



DIGITAL ACCESS TO SCHOLARSHIP AT HARVARD

The Case for Natural Law Reexamined - 1993

The Harvard community has made this article openly available.
[Please share](#) how this access benefits you. Your story matters.

Citation	Lloyd L. Weinreb, The Case for Natural Law Reexamined - 1993, 38 Am. J. Juris. 1 (1993).
Published Version	http://scholarship.law.nd.edu/ajj/vol38/iss1/1/
Accessed	February 16, 2015 7:27:32 PM EST
Citable Link	http://nrs.harvard.edu/urn-3:HUL.InstRepos:12964429
Terms of Use	This article was downloaded from Harvard University's DASH repository, and is made available under the terms and conditions applicable to Other Posted Material, as set forth at http://nrs.harvard.edu/urn-3:HUL.InstRepos:dash.current.terms-of-use#LAA

(Article begins on next page)

1-1-1993

The Case for Natural Law Reexamined - 1993

Lloyd L. Weinreb

Follow this and additional works at: <http://scholarship.law.nd.edu/ajj>

 Part of the [Jurisprudence Commons](#), [Law and Philosophy Commons](#), [Legal History, Theory and Process Commons](#), and the [Natural Law Commons](#)

Recommended Citation

Weinreb, Lloyd L. (1993) "The Case for Natural Law Reexamined - 1993," *American Journal of Jurisprudence*: Vol. 38: Iss. 1, Article 1.
Available at: <http://scholarship.law.nd.edu/ajj/vol38/iss1/1>

This Article is brought to you for free and open access by the The American Journal of Jurisprudence at NDLScholarship. It has been accepted for inclusion in American Journal of Jurisprudence by an authorized administrator of NDLScholarship. For more information, please contact lawdr@nd.edu.

THE CASE FOR NATURAL LAW REEXAMINED—1993

LLOYD L. WEINREB¹

SOME OF YOU WILL HAVE NOTICED that the title of my talk this afternoon is borrowed from the title of the lectures that inaugurated this series, thirty-nine years ago.² The person who gave those lectures, Alexander d'Entrèves, was one of the great philosophers of natural law. His statement of the case for natural law can fairly be described as definitive for its time. He himself observed, however, that the case for natural law "must needs appear in a different light according to the angle in time or in place from which it is looked at."³ It seems to me that the case for natural law in 1954 is not the case for natural law today: that some of its claims then are made no longer and that some new ones take their place, and similarly that some objections to natural law have lost their force and some others have arisen in their stead. This development of the case for natural law is to the good. We have made real progress. For all that, it remains true, as d'Entrèves said then, that "the case for natural law is not an easy one to put clearly and convincingly."⁴

My purpose is to reexamine the case for natural law once again and to state what I believe it to be, as clearly and convincingly as I can. For all the attention it has received in the past several decades, natural law remains a guest at the philosophic table, more often tolerated as an object of bemused curiosity or benign neglect than welcomed. I believe, rather, that it should have an honored place at the table, for it is at the very center of reflection about our experience—that to which we refer, quite precisely, as the human condition. I shall, perforce, take you some distance into the territory usually occupied by metaphysics and shall occasionally refer to a not everyday philosophic concept like "ontology." But I agree with d'Entrèves that when one is making the case for natural law, "it is better not

© 1993 Lloyd L. Weinreb.

1. Dane Professor of Law, Harvard Law School. This article is unchanged from the Natural Law Forum Annual Lecture, delivered at Notre Dame Law School on April 29, 1993.

2. A.P. d'Entrèves, "The Case for Natural Law Re-Examined," 1 *Nat. L.F.* (1956), p. 5. The lectures were given on October 9 and 10, 1954.

3. *Ibid.*, p. 5.

4. *Ibid.*

to drive too many metaphysical nails into the jurist's head."⁵ And I assure you in advance that the case that I shall make contains nothing that you do not already know, even if you have not thought about it in just this way. Indeed, it is a central part of the argument that you do know all of it without needing to be told.

