



A SKEPTICAL APPRECIATION OF NATURAL LAW THEORY*

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These are the confessions of a philosopher who does not start from, as many in this audience do, Natural Law Theory, but has variously criticized and avoided it, only to come to it. This story of how I came to be a Natural Law philosopher despite myself may prove instructive both as the finding fault with Natural Law Theory and as the finding of its merits in responding to supposed faults. This is a sketch of a dialogue on Natural Law in my mind, and you are invited to take part in it, filling in the positions pro and contra with more substance and insight.

1. The strongest antipathy I have had toward Natural Law Theory is its absolutism. This takes the form of an overconfident faith in reason, an unwavering commitment to the content of supposed Natural Laws, and a too eager grounding in divine guarantees. Natural Law is too neat, too proud, too presumptuous. Everything fits intelligibly in a Natural Law scheme. All great problems are already resolved in Natural Law; the only thing we have to worry about in the practical conduct of the world is making applications conform to the timeless and universal principles. Natural Law, then, is a philosopher's philosophy because it connects everything and has a reliable answer for everything. It raises the philosopher up from the contingencies of this world to another realm, pervasive, stable, accessible by reason, established by divinity, and applicable in all times.

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And as the philosopher's mind dwells in that higher realm a consoling peace of mind is the reward even for one living in a sordid and lawless daily world. Natural Law, finally, is a source of the soul's salvation.

All this is too good to be true. It is a dazzling portrayal of an ideal realm. Natural Law is the philosopher's dream *par excellence*. Its agreeable deception is overriding orderliness. Natural Law aspires to deductive formulation. It refuses to accept the world and the universe as fundamentally chaotic, fragmented, arbitrary, or disconnected. Those features of our experience are repugnant to reason. Yet those features have attracted me. They are what makes existence interesting as much as do orderliness and repeatability. Yes, I too want the universe to fit together in accordance with one set of laws, a unified field theory of physics and ethics, but I waive that passion in favor of choosing to see existence in its multifarious disconnectedness. Each feature of the universe, such as international law, has pluralistic grounds of plausible ordering, and no connection need be sought between features, say, moral principles and international law. The universe comes to me piecemeal, and I wish to respond to it in its irreducible diversity. Natural Law leaps too quickly beyond the problems amid which I dwell. How I admire Aquinas so easily stating that the laws of nature are intelligible, that human nature is governed by such laws as well, and our natural intelligence suffices to grasp natural laws. How agreeable is the temptation to accept that vision. But I stagger back from it, advancing the doubt that nature (whatever that is) is governed by laws (whatever those are) in some uniform way graspable by our mind. The very assertion of intelligibility is an imposition of our mind (or our minds) of images, desires, preferences, and probably other non-intellectual things, upon the brute encounter of the universe. I doubt that intelligence is the measure of all being. And to trust that human intelligence is the intelligence able to grasp nature's laws is to be mistakenly overconfident. Human intelligence itself is problematic. It is susceptible to diverse plausible definitions. Natural Law loses its assured means of access once we put in doubt the operation of our intelligence. Reason is doubly at the heart of Natural Law, for a principle of Natural Law is a principle of



reason and perforce is available to discovery and confirmation by reason. Reason, then, is both instrument and content of Natural Law. We professional reasoners know from experience that reason may be driven by passion, that reason may operate by incommensurable forms or commitments, that reason gets carried away with itself and rationalizes, that absurdity, contingency, contradiction, dilemma, and paradox might not be reasoned away, and that the heart has its reasons of which the reason knows nought. Distrust of reason is the first duty of a philosopher. Thus, when Marcus Aurelius writes to himself in Greek of the principles graspable by reason that underlie the souls of every person, slave and emperor, as well as underlying the cosmos, has not this Roman Emperor exchanged imperial pride for overweening pride in reason?

