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Conscientious Objection in the Nuclear Age: A Natural Law Perspective

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In order to highlight the special characteristics of the religious, Soren Kierkegaard in the writings that he later characterized as "aesthetic" emphasized the distinction between the aesthetic, ethical, and religious spheres. To highlight the specifically ethical, I would like to suggest at the outset, as a kind of heuristic device, that we temporarily utilize something like that Kierkegaardian distinction between the "three spheres". For in discussions of moral questions, very often issues of a religious and/or aesthetic nature - which are outside the scope of morality proper - are intermingled or confused with, or substituted for, moral arguments; so that it becomes advisable beforehand, as far as possible, to eliminate considerations which are extrinsic to morality, and which can prevent us from coming to terms with the strictly ethical issues. The result should be not necessarily simplification but quite possibly clarification.

With regard to liberty, for example, a religious interpretation is advanced by Kierkegaard according to which freedom is contradistinguished not from necessity but from sin. Liberty for the Christian is essentially a state of grace and salvation, which may be concomitant to, and compatible with, political oppression or insuperable practical obstacles to personal development or activity. On the level of the aesthetic (in the wide sense), we find the common concept of liberty as the "ability to preserve one's nature and do what one likes without unnecessary obstacles," which receives elaboration as a philosophical theory in the work of Thomas Hobbes and others. Standing in the middle, as an example of a strictly moral approach to liberty, is Immanuel Kant's characterization of liberty as autonomy, the rational self-determination of persons coordinated into a kind of moral republic or "kingdom of ends."

As we consider the case of conscientious objection, it seems evident that the extenuating factors and excusing circumstances which have justified conscientious objection in the United States have traditionally, and primarily, been of a religious nature. The successful American Christian conscien-

tious objector typically appeals to his denomination's pacifist interpretation of Gospel spirituality (as with Quakers), or to the complete independence of the "Kingdom of God" from secular authority (as with Jehovah's Witnesses). It is also possible for mainline Catholics and Protestants to appeal to their own pacifist interpretation, or to the interpretation of their faith subcommunity, as a justification for their stand vis-à-vis war. But it is remarkable that for both draft-board adjudicators and anti-draft appellants, specifically moral objections and arguments seem to be excluded by a kind of common consent. The venerable hosts of utilitarians, deontologists, natural law theorists, etc. seem constrained to stand on the sidelines when it comes to actual, practical, personal confrontations with one's draft board. Possibly the reasons for this are primarily practical: A denominational connection, especially where an institution has a history of pacifism, can more readily be confirmed. Long-standing active membership in a religious congregation gives credibility to an anti-war position taken by a draftee. But surely religiously motivated pacifism is not the only or the main reason for refusing to participate in a war.

Are there any powerful, persuasive and germane arguments of a purely moral nature sufficiently practical and applicable to serve to exonerate an individual from military combat service? In addressing this question, we must first distinguish between approaches which emphasize a subjective decision-procedure - e.g., the negative Golden Rule that one should not choose to do anything to anyone that he would be unwilling for that person to do to him - from approaches which are based on ostensibly more objective considerations. Prima facie it would seem that an objective norm such as "natural law," if it could point to certain hard and publicly ascertainable facts which are also indisputably common values, would be a solid buttress against the welter of counterpoised "facts" that any government can muster up in justifying mobilization and war and the drafting of recruits for war.

Natural law has at certain historical confluences
been simply identified with the positive law – e.g.,
the “natural law” of subjection of slaves to masters
in eras when slavery was officially condoned, or the
“natural” domination of husband over wife. But it
has also been at times the indispensable socio-politi-
cal lever for transcending the oppression of positive
laws. For example, the natural law that government
should exist for the sake of, and/or with the consent
of, the people governed has been the means of justi-
fying and instigating the overthrow of tyrannies.
One question is this: Can an appeal to natural law be
effective in that particular species of oppression in
which an individual is being constrained unjustly to
fight in a war, or constrained to fight in an unjust
war, or constrained by a government to fight in any
war in a context wherein no war can conceivably be
justified?

An initial elimination of one approach seems fea-
sible: When it comes to conscientious objection, it
seems that an appeal to the law of “killing only for
self-defense” would be, in the last analysis, too in-
conclusive. Such an imposing array of actual or poten-
tial hostile intentions exist in the international
arena that a protective or suspicious government can
always argue forcibly that it is fighting a war of self-
defense, or initiating a preemptive war to obviate
the necessity of defending against inevitable and im-
minent aggression, or fighting not against specifically
military aggression but against, say, economic ag-
gression which has the potential of destroying its
subsistence as a nation. In our current geopolitical
context, a third-world nation might justify a preemp-
tive attack on another nation on the grounds of dis-
tribution inequities resulting from Western “greed,”
or on the basis of a conjectured future blockade of
exports or imports.

