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A Secular Theory of Natural Law

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LECTURE

A SECULAR THEORY OF NATURAL LAW

*Lloyd L. Weinreb**

I appreciate the invitation of the Fordham Natural Law Colloquium to make this presentation. My topic is certainly within the Colloquium's jurisdiction, which is to say, it concerns natural law.¹ I shall ask you to put aside another version of natural law, with which you are likely much more familiar: the version expressed by Thomas Aquinas in the thirteenth century, which, since the fourteenth century, has been an integral part of the doctrine of the Catholic Church. It is not part of my purpose to question that doctrine or to argue that it is not properly called natural law. It is also true, however, that Thomistic philosophy did not arise in the thirteenth century out of thin air. If it was a new beginning, nevertheless it emerged out of a long tradition that had developed over more than 1,500 years and continued to develop after the fourteenth century in other directions. If Thomism represents the high point and greatest flourishing of natural law, that larger tradition has also to be considered.

I set the church doctrine of natural law aside because it is integrally, inextricably bound up with the Catholic faith. Natural law did not lead Thomas to that faith, which was unquestioned. His view of natural law proceeded from that faith and depended on it. It would be presumptuous of me, not sharing that faith, to speak about it to you. My topic is not religious but intellectual. That is not to suggest that natural law as a matter of faith is not also a matter of reason. It was, after all, Thomas's great achievement to show that faith and reason need not be altogether separate. But my topic is intellectual only, intellect unaided by faith.

The questions I want to address are first: Is there any theory of

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1. This Lecture was originally prepared as a talk for the Natural Law Colloquium, sponsored by the Law School and Department of Philosophy of Fordham University. The talk was presented at the Law School on December 1, 2003.

The material for the talk was drawn from two books: Lloyd L. Weinreb, *Natural Law and Justice* (1987) [hereinafter Weinreb, NL&J], and Lloyd L. Weinreb, *Oedipus at Fenway Park: What Rights Are and Why There Are Any* (1994) [hereinafter Weinreb, OAFP]. This Lecture is a largely unaltered transcription of the talk. References to the books on which it is based have been added.

natural law, any viewpoint or world view unaided by faith, that is properly called natural law? And second: If there is, is it worth our attention? My answer to both questions is yes.

The questions are hardly ever asked. A secular theory of natural law had a brief efflorescence after World War II, as a school of jurisprudence associated, in the United States, mainly with Lon Fuller.² It is not irrelevant that the wellspring of that jurisprudence was an agonized reaction to the phenomenon of Nazi law. As the agony has faded, so also has the jurisprudence that sprang from it. Ronald Dworkin has sometimes flirted with the notion of a secular natural law in his theory of a "right answer" or "law as integrity."³ But it is only a flirtation, an effort to have all the girls at the dance on one's dance card. And even at that, Dworkin's is a theory of jurisprudence, which is not my main concern. Full-blown secular natural law has had little staying power and for the present has little influence. My intention is to return to the original natural law tradition, the tradition out of which the doctrines of Thomas emerged, and to ask whether, those doctrines apart, anything can be found in the tradition that speaks to our present circumstances.

A distinct philosophy of natural law emerged clearly in fifth century Athens. The opposing views pervaded Greek thought, not only philosophy but also history and literature, the great tragedies above all. It is expressed most forcefully in the tragedies of Sophocles, as his response to a profound debate about the significance, or meaning, of human existence—or rather, whether human existence has any significance or meaning beyond the events themselves. Is it finally the case, as Jocasta says to Oedipus, that "chance is all in all,"⁴ or is there some larger stage on which human lives are played out? In philosophical terms, the debate was between those, like Plato, who believed that there is a natural order and those, notably the Sophists, who believed that order, however deeply rooted, is imposed by human contrivance. The idea of natural order (*physis*) beyond the contrived human order (*nomos*) meant more than bare causal order. The word for that was not *physis* but *tyche*, blind chance or necessity, without meaning. The order at stake, natural or human, was a normative order. I single out Sophocles among the three great tragedians because he stands between Aeschylus, whose view of the cosmos seems more religious than philosophical (although the Greeks would not have made the separation as we do) and Euripides, who repeats the formulas of divinely ordained natural order without much conviction, as, at best, part of the question. For Sophocles, the affirmation of moral order was a resolution, not a challenge or a

2. Weinreb, NL&J, *supra* note 1, at 101-08.

3. *Id.* at 117-22.