In 1954, if the Thomistic natural law tradition within the Catholic Church is left aside, natural law was mostly identified as a theory about law and, as such, within the province of jurisprudence. The case against natural law, which went by the name of legal positivism, was also a theory about law, a topic within jurisprudence. The principal issue for both theories could be formulated as the question whether an immoral law is properly regarded as law at all. Defenders of natural law said no and legal positivists said yes. I hope that that way of formulating the issue seems odd to you; for, although it was discussed at great length and gave rise to some excellent writing, it was an odd question. We all know, and it was known then, that there is a difference between a provision of the Internal Revenue Code—even one that we strongly disapprove—and a gunman's order to "hand over your wallet," which difference the positivists accused the proponents of natural law of ignoring, and a difference of another kind between, say, the Fugitive Slave Law and the Emancipation Proclamation, which the proponents of natural law accused positivists of ignoring. And those easily recognized differences, plus, of course, some good will, are all that one needs to see that the debate had somehow gone off the rails. The best product of the debate is probably the famous exchange between Hart and Fuller in the *Harvard Law Review*.⁶ Yet even there, a number of difficult, important issues were summed up under the rubric, "Is an immoral law really law?" It is not accidental that notwithstanding their disagreement on every important issue within the debate, Hart and Fuller reached the same practical conclusions about their most significant, testing example.⁷

I rarely see that question in that form asked anymore. From the distance of four decades the debate of the 1950's turns out not to

5. *Ibid.*, p. 38.

6. H.L.A. Hart, "Positivism and the Separation of Law and Morals," 71 *Harv. L. Rev.* (1958) p. 593; Lon L. Fuller, "Positivism and Fidelity to Law—A Reply to Professor Hart," 71 *Harv. L. Rev.* (1958), p. 630.

7. Both Hart and Fuller defend a retroactive statute as the means for dealing with acts committed by Germans while the Nazis were in power that were highly immoral but were legitimate under Nazi law. See *Positivism and the Separation of Law and Morals*, pp. 619-20; *Positivism and Fidelity to Law—A Reply to Professor Hart*, p. 661.

be timeless, as it then seemed, but peculiarly timebound. It had some historical antecedents in jurisprudence, it is true; but they alone would not have sustained the debate. The debate of the 1950's was sustained by history, the appalling phenomenon of Naziism, which forced on us an awareness of unspeakable human evil, carried out with the pretensions and efficiency of the modern state. We are now more aware of the enormous variety of ordinary laws: ordinary at least in the sense that, wise or not, moral or not, they are within our contemplation—their immorality, if that is what we conclude, is speakable. Whether we should be glad or regretful of that change, I do not say; it is not so obvious to me how to regard the unbridgeable gulf between humankind and angels; for if it is only on the human side of the gulf that we stumble, it is also only on that side that, as humans, we walk erect.

In this context, it is difficult even to make sense of the question, "Is an immoral law really law?" or, as the question also was put, "Can a 'law' be too immoral to be law?" Instead, prompted in good part by the work of Ronald Dworkin, legal philosophers ask questions about how judges—good judges—do and ought to decide cases. To what extent does a stated rule of law dictate the result in a particular case? To what extent is a conscientious judge committed to discovering a uniquely right answer? Or questions about how ordinary persons should understand their *legal* obligations, when the obligations conform to their moral understandings and especially when they do not. If the question, "What is my obligation to obey an immoral law?" is still asked, it is recognized implicitly or explicitly that the answer is found not within the province of jurisprudence but outside it. Borrowing Dworkin's apt metaphor, "law's empire"⁸ extends beyond the domain of law and is at the same time within and subject to an empire greater still.

If in this way natural law plays a somewhat diminished role on the jurisprudential stage, it has become more prominent on the larger stage of politics and social theory. Clarence Thomas may not have given natural law more than its equivalent of Andy Warhol's fifteen minutes of fame; but the very fact that he, like Martin Luther King and others, referred to natural law directly in support of political argument is remarkable. What it signals is that natural law has acquired distinctly normative significance independent of its relevance for law.