As one considers the applicability of natural law
theory to the issue in question, a hurdle that pre-
sents itself is the well-known lack of consensus even
among practitioners of natural law themselves, as to
which concept of “nature” and/or “natural law” an
appeal should be made. Some would even be satisfied
with the absolutely vague and completely in-
nocuous principle of synderesis, “good is to be done
and evil is to be avoided” – a tenet highly unlikely to
move any hearts at the military conscription estab-
lishments! Faced with this de facto lack of consen-
sus, I would like to suggest in the interim (while
pathfinders are still searching for some path to con-
sensus) that two somewhat specific tenets of tradi-
tional natural law theories (certainly more specific
than synderesis) are eminently applicable to the
issue of conscientious objection:

1) The concept of universal human brotherhood
(characteristic especially of the stoicism of Epictet-
tus), which relativizes all struggles of ascendancy of
one national, political, ethnic, or religious group
over another, and disallows any thought of annihilat-
ing, or even subjugating, any group, is inherently in-
compatible with wars which aim at such subordina-
ion or annihilation. (The recent “Eve” hypothesis
concerning the descent of the species from a single
woman gives genetic substantiation to this concept;
and the Treaty on Genocide, recently and belatedly
ratified by the American Congress, might be taken
as the final practical recognition of this principle in
the sphere of contemporary international law.) Cases
in point might be wars or campaigns directed against
Kurds, Jews, Palestinians, Hindus, Moslems, Bosni-
ans, Croats, Iraqis or Iranians. And in the past,
American intervention in Vietnam to orchestrate the
victory of one political faction over the other would
have been objectionable for similar reasons, unless it
could have been shown that one of the factions had
been aiming at the forcible extermination of the
other.

2) The law of self-preservation, universally taken
for granted and almost a truism, receives particular
emphasis in the Thomistic version of natural law,
which emphasizes the teleology of all natural beings
toward maintaining and fostering their existence. In
previous times, this law would not have been of
paramount importance for conscientious objection,
because war was considered a major, last-resort
means of self-preservation for a political entity. But
now the issue has become more precisely an issue
of self-preservation against a species of war itself,
that is, against nuclear war; since nuclear war, at a
certain level of firepower, and in probable conjunc-
tion with a “nuclear winter,” has the potential of
annihilating the human species, as well as all other
species of life on the planet. And since at present
even a limited or regional war could conceivably ex-
pand (as has happened in the past) into a worldwide
conflagration, war used by past generations as an in-
strument for the resolution of conflicts must be
viewed by the present generation as a quaint lux-
ury. With the widespread recognition of such possi-
bilities and of such dangers in the last decade, a
timely appeal to the fundamental and ineluctable
law of self-preservation of the species, and of all the
nationalities or peoples encompassed by the species,
should be both credible and powerful.

With deference to those who are anxious to avoid
“naturalistic fallacies,” we might observe that both
the above-mentioned laws – the law of allegiance to
the human species as a whole and the law of self-
preservation – are not only facts of existence and
continued existence but also are values, recognized
as commendable and rational at least in theory if not always in practice by the vast majority of peoples of the world. It is not this convergence of fact and value which should be considered paradoxical, but rather the artificial separation of fact from value in the first place (which has instigated in philosophical discourse a multiplication of specious and rhetorical "naturalistic fallacies").

With a view to possible allegations of "objectivism," it should also be observed that the appeals made both to universal brotherhood and to species-self-preservation do give due respect to the elements of subjectivity and historicity. It is precisely human social and political and technological evolution that gives these long-standing natural laws, recognized indeed for millenia, a new and an emphatically persuasive force in the present era.

One cannot, of course, predict how persuasive such arguments from natural law might be to the various concrete officials an individual conscientious objector might have to deal with. But possibly we have now sufficiently transcended our long-standing ignorance of the terminal consequences and side-effects of nuclear attacks, and possibly we have even made sufficient advances beyond the narrow provincialism of us-against-them, so that such "merely ethical" considerations might have as much force as, or more force than, the strictly religious grounds considered valid in past wars and past conscriptions.

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NATURAL LAW AND CONTEMPORARY PUBLIC PHILOSOPHY

I was just about the only philosopher at this conference, attended primarily by lawyers and judges around the country. The conference opened my eyes to the fact that natural law, which I had primarily viewed and taught as a theory, is being applied by members of the legal profession – admittedly a minority at present – on a daily basis. The conference opened with a paper by David Forte of the Cleveland-Marshall College of Law, entitled "The Natural Law Moment." Forte's paper focused on the resurgence of interest in natural law in the aftermath of the Holocaust and the Nuremberg trials, and on recent Neo-Thomist contributions as well as John Finnis's "phenomenological" contribution to natural law theory. The papers presented at this conference were primarily concerned with practical topics; vigorous applications were made to practical issues – tort reform, privacy issues in individual rights, welfare, divorce, pornography, abortion, in vitro fertilization, euthanasia, assisted suicide, workplace safety, school choice, homosexuality, sodomy, taxation, the right/duty to work, just-war theory, and many other topics. The keynote address was presented by Judge John T. Noonan, Jr., of the United States Court of Appeals for the Ninth Circuit, whose panel decision regarding the illegality of a Washington State law concerning assisted suicide had recently been overturned by the majority of the Ninth Circuit Court.

As I listened to these very interesting papers, I began looking for theoretical underpinnings. What I noticed was a strong general influence of the traditional natural law tradition from Aristotle, the Stoics, Augustine and Aquinas, but a more specific influence of John Finnis's natural law theory, a contemporary phenomenological approach which was frequently cited. On the other hand, not infrequently participants, finding it difficult to comprehend a natural law theory not based in nature, expressed disagreement with, or doubts about, the "self-evidence" of Finnis's non-naturalist revision of Aquinas's natural law theory. Thus the ongoing debate between Finnis and Grisez et al on the one side, and Henry Veatch and Ralph McInerny et al on the other side came to the fore as a kind of subtext as the conference progressed, with the specter of David Hume's "ought" versus "is" chasm and G. E. Moore's "naturalistic fallacy" hovering over the discussions. But, bracketing out such theoretical issues temporarily, the conference participants did their real work in illustrating the many areas in contemporary jurisprudence where positive law arrives at its limits, so to speak, and almost necessitates natural law considerations where morality and legality intersect.

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