Natural Law Theory can answer these charges about the disorderliness of nature, the unreliability of reason, and the gap between human intelligence and intelligible cosmos. God is the guarantor. Natural Law has a divine legislator. The author of our intelligence and the rest of our human nature, as Aquinas puts it, is also the author of nature and its laws. A supreme intelligence has seen to it that creation is intelligence of the creator's noblest creature. Moreover, the existence of such a creator is demonstrable, according to Aquinas, by natural reason, that is, unaided by revelation, upon examination of our experience of the world. Everything must have a cause, but to have anything a first cause must exist. In the Stoic as well as the Christian Natural Law Theories benevolence as well as intelligence rules the universe. All things not only make sense but somehow all things will work out for the best as righteousness triumphs. This is very frightening. If we have to make a commitment to divinity in order to justify a theory, say, of the limits of sovereignty, then we are getting into deeper water than is safe. God is the capstone of Natural Law Theory but is the cop-out according to critics who see the appeal to divinity as a problematic closing of justification. Granted that the God of Natural Law is the god of the philosophers and not necessarily that of traditional religion, yet all the questions raised by philosophy, and all the answers proposed by religion, concerning divinity come to haunt the foundation of Natural Law. Current philosophers eager to get on with problems in law, politics, or

ethics, may simply avoid Natural Law Theory because attached to its trunk is the hornet's nest of divinity. Natural Law Theory smacks of an outdated mode of philosophizing, for it bears a metaphysical odor.

The saving grace of Natural Law Theory appeared to be its welcome offering of a sense of tranquillity to the theorist who may feel at home as an intelligence in a world of rational principles. But this consolation may act like a drug to draw us away from the world that counts: this world of contingency and suffering that I encounter not as universal intelligence but as my mortal self. When Cicero or Seneca meet the painful folly of the world with composure because their souls dwell safely in the realm governed by Natural Law, do they not fool themselves that all will be well or that all in some deep sense is well? The horror that all is not well needs to be experienced by thinkers who face the world squarely. That peace of mind that comes from recognition of an eternal order is not enough consolation in this world about to be incinerated by its allegedly rational inhabitants.

All the above has been one big accusation levelled against Natural Law as too confidently smoothing out the wrinkles of life by its questionable trust in order, reason, and divinity. This confidence tends toward absolutism. We need in philosophy more flexibility, diversity, passion, and inconsolability.

2. The second great charge againsts Natural Law Theory is that in the political realm it gets in the way of a better theory: Natural Rights. Natural Rights: yes. Natural Law: no. We can better recognize the right theory, which is the Rights Theory if we get rid of the Natural Law Theory with which it has been entangled unnecessarily. Cut the useless anchor and let the ship of rights sail on its own steam. And change the name on the bow of our ship from Natural Rights to Human Rights. There we have a vessel worth the voyage through all seas of the modern world. Left behind is the outmoded vessel of Natural Law.

Natural Law refers to principles of reason, whereas Natural Rights refers to persons. In personhood as a human being are inviolable rights. In reason, which human beings share, are



inviolable principles, according to the outmoded theory. While among the rational principles of Natural Law Theory may be found universal rights of persons, we can just as well begin with Human Rights and locate the use of reason, publically as well as privately, among them. The latter move is preferable. For it avoids the controversy over the identity and content of reason. Indeed, Human Rights theory lets thinkers define and practice reason in endless ways with no absolute commitment to any principles of reason. In moving from a reason-centered to a person-centered theory we avoid smashing up on the philosophic rocks while we enhance the freedom of individuals as thinkers. Human Rights, then, are more than matters of reason: they are discoverable by examination of human existence, by self-evidence, by insight, or by experience. And Human Rights, though recognized in their grand foundations, are still open to further discovery, not as deductions, but as illuminations that accompany the encounter of new human situations. Human Rights are embedded existentially in our adventure as human beings on earth such that they possess an open-ended creative dimension. Natural Laws on the other hand are rational abstractions in a deductive system that aspires to closure. The lived world drops out of the latter picture. Human Rights Theory is forward-looking, dynamic, and dedicated to changing the world. Natural Law Theory looks instead to the unchanging, hence, static, grounds of a realm of principles. Whereas Human Rights discourse easily motivates action, Natural Law talk is an inactive contemplation. A difference of temperament is likely involved in preferring one or other of these theories.

