

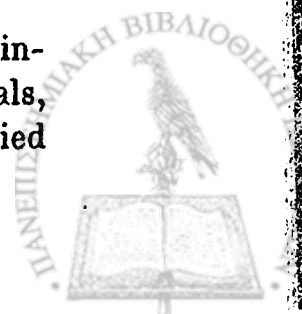
HOWARD P. KAINZ

NATURAL - LAW THEORY:
ANCIENT PHILOSOPHICAL ROOTS,
AND PRESENT STATUS

In ethical theory, natural law enjoyed a long and fruitful tenure up to the 17th century, when it began to be amalgamated with, and superseded by, a combination of natural-rights theories, "state of nature" theories, and social contract theories expounded by various philosophers — Thomas Hobbes, John Locke, Hugo Grotius and others. In the 18th century, the Lockean version of natural rights and social contract became incorporated into the American Declaration of Independence, which appealed to the "law of nature and nature's God" and also referred to the "self-evident" truths that "all men are created equal, and endowed by their Creator with the rights to life, liberty and the pursuit of happiness"; and into the Constitution of the United States, in which the original 13 states "mutually pledge to each other our lives, our Fortunes, and our sacred Honor" — thus giving formal expression to their social contract.

But after that time, natural law theory began to fall upon hard times. It was ridiculed by Jeremy Bentham as being arbitrary, and needing to be replaced by Benthamite utilitarianism; and it was reinterpreted (or deconstructed) by Immanuel Kant, who construed natural law subjectively by instructing us to act "*as if* our maxim were a law of nature" — the "as if" implying that there really aren't any laws of nature out there in the world, to which we should conform. Then in the 19th century the rise of legal positivism, under the influence of John Austin and others, weakened the connection between positive law and morality. According to the legal positivists, an immoral law does not become invalid, as long as it has been enacted by the proper authority.

But in the second half of the 20th century, a resurgence of interest in natural law developed as a result of the Nuremberg Trials, and the conclusion of World War II. The question arose: if the allied



nations conducting trials of alleged Nazi war criminals could convict them and execute them for acts which during the Hitler regime were legal, on what basis could they do so? According to legal positivism, it would seem that such laws were valid, and should be obeyed by German citizens. But then the perennial natural-law question, posed in the ancient world by Sophocles and Cicero and others, arose once more: Is there some higher law, according to which the positive laws enacted by a government can be judged invalid and unjust, and even criminal? Are there certain fundamental, unwritten laws, which would exempt individuals from obeying promulgated civil laws, or even more to the point, *command* them to resist and disobey these laws? If there are such unwritten laws, are they so obvious that any rational being, such as the plaintiffs in the Nuremberg Trials can be charged with *mens rea* for disobeying them, and obeying laws which are contrary to them? Such questions have helped to foster the reexamination of natural-law theory.

As this reexamination of natural law took place, frequent reference was made to an alleged natural-law "tradition," which had its roots in ancient Greek and Roman philosophy. There is some truth in this alleged rootedness, but it would be a mistake to attribute a full-blown natural-law theory to that era. We find at most among the ancients the initial evolutionary stages of that development. Thus it is arguable that an initial inspiration for the philosophical concept of natural law was supplied by the Greek playwrights Aeschylus and Sophocles. In Aeschylus' *Eumenides*, after Clytaemnestra had murdered her husband Agamemnon, with the help of her lover Aegisthus, Agamemnon's son Orestes avenges this crime by killing his mother Clytaemnestra. The gods then catch up with Orestes, and get into a heated debate. On the one hand, Orestes has broken the natural law against matricide, but on the other hand Clytaemnestra by committing homicide along with adultery has also sinned against the natural law. Later, in the plays of Sophocles, especially in Sophocles' Oedipus trilogy, even greater approximations to the natural-law concept are to be found. The dramatic conflict in *Oedipus Rex* highlights the natural laws against parent-child incest, as well as patricide; and in the most often-cited example of dramatic presentations of natural law, Sophocles' *Antigone*, the natural law of fidelity to sacred / familial obligations is the main source of tragic conflict.



