkers (such as Locke, Kant, and Rousseau) and sees in them the seeds, the "incomplete" forms, of his own more purified and consistent liberalism.