When pressed for its guarantees Natural Law Theory appeals to divinity as ordering the great chain of being that links humanity and the rest of nature. But Human Rights Theory need go no further than humanity to justify its claims and this strengthens the commitment that we are rightbearers by virtue of being human. Human Rights are rightfully the due of human beings, no thanks to God. And Human Rights need not be connected with the orderliness of nature. Indeed, rights often operate as normative commitments that go against the grain of natural operations. Humanity refuses to conform to the Darwinian law of nature. Human Rights Theory, then, keeps the ball-

game in the proper court, whereas Natural Law Theory in connecting everything as the playing field could only weaken the Human Rights area. This criticism is not just of the overreaching scope of Natural Rights Theory but of its ontology. When the Declaration of Independence opens with an appeal to «the Laws of Nature and of Nature's God», persuasive connections are effectively made to eighteenth-century thinkers on behalf of rights. In the twentieth century such an appeal is neither effective nor necessary. Human Rights may speak for themselves.

3. The third and last attack I shall make on Natural Rights is in the legal sphere and amounts to this: they don't exist. The accusation springs from a commitment to Positive Law Theory. In this perspective, Natural Laws being unlegislated and not subject to sovereign enforcement, are no laws. Some Natural Laws may indeed become Positive Laws, but then they have no special status. Some Natural Laws may be active as moral principles or as wishful thinking, but then they remain outside the law strictly speaking. Thus, the very term «Natural Law» should be dissolved. Even talk about scientific laws of nature is misleading, since law should only be understood as enforceable enactment. No sovereign: no law. The laws are discoverable, then, not by deductively consulting reason, but by inductively consulting practice. Universal and timeless laws are scarcely to be expected, for law operates within a polity under a regime. Comparative Law teaches us about the plurality of legal systems and hence of laws. Natural Law Theory is too idealistic, envisioning everything of importance to have been settled. Positive Law Theory is realistic, seeing that room always exists for changing the law. The noble vision of Natural Law gets in the way of the practical challenge to law-making. Thus, Grotius writes confidently of the Natural Law foundation to international law without adequate attention to means of legislation or assurance of enforcement. Concerning international law a student once asked a professor in law school, «What should we prospective lawyers know about it?» «That there isn't any», was the pithy reply. Unenforceable agreements do not have the status of law, and while there are treaties, conventions, and customs, no solid body of international law yet exists, despite the well-meant and misleading claims of Natural Law Theorists. If genuine international law is to emerge, say, to prevent global



holocaust, a global sovereign will have to be entrusted with enforcement. Reason, alas, does not enforce its so-called Natural Laws.

I have made these three critiques of Natural Law Theory in its overall philosophic position, its status in political discourse, and its place in legal discourse, in extreme and perhaps exaggerated terms as if I were trying to exorcize a demon that has had a firm grasp upon my soul. Getting rid of Natural Law frees me as philosopher, political thinker, and theorist of law to do other things with more chance of success. Natural Law Theory blocks my path in significant ways. Even if the theory could be made sound, it would still not be best for the aims of philosophy, politics, and law. Rather than make it sound, let us turn our backs on it.

But other positions, all other positions, have similar difficulties. For they are open to critical challenge to which they cannot reply in a fully sound manner, and they are only partial contributions to dealing with great problems. Existentialism, Human Rights Theory, and Positive Law Theory have their problems. Thus, we may come back to Natural Law Theory to make good use of some of its features once we have tasted of the shortcomings of more promising ways of thinking. This, then, is how upon second thought I become a Natural Law theorist. I try to answer the attacks I have mounted.