8. Ronald Dworkin, *Law's Empire* (1986).

The focus of natural law has thus shifted dramatically from one internal to the law to one that is outside and independent of it. Whereas previously it was concerned to differentiate phenomena within the general ambit of law, distinguishing that which did and that which did not satisfy certain normative criteria, it now is concerned in the first instance to defend the objectivity—or validity or reality, it comes to the same thing—of the normative criteria themselves. Only secondarily, having established the objectivity of normative criteria, does it apply them to law or insist that they be applied and draw conclusions about the content of the law, the judge's act of interpreting the law, or the citizen's obligation of compliance. The jurisprudential issues have become subsidiary to the general normative question: Are there objective moral principles? Is there an objective moral order?⁹

A further notable feature about recent concern with natural law, which should attract more attention than it does, is that its nonjurisprudential normative significance is just about always formulated in terms of rights.¹⁰ The accepted account of how natural law became associated with rights is well known. After around 1500, as the individual emerged from the social context and became the protagonist of western political philosophy, older, ontological notions of natural law were simply appropriated and put to new use in defense of the individual. Speculation about a universal normative order as an aspect of the real was succeeded by concern for normative relations among humankind, also as an aspect of the real. So, to mention one well-known example, John Locke, with scarcely a pause in the narrative, resorted to natural law to shore up certain rights of the individual against claims of the community or the king as its representative.¹¹ That this was a departure from classic natural law is evident; rights as such are not much in evidence in the natural

9. That is so, at any rate, for those who continue the debate about natural law. Those who regard it as a philosophical curiosity simply ignore it. To say that the jurisprudential issue is subsidiary is not to say that it is unimportant. For those of us who are especially concerned about law, the hypothesis that there are moral truths has the specific significance that laws contrary to such truths are in a sense not properly laws at all, for they would prescribe conduct that one ought not, all things considered, adopt. See John Finnis, *Natural Law and Natural Rights* (1980), pp. 360-61.

10. Oddly, the principal exception is John Finnis's deservedly much discussed *Natural Law and Natural Rights*, which makes the connection between natural law and rights in its title.

11. J. Locke, *Two Treatises of Government* §§6-8 (J. Laslett, ed. 1960) pp. 311-12.

law of Thomas Aquinas or the classical Greek conceptions from which it derived. But it was not, as it sometimes is made to appear, a fortuitous (if serendipitous) borrowing of whatever was to hand. On the contrary, I shall suggest, natural law properly conceived was the obvious, even inevitable, vehicle for the view of rights that was at stake.

Since the eighteenth century, our conception of nature has changed from moral tutor and taskmaster to a vast cornucopic warehouse, from which we select according to our own needs and desires. Unsurprisingly, therefore, it is not so common anymore to talk about natural rights. Rather we talk about human rights. Since the two concepts are equally ambiguous and, for aught that appears, are extensionally the same, the substitution of the human for the natural has not occasioned much controversy; indeed it seems scarcely to have been noticed. But it ought to be attended to closely and taken quite seriously; for it is of the greatest significance. The key to the re-examined case for natural law, I believe, is found just there.

To understand how our current engagement with human rights makes the case for natural law, we have to look deeper into the connection between natural law and rights generally. And to do that, we have briefly to go back to the beginning. The phrase “natural law” can be traced quite precisely to Cicero, the Roman lawyer and orator who survives in third-year Latin classes more than anywhere else. Cicero was not a great thinker; he was a great talker. But he was a bit of an intellectual magpie; and so far as he subscribed to a philosophy, he was a Stoic. In view of the Roman distaste for abstractions and regard for law—the *pax Romana*—as the mortar that held civilization together, it is not surprising that Cicero used the concept of law to express the principal element of the stoic idea of *Logos*: an ordered universe in which events fulfill an inherent purposiveness that provides its own justification—what I have elsewhere called “normative natural order.”¹² Just as the law of Rome made orderly the known, civilized world, so, he suggested, the law of nature—natural law—made the physical universe a coherent, orderly whole. From our point of view two thousand years later, that conception of natural law literally understood on its own terms is not simply wrong; the proposition that whatever happens to happen is, merely in virtue of its happening, what ought to happen is incoherent—high-level gibberish. If one adds some external guiding force, an abstraction like *Logos*, the incoherence can be hidden; but