The concept of natural law intimated by Aeschylus and Sophocles may have had an influence on some of the comments on law by pre-Socratic philosophers. For example, when Hippias spoke about a divine law which can never be superseded, or when Xenophon spoke about an "unwritten law" (*agraphos nomos*) over and above human conventions, they may have been attempting to give philosophical expression to the superior law which motivated and at least partially justified the actions of alleged lawbreakers such as Orestes and Antigone.

It is often asserted that the distinction between the "law of nature" and conventional, "positive" laws is found in Plato. But this assertion is very misleading. Yes, there is such a distinction; but the distinction between conventional law and the law of nature in a number of places in the Platonic dialogues is the diametrical *opposite* of the traditional concept of natural law (i.e., what most ethicists understand now by "natural law.") The most explicit contrast between natural law and conventional law is to be found in Plato's *Gorgias* where Callicles is praising the law of nature as superior to conventional law; but by the "law of nature" Callicles means the laws imposed by powerful people on others — in other words, he is advocating a proto-Nietzschean theory of "might makes right." A similar position is attributed by the Athenian Stranger in Plato's *Laws* X, 889-90, to certain materialist philosophers who invite people to live "according to nature," i.e. according to their natural impulses and taking advantage of their natural prerogatives. But this is not the opinion of Plato himself. Plato refers to these positions disapprovingly, and gives just a very general indication of his own opinion in the *Republic* (V, 501), where the separated Form of justice is referred to as "the just by nature" (*to phusei dikaion*); and also in the *Laws* (IV, 715-716), where the Athenian Stranger expresses the opinion that the divine law should be the criterion for human laws. But in these brief comments by Plato, we find only a foreshadowing of the later distinction of natural law from positive law.

Aristotle is more frequently than Plato cited as a proponent of natural law, especially in connection with a passage from the *Rhetoric* in which Aristotle seems to agree with the famous characterization of natural law (i.e., "universal law") made in Sophocles' *Antigone*. Aristototle writes,

Universal law is the law of Nature. For there really is, as every one to some extent divines, a natural justice and



injustice that is binding on all men, even on those who have no association or covenant with each other. It is this that Sophocles' *Antigone* clearly means when she says that the burial of Polyneices was a just act in spite of the prohibition: she means that it was just by nature. Not of today or yesterday it is,
But lives eternal: none can date its birth.¹

But it is important to understand this passage in context. For, immediately following this statement, Aristotle also quotes Empedocles, to the effect that there is an eternal law that we should "kill no living creature"! Empedocles preached vegetarianism, and was reportedly supporting vegetarianism with this principle; Empedocles also propounded a doctrine of reincarnation, and so when he commands, "kill no living creature", he presumably is telling his followers to avoid eating a reincarnated soul. But Aristotle himself was apparently *not* a vegetarian; and Aristotle did *not* believe in reincarnation, since in his *De anima*, he strongly emphasizes the unique relationship of each soul with its specific body². So it would seem very inconsistent for Aristotle to cite *Empedocles* for an illustration of natural law.

But there are additional reasons for thinking that the passage beginning with the citation from *Antigone* is not an endorsement of natural law. For immediately after the reference to Empedocles, Aristotle also refers to Alcidamas, who emphasized that all men are free by nature! Aristotle is obviously not citing Alcidamas here to support the idea of universal human equality, since, as is well-known, Aristotle in his *Politics* argues that many human beings (mostly outside of Greece!) are *not* free by nature, but "natural slaves."