4. Sophocles, Oedipus the King 9, 52 (David Grene trans., Univ. of Chi. Press 2d ed. 1991) (n.p., n.d.) (line 977).

complaint. It meant that Oedipus's suffering, or Creon's or Philoctetes's, all different in their circumstances, was not merely the play of blind forces. However bitter, it was, when all was revealed, as it ought to be and, therefore, had to be.⁵

There is a direct line from these ruminations, by way of the Greek and Roman Stoics and later the Roman lawyers and Church fathers and Christian theologians, to Thomas Aquinas.⁶ Cicero, not himself an original thinker, provided the phrase "natural law."⁷ Brought into contact with Christian belief in a personal, all-embracing God, the normative natural order of the Greeks became Divine Providence, in which human beings, able in some measure to provide for themselves, have a share. Thomas Aquinas, of course, brought that to fruition in his doctrine of natural law:

[T]he rational creature is subject to Divine providence in the most excellent way, in so far as it partakes of a share of providence, by being provident both for itself and for others. Wherefore it has a 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.⁸

In this way, natural law preserved the crucial elements of the Greek *physis*. It was real, and it was normative. Thereafter, aside from Christian theology, although the tradition of natural law continued, it lost that duality, which the intellectual separation of "is" and "ought" made impossible outside of religion. In the guise of a doctrine of natural rights as, still later, in jurisprudence, natural law became one kind of moral theory, the distinctive quality of which was that it was said to be true, even self-evidently true. Reality, or nature, and especially the interconnectedness of the right and the real was not in the case, except as an expression of what one took to be incontrovertibly true.⁹ Puzzlement about humankind's place in nature was refashioned as a question of the relationship between the individual and the state, to which natural law in various guises, adapted to fit the theory at hand, provided an answer. It is instructive to look at the great political philosophers of the seventeenth and eighteenth centuries—Hobbes, Locke, and Rousseau—in that light.¹⁰ In jurisprudence, the legal positivists accused the natural law theorists of confusing "is" and "ought," because they conflated questions about what the law is with questions about what the law ought to be, and, so the positivists said, asserted that a very bad law was not law at all.

5. Weinreb, NL&J, *supra* note 1, at 15-35.

6. *Id.* at 43-66.

7. *Id.* at 39-42.

8. Thomas Aquinas, *Summa Theologica* I-II, Q. 91, art. 2 (Fathers of the English Dominican Province trans., Benziger Bros., Inc. 1947) (n.p., n.d.).

9. See Weinreb, NL&J, *supra* note 1, at 108-15.

10. *Id.* at 62-96.

Natural law theorists responded that the legal positivists made questions about one's obligation to obey law trivial. And in truth, for all the anguish that lay behind it, the whole debate seemed trivial. Because the case for natural law did not go beyond the assertion of moral certitude, it appeared that the debate had to do not with what is the case but merely with what label to apply.¹¹

To the modern mind, the original conception of natural law, the idea of *physis*, a normative natural order, is simply a fundamental mistake. The separation of "is" and "ought," description and prescription, is not a theory or position; it is a given, where we start. It can, however, be demonstrated, I believe, that the idea of justice, as we understand and use it, contains an incoherence—the antinomy of freedom and cause at the individual level, and the antinomy of liberty and equality at the level of community—that only a conception of normative natural order resolves. Far from supplanting the Greek view, we have merely hidden the problem out of sight and agreed not to talk about it. And so the question is whether, without requiring too great a suspension of disbelief, there is any aspect of the real that contains an indisputable normative element.

I believe that there is. Oddly, the natural rights theorists had it right. But because their interests, both intellectually and practically, were not ontological but political, they did not recognize what they had and came out in the wrong place.

The place where nature and the moral order intersect is the matter of rights. The division between persons and things is an inescapable fact about our experience of the world. The distinction does not rest merely on physical or mental differences, although departures from the norm in those respects may make hard cases. Rather, the distinction is that persons are responsible and, as responsible, have rights; things are not responsible and have no rights.