12. L. Weinreb, *Natural Law and Justice* (1987), pp. 6-7.

it does not overcome the axiomatic principle, however it is put, that is and ought, fact and value, are distinct. The Greeks did not think so. There is pervasively in their literature, not as a poetic *façon de parler* but as a profound truth, brooding recognition that our existence is purposeful and our joys and our suffering alike are not without meaning, whether or not we see it. That is what, at least sometimes, Cicero meant by natural law, although characteristically he did not linger over the puzzles. And sometimes, he seems to have meant something much more modest: only that ordinary human reason, *logos* with a small "l," is a sound prudential guide.

The fertile ambiguity of the term "natural law" helped it to survive after Cicero. While the Roman Empire and the Christian Church maintained an uneasy coexistence and the former gave way to the latter, Roman lawyers and the fathers of the Church made natural law the repository of their *a priori* certainties and *a posteriori* doubts about the human condition. For the lawyers, natural law—*ius naturale*—gave the universal law of nations—*ius gentium*—a normative dimension that a mere amalgam of the law of Rome with disparate foreign laws of the far-flung empire would not have had. And for the Church fathers, natural law preserved the reality of the early Christian ideals of freedom, equality, and, incidentally, communism, without condemning the palpable lack of individual freedom or equality or even the existence of slavery in the actual law and institutions of society.¹³ Although the precise formulations by which they performed this metaphysical juggling act varied, it remained throughout an affirmation, not an explanation. That is, lawyers and fathers alike asserted confidently that the normative realm was actual without explaining much at all how the actual realm was normative. This development came to fruition in Thomas Aquinas' classic exposition. Pulling together the multiple variations on the same theme, he filled the linguistic container provided by Cicero with the substance of the ancient Greek view as it had been communicated to the thirteenth century in a new, distinctly Christian guise.

In Thomas' formulation, reason, the heritage of the Greeks, and faith, an abiding confidence in the Christian God, come together. The normative natural order, and we within it, are part of God's Providence. More particularly, our awareness of our own freedom, our individual moral responsibility, is not inconsistent with God's providential order but is rather a manifestation of it. As Thomas put it:

13. For a brief account, see *ibid.*, pp. 44-49.

Now among all others the 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.¹⁴

It is easy to find in that statement a specifically theological reformulation of the stoic equation of Logos, the purposive force in nature, and logos, the human capacity rationally to choose one's own end. But—and it is a large “but”—it contains nothing that explains *how* we can be both subject to God's Providence and free, provident for ourselves. Nor is there anything in it that tells us the actual content of God's Providence or what God would have of us. For the former we require faith; and for the latter, we require the aid of God's holy church. There are elsewhere in Thomas' writings some actual prescriptions of how we ought to behave. On inspection, however, insofar as they are not general, indeterminate abstractions, like “*good is to be done and pursued, and evil is to be avoided,*”¹⁵ they turn out to reflect the conventional moral premises of western Europe in the thirteenth century. That, of course, does not make them incorrect. It does not make them correct either, however, although some prescriptions of Thomas, as interpreted by the Church, may be authoritative for that reason. From the distance of seven centuries, Thomas' achievement so described may seem less than his reputation would have it. But it was not his concern, even if it is ours, either to demonstrate God's Providence or to validate a moral code. God's Providence and the moral authority of the church required no demonstration; they were premises from which he started.