How then are we to understand such references? The key to understanding them comes a little later in the *Rhetoric*, where Aristotle first of all advises *defense lawyers* to appeal to the unwritten law if their client has broken the written laws, but then goes on to give different and opposite advice, which is most useful to *prosecutors*:

If... the written law supports our case, we must urge that the oath "to give my verdict according to my honest opin-

1. Aristotle, *Rhetoric*, I, 13; Aristotle's citation is from Sophocles' *Antigone* 456:7.

2. See Aristotle, *De anima*, I, 3, 407b, 20ff.



ion" is not meant to make the judges give a verdict that is contrary to the law, but to save them from the guilt of perjury if they misunderstand what the law really means. Or that no one chooses what is absolutely good, but every one what is good for himself. Or that not to use the laws is as bad as to have no laws at all. Or that, as in the other arts, it does not pay to try to be cleverer than the doctor: for less harm comes from the doctor's mistakes than from the growing habit of disobeying authority. Or that trying to be cleverer than the laws is just what is forbidden by those codes of law that are accounted best...³

At this point it becomes absolutely obvious that Aristotle does not offer in the *Rhetoric* any defense of natural law, but is rather offering instructions not only to attorneys, but also to prosecutors and politicians, about *how to win arguments* in a civil or criminal trial, or how to win debates. Aristotle is showing defense lawyers how to appeal to the "universal law" if and when their client has done something contrary to the actual civil laws; but he is also showing state prosecutors how to emphasize the written law, and dismantle any appeals to an "unwritten law" made by defense lawyers. The *Rhetoric*, at least in part, is a handbook on public speaking. If the sections of the *Rhetoric* just cited were published in our own day, they might bear the title, *How to Win your Arguments in Legal Battles*.

Another text from Aristotle which is frequently cited is to be found in the *Nicomachean Ethics*, V, 7, where Aristotle offers some observations on "natural justice." These observations are concerned largely with the prevailing criteria for the proper exchange of goods and merchandise in various lands and cultures—but we find no theory of natural law in this text. Since Aristotle is discussing customs governing justice in various cultures, the norms he cites are of an empirical sort, and approximate at most what later came to be called the *jus gentium*, not the *jus naturale*.

For a more explicit concept of natural law in ancient philosophy, we have to take our leave of Greece and look to Rome. The most widely-quoted statement of natural law in ancient philosophy is of course from Cicero, who, after raising the issue of the existence of unjust laws, talks about a superior law which "is not one thing at

3. *Rhetoric*, I, 15.



Rome, and another at Athens; one thing today and another tomorrow, but in all times and nations this universal law must for ever reign, eternal and imperishable."⁴ But this statement offered just a general sketch of the idea of natural law, a principle to be developed further; Cicero himself did not develop a full-blown theory of natural law. He left this task to medieval jurists and philosophers.

In the Middle Ages Thomas Aquinas, building on the Roman legal tradition derived from Gaius, Ulpian, Gratian and others, and with the help of Aristotelian anthropology, added the concrete content to this bare outline of the idea of a natural law superior to actual prevailing positive laws. He argued for the existence of a reflection of God's eternal law in nature itself, more specifically in human nature in which, following Aristotle's *De anima*, there is a tripartite division in human beings among the vegetative soul, the sensitive or animal soul, and the rational soul. Associated with this triadic division he distinguished a triad of fundamental natural tendencies—the tendency to live and remain in existence, the tendency to reproduce sexually, and the tendency to reason and act rationally. From these basic human tendencies are derived three general natural laws implanted by God in human nature—the law of self-preservation, the law of preservation of the species and caring for offspring, and the law of pursuing the truth and developing rational social relationships.

But "the devil is in the details," as they say. In late medieval scholasticism and early modern Protestant natural-law theorizing (by Grotius, Pufendorf, Cumberland, *et al*) questions about applications were raised: How far does the law of self-preservation support the right of self-defense, e.g. can we kill someone who threatens our property? Are fornication and polygamy compatible with the natural law of preserving the species? Is incest between cousins against the natural law? Is slavery compatible with a rational society? Is revolution justified to overthrow irrational social structures? And so forth.