We are looking for a place in the description of the world as it is that in and of itself implicates normative conclusions; that is, we are looking for a locus of the normative in nature. The only phenomenon that meets that description—as opposed to the view that nothing can meet it—is persons, regarded as bearers of rights. That rights have normative implications or, if you like, are normative concepts, is evident. Perhaps it is the case—*pace* Immanuel Kant—that rights can be overridden; but they unquestionably have a bearing, a strong bearing, on how one ought to behave. More controversial is the other side of the matter: that who has rights and what rights they have is a matter of fact.

For a start, the grammar of rights is instructive. We speak about many rights, many sorts of rights, in a normative mode. "Everyone ought to have a right to medical coverage." "Some groups in the

11. *Id.* at 97-101, 259-63.

population ought to have a right to preference for municipal jobs or college admissions”—or “No one ought to have such a right.” “Gay persons ought to have a right to marry.” The grammar changes when we reach the level of “natural rights” or “human rights.” It is no longer appropriate to use the normative mode. “Everyone ought to have a natural right to food and shelter.” “There ought to be a human right to reasonable employment.” “Gay adults ought—or ought not—to have a natural right to engage in consensual sex.” We do not speak that way (unless our words are surrounded with quotation marks) for good reason. Either there is such a right or there is not. Of course, the right may or may not be honored. And one can say that this country or that ought to honor the human right to food and shelter better than it does, or that it ought to recognize the human right to work, or that the Universal Declaration of Human Rights ought to include reference to some particular right. But to whom, to what, could a claim simply that something ought to be a natural right, which is to say, a human right, properly be addressed? Such a claim amounts to an assertion that the natural order ought to be different. Natural rights, or human rights, are asserted as a matter of fact, to which the proper response is not, “I think—don’t think—that would be a good idea,” or “I agree” or “I don’t agree,” but simply “True” or “False.”¹²

The facticity of rights has always been the great stumbling block to an analysis of rights. Judith Thomson made rights the focus of years of fruitful scholarship, but in the end she says that rights are unanalyzable. They are simply “moral facts.” Putting aside the objection that there are not supposed to be any moral facts, what are they? Thomson seems generally to disregard the implications of the very phrase she uses.¹³

The short response is: there are no moral facts, and there are no natural, or human, rights. To say that a right is “natural” or “human” is to say only that one thinks it is a very important right, one that ought to be recognized for all persons. Although the statement, “There ought to be a natural right to food and shelter” is meaningless, the statement that every nation ought to recognize a right to food and shelter for all its people is not. And, speaking carefully, that is all that the former statement means. It is a rhetorical flourish and nothing more. So, rights are only normative after all.

That method of avoidance does not work, because we need a concept of rights in its strong form to account for the difference between persons and things. That difference is a structural fact of our experience. And the core of the difference is the notion of responsibility, the difference between being the *cause* of some occurrence and being, in the full sense that implicates moral

12. Weinreb, OAFP, *supra* note 1, at 13-21.

13. *See id.* at 37-39.

judgment, *responsible* for it. By "structural fact" I mean a proposition that cannot be contradicted without altering the nature of our experience, not just in some concrete particulars but fundamentally, making it a different experience altogether. To deny that persons are responsible (or, for that matter, to assert that things are responsible) is not like denying that human beings have opposable digits or denying that any human beings live on Staten Island. Those propositions are startling enough, but we would adjust, if only by supposing that the denial was play-acting. Strict behaviorists may deny that human beings are responsible in this sense, but they do not behave as if it were so. If they did, we should lock them up. To deny the responsibility of persons does not merely contradict something that we believe strongly to be true. It transforms the nature of what we, as human beings, experience. To translate a description of behavior that we think responsible into a description entirely in terms of causes is not equivalent, because responsibility has no equivalent in those terms.¹⁴

Speaking about responsibility as the difference between persons and things, I referred to human beings, because broadly speaking, leaving aside troubling cases at the edges—infants, the very aged, the comatose—all human beings are persons, that is, are responsible beings. Again, leaving aside some possibly troubling cases—the Planet of the Apes—only human beings, defined simply by birth to a human mother, are persons. Those propositions would be tested if a creature from another planet altogether unlike us physically exhibited a sense of human responsibility. Would we regard the creature as a person? (To suggest the profound implications of the question, consider how an affirmative answer would affect the story of Genesis. Or consider how the story of Genesis indicates an answer.)¹⁵