Coming back to the present, the first point that I want to make is that it is no part of the case for natural law that it furnishes conclusive answers to our concrete moral dilemmas. It never was and it is not now. The endings of Sophocles' great tragedies, in which the Greek source of natural law is most visible, are not pronouncements of moral truths. They are an affirmation of the truth of morality: notwithstanding Oedipus' unavoidable and, as we see it, undeserved doom,¹⁶ notwithstanding the divinely inspired madness that led Creon

14. Thomas Aquinas, *Summa Theologica*, I-II, q. 91, a. 2 (Fathers of the English Dominican Province, trans. 1947) p. 997.

15. *Ibid.*, I-II, q. 94, a. 2, p. 1009.

16. Sophocles, *Oedipus the King*.

on the tragic path of excess,¹⁷ they dwelt in a normatively ordered universe, in which, as the Chorus says at the end of the *Antigone*,

Our happiness depends
on wisdom all the way.
The gods must have their due.¹⁸

Similarly, the natural law of Thomas Aquinas gave assurance that our moral dilemmas are real and are to be answered in moral terms, that moral judgment is not illusory; but it did not itself, except incidentally, purport to describe that reality concretely. So also now, the case for natural law must be that there is a basis for an affirmation of the truth, or reality, of morality—a basis for denying that, as Jocasta said to Oedipus,

. . . chance is all in all
. . .
Best to live lightly, as one can, unthinkingly¹⁹

That speaks intelligibly to us as inhabitants of the end of the twentieth century.

A way to describe what has happened since the thirteenth century is that the metaphysical assumptions of modern physical science have driven the Thomistic synthesis between reason and faith apart. There is not an opposition between them, as Augustine had urged; rather, they are simply separate and belong to different realms of our being. The consequence is that the assumptions that gave specific, concrete content to earlier versions of natural law have lost their power over reason. For those who, lacking faith, have discarded those assumptions, the fundamental, unexplained affirmation of natural law seems, therefore, to be no more than a fond hope, a wish, or a dream. Like Oedipus, when he believed momentarily that the oracle's prediction had been proved false, they may declare,

. . . they,
The oracles, as they stand . . .
. . . they're dead . . .
. . . and worthless.²⁰

One way or another, implicitly or explicitly, all the recent work about natural law—in its defense or in opposition—has been concerned with that problem.

17. Sophocles, *Antigone*.

18. Sophocles, *Antigone*, 1348-1350 (Elizabeth Wyckoff trans.) in David Grene & Richmond Lattimore, eds., 2 *The Complete Greek Tragedies* (1959), p. 204.

19. Sophocles, *Oedipus the King*, 977-979 (David Grene trans.) in 2 *The Complete Greek Tragedies*, p. 52.

20. Sophocles, *Oedipus the King*, 970-973 (David Grene trans.) in 2 *The Complete Greek Tragedies*, p. 51.

I believe that the case for natural law can be made in a way that speaks to our time: that is, that one can affirm significantly, without dependence on the metaphysical assumptions of the past, that the moral dimension of human experience is real. To do so, we need to look not beyond ourselves but within.

Much as we may disagree about who is responsible, for good or for ill, for some occurrence, or about whether anyone is responsible, or about the extent of a specific person's responsibility in view of his particular characteristics, the reality of human responsibility is not in doubt. Whatever thoughts we may entertain to the contrary in a mood of philosophical speculation or a moment of despair, we live in a condition of human freedom and hence, human desert. It is a structural fact of our experience, which cannot be contradicted without altering the nature of our experience, not merely in some concrete particular(s) but in a fundamental way, making it a different experience entirely. To deny that human beings are responsible is not like denying that they have opposable digits or denying that there are any human beings on an island that we had thought was inhabited. Those denials would be startling enough, but we could adjust. The denial of human responsibility does not merely omit some information or contradict something that we had strongly taken for granted. It transforms the very nature of what we, as human beings, experience. So, although one might translate the description of an event that refers to a person as a responsible agent into a description that omits such reference, the translation would not be fully equivalent, because responsibility has no equivalent in those terms. It is fundamental.