In the twentieth century, natural law has held a minority status among ethical theories, and has gradually moved away from the Aristotelian anthropology utilized by Thomas Aquinas. An unexpected impetus to *non-Aristotelian* natural-law theorizing came several decades ago from the Vatican. In the papal encyclical, *Humanae vitae*, Pope Paul VI argued that artificial contraception was contrary

4. *On the Commonwealth*, III, 22.



to the natural law. The Pope had in mind the Thomistic - Aristotelian version of natural law. Many of the Pope's critics saw his pronouncement as one further indication that natural-law theory, especially Thomistic natural-law, needs to be replaced by more viable moral theories, but in some quarters ethicists took the papal encyclical and the criticism of Thomistic natural law as an opportunity for re-thinking or revising natural-law theory. In this latter category, unexpected interest was shown by Anglo-American "analytic" philosophers, especially Germain Grisez and John Finnis, who went to work defending the Pope by developing a new theory of natural law allegedly free from questionable Aristotelian anthropological presuppositions, and strongly emphasizing the "fact-value distinction" and the prohibition of deriving "ought" from "is." The latter injunction—prohibiting is/ought derivations—is now considered canonical and almost sacrosanct in analytic ethics, and claims the authority of David Hume. The "received" interpretation of Hume has been subjected to disagreement in many quarters, but the canon still prevails almost axiomatically—no moral values can be derived from facts.

As applied specifically to natural law, the is/ought canon dictates that no moral theory can have a basis in *human nature*. If that is the case, then how can there be a "natural-law" theory with any moral significance? Can a natural-law theory exist, without being rooted in nature? The "new natural law" theory responds to this challenge by appealing to reason itself, as the essential and sole morally significant aspect of human nature. Like Kant, who focused on rational nature as the telos of morality, the "new natural lawyers" equated morality with rationality, or, more specifically, with rational fulfillment ("human flourishing," *eudaimonia*). Using reason alone, and methodological checks for logical consistency, John Finnis generated a list of seven basic values — under which all other forms of the good in human living are comprised: The basic values are 1) knowledge; 2) life; 3) play; 4) aesthetic experience; 5) sociability (friendship); 6) practical reasonableness (applying one's intelligence to problems and situations); 7) religion and pursuit of ultimate questions about the cosmos and life⁵. Finnis gives most attention to the value of knowledge, but claims that the other values are equally important, such that none of the seven values should be subordi-

5. NLNR, Chap. 4, 86-90.

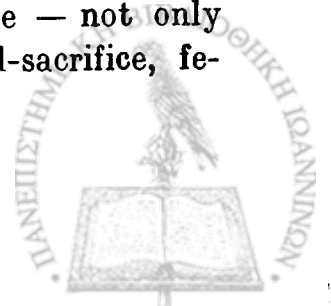


nated to any other. He argues that all these values are self-evident, and that correct moral judgements can be made by referring to these values.

At the present time, the "new natural law theory," supported by Grisez, Finnis, Boyle, George, and others, has gained the ascendancy, but has been subjected to frequent criticism by more traditional natural-law theorists, including Russell Hittinger and Thomists such as Ralph McInerny, and the late Henry Veatch. But in any case, as has been pointed out by many critics, although this theory may be an interesting and even valid approach to ethical theorizing in its own right, it is not really a *natural law* theory in any univocal sense, since it is not based ontologically or anthropologically on a theory of human nature; also, it is not bolstered by any participation in a divine law, as was the case with the classical theories.

Natural-law theory, whether of the "new" variety or the more traditional version, faces formidable philosophical challenges: The new natural lawyers encounter formidable difficulty, since their theory is not based ontologically on any theory of nature, and the "basic values" (such as aesthetic experience, and play, and religious pursuits), which form the foundation of their moral theory, are by no means "self-evident" to many of their critics. But the more traditional natural-law theorists also face serious challenges: Can a Thomistic-Aristotelian theory of human nature still supply a basis for natural law? or perhaps a more modern approach to philosophical anthropology? Or, in the light of evolutionary theory, can we maintain that there is any stability to human nature at all? But even if human nature is stable and knowable, can any *moral* principles be derived from this knowledge? In particular, can the three tendencies ascertained by Aquinas—life, reproduction, rational operations—generate any specific moral norms? Wouldn't such norms be "oughts" illegitimately derived from "isses"?