There are many puzzles about responsibility. Hardest of all are not the cases of unusual individual beings or beings in stages of the life cycle in which responsibility is generally lacking. The latter cases are generally resolved by regarding birth to a human mother as establishing a conclusive presumption of personhood, even if responsibility is temporarily or permanently lacking. The presumption is accepted the more easily because persons who are indubitably responsible pass regularly through periods when they are not, like sleep. Rather, the hardest puzzle is the ordinary ascription of responsibility in the standard case of an adult, competent person. We take it for granted that one is responsible in a moral sense, the sense that implies desert, only for conduct that is self-determined. Just as a hurricane is not responsible in that sense for the devastation that it causes, and a puppy is not responsible for the mess it leaves on the

14. *Id.* at 45-46.

15. *See id.* at 101-13.

floor, a person is not responsible in that sense for bumping into someone if he is shoved from behind, for crying out if he is stuck with a pin, or for any of the conduct about which he might say, "I couldn't help it." Usually that is an empirical question, although there is plenty of ambiguity, plenty of difficult, close cases, and plenty of disagreement. But generally there is a pattern, understood and accepted by us all.¹⁶

The pattern is illustrated by our practice of excuses. Self-determination is not a quality of action that we observe, like speed or agility. We speak of someone acting with determination, not of acting with self-determination. But in a general way, even if conduct is of a kind for which we ordinarily regard persons as responsible, we regard as not self-determined conduct that has a recognized, identifiable causal explanation that places the person outside the endless variety of the ordinary. Not regarded as excuses are any of the ordinary qualities of one's nature—intelligence, good looks, physical strength, or their lack—or any of the ordinary qualities of nurture—loving, supporting, economically successful parents, or their lack. Some rise above their individual circumstances, and some fall below theirs. But we suppose that attributes such as industriousness and determination (not self-determination) are also a product of nurture and, more and more it turns out, nature—the chemical composition of the body, the shape and mass of the brain—both beyond our control.

In fact, the determinist argues that everything we are now is traceable to who, what, we were, in an unbroken chain of cause and effect, circumstance and consequence. That is true as a matter of fact, since whatever else we may be, we are part of the natural order. And it is true as a matter of principle. For if an action that a person takes now is not, however indirectly, a determinate consequence of the person's individual attributes that are themselves fully determined in the same way, how is it anything more than happenstance, not his normatively, in a way that makes him responsible, but only an event that happened to him, in which he happened to be embroiled, much as Oedipus was unwillingly and unwittingly embroiled in the destiny of the Theban royal house and, despite himself, fulfilled the oracle's prophecy that he would kill his father and commit incest with his mother.¹⁷

The notion of human responsibility requires that our acts be free, that is to say self-determined and not determinate. But, at the same time, unless an act is fully determined by the person as he is and not by anything else, it is not his in the necessary sense. It is a true antinomy, not resolvable by halves, some of one and some of the

16. *See id.* at 40-65.

17. *See id.* at 46-51.

other. The autonomy on which responsibility and desert depend requires that actions be fully undetermined and fully determined.

The scope of the antinomy is indicated by our extraordinary, not to say desperate, solutions. For the ancient Greeks, the solution was that Oedipus was responsible for the circumstances of his being, that to be Oedipus, the person that he was, was to do as he did. Responsibility attaches to his self, because the natural order is itself normative. We, of course, reject that solution out of hand. We are not responsible for what we cannot help. Some years ago, an official in the Department of Education, evidently a student of classical Greece, asserted publicly that a person should be held responsible for physical handicaps due to birth defects, which the official said reflected a person's inner worth. The official was excoriated in the press and finally resigned from her government position.¹⁸ Kant's solution was to remove the autonomous self to an ineffable, noumenal plain, from which all traces of the phenomenal, causally determinate self are removed. But, of course, we are interested in the actions of the responsible self within the phenomenal universe. The person whom we reward and punish is the phenomenal self, with all those actual attributes. Kant's argument, as he acknowledged, is not a solution but a thorough, rigorous statement of the problem. Or the currently favored approach of Strawson and others: There simply are two perspectives, the scientific and the moral. There is no unified perspective, nor need there be. All that is required is to specify the point of view. But it is not so, again because the person to whom we respond one way or the other is one and the same person, acting freely or not, with all his characteristics, his self.¹⁹