That, in a sense, is the problem. Responsibility and the desert that responsibility implicates depend on freedom.²¹ How can we in reason affirm human responsibility and at the same time recognize the causal determinacy of the natural order? But we do not reason our way to human responsibility; and we do not have to, because it is where we start. That always has been the starting point of natural law. Eliminate human responsibility and the whole Theban epic, Oedipus and the

21. I recognize that some philosophers have sought to break the bond between freedom and responsibility or desert. However ingenious, their arguments to that effect are unpersuasive in the face of universal recognition that if one truly "couldn't help it," blame (or praise) is inappropriate. As I have said elsewhere: "Acting freely means that how I act is up to me as an initiating, self-determining agency, no more or less. A complete causal explanation does not leave the matter up to me or anything else. So far as freedom in that sense—which is the only sense for the present purpose—is concerned, it is all up." *Natural Law and Justice*, p. 201n.

rest, is nothing more than a bit of cosmic slapstick, one hero after another slipping over and over again on a giant banana peel. Eliminate human responsibility and the self-providence of the rational creature, "this participation of the eternal law . . . [that] is called the natural law," is gone. The metaphysical settings that sustain those solutions, are profoundly different from our own; but the fundamental human experience on which they build has not changed.

The case for natural law today is made by locating the grounds of responsibility not in an impenetrable normative natural order nor in divine Providence sustained by faith but concretely in what is the case.²² It is important to emphasize that now as heretofore the case for natural law must be cast in ontological terms; it must affirm the actuality of morality, not merely as an attitude or belief, however widely shared, but as something objectively real or true. Such a case, natural law *sub species 1993*, is made by grounding responsibility on the deep conventions that constitute a human community. To rely on convention in this way will seem contrary to the ontological requirement on which I have insisted. The bridge is made if we notice that responsibility is the concomitant of rights, the *due* powers that constitute human beings and only human beings as persons rather than things.

The connection between responsibility and rights is familiar. It is a commonplace of moral exhortation that there are no rights without responsibility, a commonplace of political rhetoric that there is no responsibility without rights. (Or, as our forefathers said more specifically, "No taxation without representation.") The connection is, however, much tighter than that. To say that a person is responsible in some respect for an occurrence *is* to say that he had a right that was dispositive of the outcome in that respect. To say that a person has a right *is* to say that, the right being honored, he is responsible for the outcome to the extent of the right.²³ So to speak extends the

22. Nothing that I have said is intended to deny or belittle premises founded on faith. However, faith is individual. It can prescind argument, but it does not take its place.

23. That will seem perversely contrary to a familiar example: The robber who takes my wallet is responsible for taking it, and he will be found guilty of robbery precisely because he had no right to take it. The right that establishes his responsibility, however, needs to be stated with some care. In this instance, the robber had a duty—and therefore a right—not to take the wallet. Although when we speak of a duty, we do not need also to mention the right, it is there, in this case subsumed within the robber's general liberty to determine his conduct. Unless the robber had that right, or liberty, he would not be responsible, whether he were compelled to take the wallet, on one hand, or prevented from doing so, on the other.

usual reference to rights by including among them capacities or powers that are less than one would like as well as those that one is glad to claim. It shifts the focus of rights from the duties of others, which are the typical "pay-off" of rights, to the specifically moral situation of the actor himself. To explain how that connection is made concretely in specific contexts requires more time than I am able to give it here. Without pursuing the matter further, I shall simply affirm that a reconsideration of the concept of a right along these lines can be carried out that is both internally coherent and consistent with related concepts and that greatly clarifies our understanding of rights and responsibility alike.²⁴

Rights are typically assigned to normative discourse. Indeed they are commonly described as the most fundamental element of normative discourse, its primary, unanalyzable "building blocks." But if human responsibility arises directly in our experience without the mediation of reason and if responsibility and rights are two ways of expressing the same moral cognition, then rights too are an aspect of that experience; they can be described not simply as valid or invalid, according to further normative premises, but as real or actual, as much as responsibility itself. Without them, as I have said, our experience of ourselves as human would be a different experience entirely.