Because these controversies are ongoing, and haven't been resolved, one might conclude that there are probably *no* fundamental, unchanging "natural" moral laws, in the light of which we can judge unjust positive laws. But then—back to our beginning question—what are we to say about the Nuremberg trials, and the judgements made there? Isn't it clear that genocide is unlawful—don't we want to say that it is against the natural law? And isn't it intuitively clear that there are certain basic laws universally applicable—not only against genocide, but also, for example, against child-sacrifice, fe-



male genital mutilation, cannibalism, parent-child incest, torture and terrorism?

In our scientifically-oriented world, a starting point for responding to such questions might be an empirical investigation (through anthropological research on a global scale) concerning actual values held in all nations and cultures. If this investigation resulted in a bedrock of basic values, one might argue that this tells us something about human nature, and the imbedded "laws" of human nature. But even if we could find such a consensus, how can we prove the *necessity* of the laws? Would a philosophical justification of their necessity be possible? And are the laws *obligatory*? The problem of obligatoriness is a general problem that is encountered by most modern ethical theories that attempt to generate binding norms independently of religion, or independently of any metaphysical presuppositions about a divine legislator. The more traditional versions of natural law often presuppose the existence of God and an eternal law, in which natural law participates; but this leaves them open to the suspicion that they are mixing philosophy with religion. Other, more modern versions of natural law, including the "new natural law theory" try to avoid any necessary connection with religion or theology. But then, whence comes the obligatoriness? With these versions, we find ourselves back at the dilemma of Kant, who in his first formulation of the Categorical Imperative asks us to "act *as if* our maxim were to become a law of nature." The "as if" here is an important and perhaps insuperable obstacle to the "categoricalness" of Kant's Categorical Imperative. It leaves open the possibility that there really is no law of nature; so our categorical imperative is downgraded to an interesting personal reflection or meditation, without entailing any solid and meaningful obligation. Likewise, natural-law theory has to do more than tell us that we should act "as if" there were a natural law governing our actions.



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ΘΕΩΡΙΑ ΤΟΥ ΦΥΣΙΚΟΥ ΔΙΚΑΙΟΥ: ΟΙ ΑΡΧΑΙΕΣ ΦΙΛΟΣΟΦΙΚΕΣ ΡΙΖΕΣ ΚΑΙ Η ΚΑΤΑΣΤΑΣΗ ΣΗΜΕΡΑ

Π Ε Ρ Ι Λ Η Ψ Η

Μετά τις Δίκες της Νυρεμβέργης κατά το τέλος του Β' Παγκοσμίου Πολέμου, και ανάμεσα στα επακόλουθά τους, προέκυψε μία αναβίωση του ενδιαφέροντος για τη θεωρία του φυσικού δικαίου. Ανέκυψε το ερώτημα: επί ποίας βάσεως μπορεί ένα έθνος των νικητών να καταδικάζει τους δράστες εγκλημάτων πολέμου, εάν και εφόσον όλα όσα οι τελευταίοι έπρατταν ήταν νόμιμα, ή ακόμη και διατεταγμένα, στο πλαίσιο της δικής τους κυβερνητικής ιεραρχίας; Με άλλα λόγια, υπάρχει άραγε κάποιος υψηλότερος νόμος, κάποιος «νόμος της φύσης», υπό το φως του οποίου οι νόμοι των διαφόρων κρατών μπορούν να ανακηρύσσονται δίκαιοι ή άδικοι;

Υποστηρίζεται συχνά ότι το φυσικό δίκαιο έχει τις ρίζες του στη αρχαία Ελληνική φιλοσοφία. Λέγεται μερικές φορές ότι βάση αυτού του ισχυρισμού αποτελούν οι διακρίσεις που κάνει ο Πλάτων μεταξύ «φύσεως» και «συμβάσεως», η αναφορά που περιέχει η Ρητορική του Αριστοτέλους περί της Αντιγόνης ως υπερμάχου του «παγκόσμιου νόμου» και τα σχόλια από τα Ηθικά Νικομάχεια του φιλοσόφου σχετικά με τη «φυσική δικαιοσύνη», κλπ. Εάν όμως αναζητούμε μία θεωρία φυσικού δικαίου, τις απαρχές της θα τις βρούμε στην αρχαία Ρωμαϊκή φιλοσοφία, και συγκεκριμένα στον Κικέρωνα.