Abstracted from reference to an individual person, the puzzle of human responsibility is lodged within the notion of justice. Hence, the title of my book, *Oedipus at Fenway Park*. If Oedipus's fate was, as we think, unjust, why is it just that Roger Clemens gets to play for the Red Sox (as it then was) rather than some young man who desperately wants to play in the major leagues but has a bad pitching arm, never makes a base hit, and bobbles the ball in the field—all of which he tries ceaselessly to overcome. Our response is peremptory: Clemens just is a better ball player. He *is* Roger Clemens, and being Roger Clemens, the person that he is, he deserves to play for the team. But isn't that like the Greek answer to the fate of Oedipus—he is Oedipus—an answer that we reject out of hand? Nor can the two cases be distinguished because baseball is only a game. Try telling

18. See Philip Shenon, *Weicker and Education Chief in Sharp Clash*, N.Y. Times, Apr. 17, 1985, at B4; *The Philosopher and the Handicapped*, N.Y. Times, Apr. 18, 1985, at A26; Stephen Engleberg, *Two Aides Quit Education Dept. in Dispute Over Views on Disabled*, N.Y. Times, Apr. 19, 1985, at A19; *Handicapping Education*, Newsweek, Apr. 29, 1985, at 33.

19. See Weinreb, OAFP, *supra* note 1, at 51-55.

that to the young man—or, one might add, to all those Red Sox fans who waited out those extra innings last October. But, in any case, just the same argument might be made across the river, where the question is not who plays for the Red Sox but who is admitted to Harvard. That, we all agree, is not a game, or not only a game.²⁰ In this way, the antinomy of freedom and cause is reflected in the antinomy of desert and entitlement. The former reflects the individual, autonomous actor, responsible and incurring desert. Entitlement reflects the just background order that alone gives meaning to individual responsibility and desert. And rights are the means by which we make the distinction.²¹

To say that a person has a right to do, or to be, something is to say that he is responsible for what he does or is. Nothing more. That, and only that, is the source and explanation of the facticity of rights. Having a right to do something does not mean that one will do it or ought to do it. More often than not, the assertion of a right suggests that perhaps one ought not act in that way. A right to do something is also, necessarily, a right not to do it; for if one did not have a right not to do it, there would be no point in saying that one has a right to do it. Rights constitute our autonomous selves. Having a right, one is responsible for its exercise (or nonexercise). Not having a right, one is subject to the causal order of nature or, as we usually think of it, to a humanly imposed constraint; one is not responsible and does not incur desert. The normative natural order is the order in which we, as natural beings, are also bearers of rights and exercise responsibility.²²

That is a lot to swallow. Let me elaborate and add some footnotes. I am speaking of rights as attributes of a person simply as a person, not as American or British, professor or student, member of this club or that. That is, since all human beings are persons and all persons are human beings, I am speaking of human or, as they used to be called, natural rights. In any more particular role, as an American or professor or club member, a person may be granted additional rights, or not granted additional rights that others are granted, for instrumental reasons. If additional rights are granted, then within the bounds of and according to the terms of the community that grants them, a person is responsible for what he does. To say that one has a right is not necessarily to say that the right is honored, and if it is not, within that community a person is not responsible for the consequence in question. To say that a person does not have a right is not necessarily to say that he lacks the power; and if he exercises the power, he will be subject to blame for acting without right. But if a person does exercise the power, albeit without right, it demonstrates that he has the right to liberty that enables him to do so. So a thief,

20. *Id.* at 66-73.

21. See Weinreb, NL&J, *supra* note 1, at 184-223.

22. Weinreb, OAFP, *supra* note 1, at 74-100.

who has no right to steal a wallet, is responsible for doing so, and subject to punishment, is able to do so only because he has the right—the right to liberty—to determine his conduct. It would be another matter entirely if he lacked that right. Then we should put him in a cage—or prison—and prevent him directly from stealing a wallet.

Because we tend to think of rights as things that can be granted or withheld, honored or ignored, it is easy to think of them not as a matter of fact but as something that one ought, or ought not, to have. But it is just that facticity of rights—moral facts—that gives us all the difficulty. In just the same way, responsibility is a matter of fact (although it may be a much contested matter of fact). A person is or is not responsible for this or that. It makes no sense to say that a person ought to be responsible. That is like saying a chipmunk ought to be responsible. To whom could such a statement be addressed? Of course, a person may behave responsibly or not, and if the latter, he may incur blame. But a person incurs no blame if he is not in fact responsible for the conduct in question.