That may sound like a gross confusion between the normative and the descriptive; but it is what I intend. I should argue that it is not confusion, but is rather an accurate description of our experience, which fulfills the ontological claim of natural law. It is substantiated, moreover, by the most insistent puzzle about rights, which none of the theories of rights as exclusively normative is able to resolve. Rights are somehow prior to our judgments about what is right or good; they have a quality of independent validity or objectivity that separates them from consideration of what is the right course of action or what is best on the whole. Yet, too plainly to be ignored, they are variable from one community to another. Although there are, I believe, some rights that attach to all human beings simply as such, there is another, larger category of rights, usually designated as civil rights, that are validated within a specific community but are nevertheless prior to and independent of the community's laws, which

24. Such an account of rights is elaborated at length in my book *Oedipus at Fenway Park*, to be published by the Harvard University Press in 1994.

may be criticized precisely because they fail fully to protect civil rights. Yet how, we are constantly led to ask, can the community be the source of both the standard of evaluation and that which is evaluated? The perplexity of reason notwithstanding, there is an indissoluble fusion of the real and the normative. Rights theorists typically notice the puzzle and throw up their hands; they acknowledge that rights are *sui generis* and let it go at that.

I have already intimated what I believe is the solution. Rights arise together with responsibility directly in our experience. Both alike depend on the actual, ongoing conventions of an established social order. By convention I do not mean the small practices of social intercourse, matters like dress or polite behavior, that we may dismiss as merely conventional. I mean rather what the Greeks meant by *nomos*: the fixed, established ways of the community that were themselves a ground of moral judgment, distinct only from *physis*, the necessary, unalterable normative order of nature. Such conventions are a matter of fact and contestable, although they have normative significance. A person *is* responsible or she *is* not, deserves or does not deserve. It is simply meaningless to say that a person ought to be, or ought not to be, responsible—even though we may assert that she ought to be held responsible or not (or that, being responsible, she ought to behave more responsibly). It is meaningless also to say that a person deserves well or ill, but ought not, or that she does not deserve at all, but ought to—although we may and commonly do assert that a person ought to get what she (in fact) deserves, or not. So also are rights a matter of fact, even though we tend to talk about rights rather than responsibility when their contestability rather than their conventional grounding is prominent. In this way, although I recognize that a great deal of careful elaboration needs to be done, the reality of our moral experience is established.

Although my interest in these matters is frankly philosophical more than practical, tracing rights to the myriad concrete, specific details that compose the *nomos* of a community has, I believe, important consequences for the continuing, often deeply divisive, public debate about specific rights. It may help us to avoid a sense that when rights are involved, nothing less than the whole person, his dignity and self-respect, is at stake, and to replace the stridency of abstract rhetoric with more limited and more manageable issues. So also, it encourages us to reason by analogy from what we know and agree to be true, instead of deducing our conclusions from broad principles that are instantly opposed by those who disagree. Beyond our own community, it allows us to understand and appreciate, even when

we do not approve, deeply held beliefs and established customs different from our own.

That, so far as I can tell, is the case for natural law today, one to which, as opposed to the unconstrained moral indifference of existentialism, I happily subscribe. It is, I recognize, far different from the case for natural law as it was at different times in the past. How could it be otherwise? The world that we inhabit is so profoundly different. All the same, there is continuity. Qualifying us as beings duly constituted, rights break through the morally indifferent causal order of nature and establish us as free and responsible, therefore moral, beings. The *nomos* that gives rise to rights lies closer to home than nature or divine Providence; but it comes to the same thing. In all its guises, the natural law tradition was and is nothing more or less than an affirmation of the human condition itself.