Ο Θωμάς ο Ακινάτης αναφέρεται συχνά ως ο κατεξοχήν υπερασπιστής του φυσικού δικαίου κατά τον Μεσαίωνα. Ο Ακινάτης, αν και αναπτύσσει τη θεωρία του κυρίως στηριζόμενος στην αριστοτελική φιλοσοφική ανθρωπολογία, πηγαίνει πέρα από τον Αριστοτέλη και δομεί μία θεωρία ευρείας κλίμακας, την οποία ελέγχει με ερωτήματα περί δυνατοτήτων εφαρμογής.

Η θωμιστική παράδοση συνεχίστηκε δεχόμενη πολυάριθμες τροποποιήσεις έως τα τέλη των μεσαιωνικών χρόνων, με σχολιαστές όπως ο Suarez· κατόπιν, μετά την Προτεσταντική Μεταρρύθμιση, γνώρισε νέες εξελίξεις με προτεστάντες θεωρητικούς όπως ο Locke, ο Pufendorf και ο Grotius.



Οι ιδρυτές των Ηνωμένων Πολιτειών της Αμερικής τον δέκατο όγδοο αιώνα γνώριζαν εκείνη την εκδοχή της θεωρίας του φυσικού δικαίου η οποία ανάγεται στον Locke, και η οποία άσκησε έτσι επίδραση στην διατύπωση της Αμερικανικής Διακήρυξης Ανεξαρτησίας και Συντάγματος. Ωστόσο το ενδιαφέρον των Αμερικανών για το φυσικό δίκαιο υποχώρησε κατά τα τέλη του δεκάτου ενάτου αιώνα για να δώσει τη θέση του σε περισσότερο πραγματιστικές ή θετικιστικές προσεγγίσεις, έως το τέλος του Β' Παγκοσμίου Πολέμου, οπότε και έλαβε χώρα η αναβίωση η οποία αναφέρθηκε στην αρχή.

Ένα σημαντικότατο εμπόδιο, εντούτοις, σε αυτήν την αναβίωση φαίνεται πως έχει αποτελέσει η αδυναμία της θεωρίας του φυσικού δικαίου να προσαρμοστεί στους ιερούς και απαραβίαστους κανόνες της ηθικής θεωρίας —ιδιαιτέρως στη διάκριση του «είναι / οφείλει να είναι», η οποία ανάγεται στον David Hume, και στην ανάγκη να αποφευχθεί η «φυσιοκρατική πλάνη», την οποία υπέδειξε ο G. E. Moore.

Ορισμένοι ρωμαιοκαθολικοί ηθικιστές προχώρησαν στη διατύπωση μίας θεωρίας «νέου φυσικού δικαίου», ανταποκρινόμενοι στην διαμάχη η οποία προέκυψε από το γεγονός ότι ο Πάπας Παύλος VI χρησιμοποίησε το φυσικό δίκαιο για να καταδικάσει την πρακτική της αντισύλληψης. Η νέα αυτή θεωρία του φυσικού δικαίου φέρεται ως αποδεσμευμένη από τις εννοιολογικές παγίδες που έθεσαν ο Hume και ο Moore, και είναι χωρίς αμφιβολία περισσότερο αποδεκτή από θεωρητικούς ανήκοντες στην παράδοση της αναλυτικής φιλοσοφίας του εικοστού αιώνα. Προβάλλει επιπλέον τον ισχυρισμό ότι είναι θεμελιωμένη σε αυταπόδεικτες «βασικές αξίες», και έχει ευρέως προκαλέσει το ενδιαφέρον, ωστόσο γεννά κάποια ερωτηματικά: υπό ποία έννοια είναι βασισμένη στη φύση; και (εφόσον αποφεύγει κάθε συσχέτιση με τον Θεό ως πρωταρχικό νομοθέτη) υπό ποία έννοια πραγματεύεται, εάν πραγματεύεται καν, όρους δικαίου;

Περίληψη: ΝΙΚΟΛΑΟΣ ΓΚΟΓΚΑΣ