For human beings, therefore, apart from nature and a part of it, rights specify the boundary between constitutive attributes, those that define us individually as autonomous, responsible beings, and circumstantial attributes, those that happen to us, with respect to which we are natural beings, within a chain of cause and effect. So long as we refer to a person's attributes descriptively, there is no need to distinguish constitutive and circumstantial attributes. But when we refer to a person normatively, as an autonomous being, acting responsibly and incurring desert, there is a need to make that distinction, because he is not responsible for, and incurs no desert for, circumstances that happen to him, not by him. Circumstantial attributes are subject to amelioration or limitation for instrumental reasons, reasons of social policy, because they are not deserved but merely circumstantial. Constitutive attributes, on the other hand, are deserved and constitute a person as he is normatively, and they may not justly be limited or, without unjustly depriving some other, ameliorated.²³

Consider affirmative action. Are the educational handicaps of many African-Americans in this country—lack of family models, parents who are not alumni of prestigious institutions, bad schooling—constitutive or circumstantial? If they are constitutive, simply who that person is, like Roger Clemens's good right arm, then they are deserved, and there is no reason why they should be ameliorated by affirmative action. But if they are circumstantial, the effects of circumstances without normative significance, then they are undeserved and ought to be ameliorated, in order to satisfy the demands of justice. Amelioration, of course, is not cost-free. It

23. *Id.* at 87-100.

requires the limitation of someone else's opportunities to use his favorable attributes to his advantage, and, unless those attributes are not constitutive, the limitation will be unjust.²⁴ The same could be asked of other attributes, such as a high IQ or low IQ, with respect to anyone. We can always ameliorate or the reverse, if not directly, then by the example of the Wizard of Oz. If we cannot give the Scarecrow a brain, we can give him a college degree. If we cannot give the Cowardly Lion courage, we can give him a medal and a seat on the dais, which is probably all he wanted anyway. And if we cannot take away the powers of the Wicked Witch of the West, we can tax her profits. So long as a person has her rights, and only her rights, responsibility makes sense and the demands of justice are met. If a person has more or less than what she has a right to, justice is denied.

But isn't this manner of speaking—the constituted self and its attributes, and the circumstantial self and its attributes—willfully confusing? There is, after all, only one person with all her attributes. Yes. So long as the matter at hand is not a matter of the person's desert—or responsibility. If that is our concern, then attention to the distinction is unavoidable, because desert depends on responsibility, and responsibility depends on the freedom that is the antinomy of cause; that is to say, it depends on rights. The unity of our being is not a part of the puzzle; rather, it is an essential aspect of the solution. Responsible conduct is self-determined, that is both not determined and fully determined according to one's self. That is the human condition, and only the human condition. Things, animals, are not persons, they are not responsible, and they do not have rights. So also, angels, whose nature it is always to will the good, have no rights. They have no need of them. Responsibility, for angels, is out of the question.

What rights, then, does a person have? Proceeding from the premise that all and only human beings are persons, what human rights are there, rights that all humans, merely as humans, have? Rights are an implication of autonomy, or personhood, so we start from there. I should say that the human rights are these:

1. The right not to be subjected to constraints too great to be resisted. Since human beings are, as a matter of fact, persons, they must have a domain of autonomous action that is not restricted by the power of others.
2. The right to physical and mental well-being. Perhaps it is always possible to try. But one must have some capacity, some possibility of effective action, to believe that it is worthwhile to try. So there is a right to well-being. The satisfaction of basic human needs—food and shelter—is an aspect of this right.
3. The right to education. Effective agency, autonomous action, is

24. *See id.* at 181-95.

a matter of intellect as well as will. One must have a capacity to reflect congruent with one's situation.

4. The right to moral consciousness. One must be aware of oneself as not merely a source of power, like an electrical storm or a wild beast, but as a moral actor. One has a right to development as a moral being.