1. Natural Law Theory has an inevitable attraction for the philosopher as the insistence upon intelligibility of humanity and nature. The philosopher's imperative is: seek the intelligibility of all things. Philosophy is largely a presumption in favor of finding the laws that govern every kind of existence, although it is not certain that such laws will be found. It doesn't hurt to look. And this is a useful presumption, for we might well find, say, principles that govern our humanity. And if such principles as laws of nature are nothing but laws of reason, then the pre-eminent instrument of philosophical activity, reason, may be put to good use on behalf of a worthy activity. As philosopher I cannot silence the demands of reason to justify its principles. Thereby I share something with others, with Epictetus the slave and Aurelius the emperor, which seems to have an independence from my self, my way of thinking and

my passions. Natural Law Theory opens the forum to rational sharing by every thinker. Some content of Natural Law is about reason itself so that reason finds its eloquent defense and expression in Natural Law. Natural Law as reason's construct must then be dear to one who tries, intermittently, to live in accordance with reason. To avoid Natural Law, then, or to veto its legitimacy is to miss a valuable realm of the life of reason, which should be especially dear to the philosopher. I can associate myself willingly with Natural Law Theory in its noble effort if I cannot acknowledge its success. «Try it», urges my reason, «you might not like its conclusions but the effort is worthwhile». Thus, while on guard against that absolutism in Natural Law Theory, I give it a try on behalf of reason. Natural Law Theory can be practiced in mid-stream by reason alone without resort to divinity. In the twentieth century we can work on Natural Law without God. We might also be better able to work on God without Natural Law.

A consoling peace does come with recognition by reason of what is ever right, even if the world perversely pursues the wrong course. We need consolations in a self-destructive world. We need a taste of internal peace if we are to keep up the fight to prevent total human immolation. Passion is needed but it may be aided by the firmness of reason which instills inner calm. We live in contingency, in the unique now, in the human situation we are creating, but it cannot hurt to have some connection to ideals that stand behind all human situations. Natural Law enriches the encounter with the world in its particularity. Some principles of existentialism might even be reformulated and expanded in Natural Law terms.

2. While my preference is for Natural Rights Theory over Natural Law Theory, the two need not be antithetical. Indeed, Natural Law has been a standard grounding for Natural Rights. Hobbes, for instance, does a very nice job in *Leviathan* of drawing rights out of Laws of Nature considered articles of reason, and then basing polity on such rights. Since Human Rights Theory has its problems of justification, Natural Law remains available for its rational grounding. The more we look at specific Human Rights and answer the questions, «How do you know this is a right?» and «From where do we get such a



right?» the more we may speak in Natural Law terms. That discourse is also helpful as we discuss the ranking or trade-off of rights. Human Rights Theory can and ought to be supported by other modes of explanation and justification, so that Human Rights Theory should not be confounded with Natural Law Theory, yet Natural Law is one highly useful and well-practiced support.

3. The attack waged by Positive Law Theory that no such thing as Natural Law exists is the least troubling, of the accusations for philosophers are accustomed to valuing things they know do not exist. Positive Law itself has severe limitations, such as openness to oppression, and it is in our interest to detect Natural Law implications imbedded in a body of Positive Law. Some dictates of reason may well be proposed for enactment so that the Natural Law taken for granted may be explicitly entered into the law. A case may be made for the precedents of unlegislated Human Rights over enacted laws. Here the Natural Law would come to the defense of what perforce is indefensible in Positive Law. Finally, the non-existence of international law, in the sense of an enforceable body of laws, must not inhibit the development of law between nations since the world's existence is at stake. Natural Law, though it has no legal status in the narrowest sense, can be the guide of international conduct, first as the conscience of the world, then as principles generally agreed upon, next as customary behavior, and finally as laws recognized as binding and given assured enforcement. Desirable growth is possible from Natural Law to Positive Law, while Natural Law always remain available to attack the oppression of human beings that misguided Positive Laws may enforce.

I stand for Natural Law, then, insofar as it stands for reason, humanity, and justice.