5. The right to moral opportunities. One must not have all one's choices made for one, even if they are made in one's favor. One must not be so educated or trained, like Rousseau's citizen or Winston in *Nineteen Eighty-Four*²⁵ that he always chooses the good, or what passes for the good. Angels are not persons. There is a human right not to dwell in paradise.²⁶

Other human rights are sometimes mentioned. The right to what one has. The right to equal dignity and respect. The right to life. Each of these asserted rights refers to some value that may be thought to be of great, even overriding, importance. I do not want to contradict that. I should say, however, without elaborating the point here, that none of those rights is an indisputable condition of responsibility. For that reason, I qualify them not as rights but rather as basic components of the good.²⁷

The human rights that I have identified are glaringly imprecise. And, inasmuch as they belong to all human beings, they do not differentiate among individuals. Yet responsibility is insistently individual. How do we justify concretely differential individual attributes? The former issue—the rights common to all—are important, desperately so, in a world where so often rights are denied for so many. But we need also to understand the basis for differential rights, not the rights that we all have in common, but the rights that each of us as an individual has, which differentiate us normatively. We do not start from an abstract principle. Autonomy is not a derivation of reason (even for Kant, whose moral theory sought not to derive autonomy from reason but rationally to derive the conditions of autonomy, taken as a given). We start from the concrete experience of persons as persons, and consequently the direction of thought is from concrete particulars to the abstract and general. The source of individual rights that differentiate us one from another is found in experience. One must look to the deep normative conventions of the community for the bounds of personhood, what is constitutive and what circumstantial. That is not to say that whatever is, is right. Rather I mean what the Ancient Greeks meant by *nomos*, the constantly reconsidered, deepest, weightiest aspects of a community's way of life, what we commonly refer to as civil rights.

25. George Orwell, *Nineteen Eighty-Four* (Penguin Group 2003) (1949).

26. Weinreb, OAFP, *supra* note 1, at 114-22.

27. *Id.* at 122-36.

Not only the contested, potentially vulnerable rights we usually refer to as civil rights—the right to vote, the rights specified in the Bill of Rights—but also, and more important, the deepest understanding about the contradictory values of liberty and equality that define a community: What an individual can withhold from, or demand from, the community, and what the community can demand from, or withhold from, an individual. The rights that define a person are always in some state of flux. They conjoin what is and what ought to be. In that way, the abstract conjunction of is and ought is brought concretely down to earth.²⁸

Issues about affirmative action are so difficult because the community's way of life is deeply conflicted. The intractable question is how to regard the differential attributes of African-Americans and others who have been and are deprived as not deserved, not constitutive, and, therefore, appropriate for amelioration, without regarding the differential attributes of others who have fared better as similarly not constitutive and, therefore, appropriate for limitation. Both sides perceive the issue, correctly, as a matter of justice, because their individual worth, or desert, is at stake, according to the *nomos* of the community.²⁹ So also, to answer the question whether a person who is gay has distinct rights associated with sexual orientation, one must look to the actual practices of the community. In 1994, when my book *Oedipus at Fenway Park* was published, I concluded that the *nomos* of this community, reflected in open acknowledgement of gay sexuality by public figures, participation of openly gay persons in every kind of public event, frank portrayal of gay sexuality in the theatre, movies, fiction, and so forth, indicated a right to one's own sexual identity, whether deliberately chosen or not.³⁰ The Supreme Court's decision in *Lawrence v. Texas*³¹ confirmed that. But that is not so in every country and, even in the United States, such a conclusion is as tenuous as the public attitudes on which it rests.

So, to return to the beginning, can what I have outlined properly be regarded as a theory of natural law? The answer, I think, is yes. It is a theory that locates the normative aspect of our existence within the natural order, in the irrefutable designation of human beings as persons. And is it worth our attention? Again, the answer is yes. The theory does not itself provide us with a moral calculus, nor even a moral compass. It requires us to look toward and beyond the actual conditions of the community in which we live. But it is not without significance. Its largest significance is that it rejects a utilitarian calculation of the good as sufficient in itself. It insists that the recognition of persons as persons, honoring their rights, is the only

28. *Id.* at 137-56.

29. *Id.* at 181-95.

30. *Id.* at 171-78.

31. 123 S. Ct. 2472 (2003).

path to the good, not the highest good perhaps, but the humanly good. And it tells us, without providing a certain guide to success, the manner and means for achieving it.