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Natural Law and Natural Rights

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First, I want to discuss some terms. "Natural rights" and "human rights" are closely related but not synonyms. Natural rights are connected with natural law theory and encompass human rights. If something is considered a natural right, it is also a human right. Not every proponent of human rights subscribes to natural law theory, however. From this perspective, it is false to say that if something is a human right, it is also a natural right. Although we expect a broad convergence of rights agreed on from both perspectives, divergences may occur.

Also, "natural rights" should be distinguished from "natural law." The confusions between them are traditional and long-standing. Ius in Latin can mean either "right" or "law." This ambiguity led the medieval jurists to make a distinction between objective ius and subjective ius (law and right).¹ Perhaps the same ambiguity helped transform the historical emphasis from law to rights, without the change being noticeable. In German, das Recht has a similar double meaning, leading to hesitation among translators as to whether Hegel's Philosophie des Rechts should be translated as Philosophy of Right or Philosophy of Law. The case is similar to le droit in French, el derecho in Spanish, and lo diritto in Italian. So we are faced with at least one situation where Anglophones might claim that their language is more precise philosophically than other languages!

But the ambiguities are not just semantic, they are also conceptual. Many philosophers associate "natural law" with "state of nature" theories, which are primarily concerned with the elucidation of basic rights. However, we should remember that even classical theorists like Hobbes and Locke discuss natural law as well as natural right.

Natural law addresses fundamental moral duties, natural right (and rights) concern fundamental moral claims or entitlements. John Finnis in Natural Law and Natural Rights develops a precise legal definition:

We may safely speak of rights wherever a basic principle or requirement of practical reasonableness, or a rule derived therefrom, gives to A, and to each and every other member of a class to which A belongs, the benefit of (i) a positive or negative requirement (obligation) imposed upon B (including, inter alia, any requirement not to interfere with A's activity or with A's enjoyment of some other form of good) or of (ii) the ability to bring it about that B is subject to such a requirement, or of (iii) the immunity from being himself subjected by B to any such requirement.²
Natural law and natural right are correlative; neither can exist without the other. In social relationships, the existence of a right implies a corresponding duty, and a strict duty in a social context implies that someone has a right. In philosophy, natural rights are connected with individuality and personhood. Natural law, however, is associated with sociality and communality—the proper relationship between individuals, possibly in a top-down configuration, sometimes horizontally.

Natural rights are implicit in a natural law theory, but explicit attention to natural rights has evolved slowly. One hears of dubious and strained ascriptions of natural rights theory to Plato and Aristotle, but we should focus on the Stoics for definite statements about natural rights. The Stoic philosopher Epictetus writes, "Even the slave is deserving our esteem and able to claim from us his rights"—a far-reaching insight coming from the second century A.D. Aquinas, however, does not present a theory of rights in the modern sense. *Ius* for Aquinas is Aristotelian justice, the virtuous maintenance of equitable relationships concerning property among individuals. He says nothing about the right to political liberty or equality, or even to life or happiness.

The modern notion of natural/human rights came into the limelight with the French *Declaration of the Rights of Man and the Citizen* (1789), which asserted that liberty, property, security, and resistance to oppression were the "impresscriptible natural rights" of all human beings. They are "impresscriptible" because no political power or legislature could grant them or take them away. Earlier, American founders like Jefferson, working in the context of Lockean natural law theory, grappled with the problem of coordinating natural law with the rights of subjectivity. Spelling out these rights, the American *Declaration of Independence* (1776), thirteen years before the French *Declaration*, opens by emphasizing the basic rights of "life, liberty, and the pursuit of happiness."

For us in the twenty-first century, the major impetus to a revival of interest in both natural law and natural rights was the Nuremberg trials in the aftermath of World War II and the Holocaust in Nazi Germany. These trials brought to the fore the question of whether there is any higher law to which we can appeal when statist laws are corrupt or evil. (How can we even judge statist laws as evil, except in terms of some higher standard of law?) Subsequently, a remarkable international consensus on basic human rights was achieved in the Universal Declaration of Human Rights, promulgated by the United Nations, which gave member nations the hope of preventing any recurrence of a holocaust. The rights listed in the 1948 Declaration included rights to life, liberty, and security of person; equality before the law; privacy; marriage and protection of family life; the ownership of property; freedom of thought, conscience, and religion; work; education; protection against unemployment; enjoyment of the arts; and many other rights in the legal, political, and cultural spheres.

As we examine this extremely extensive list, the question naturally emerges as to whether consensus, even broad consensus, is enough to provide a justification for these rights. If someone asks, "What are the grounds for the supposed right to
freedom of thought?" we should be able to offer a satisfactory philosophical 
grounding for this alleged right. And do not some rights exist, say, the rights of 
women and children, which, even in lieu of a broad consensus, can be and should 
be justified and defended?

When asked about the foundation of natural rights, our first response might be, 
"Well, of course, the basis for natural rights must be in human nature itself." But 
this response will soon encounter the objection, "What do you mean by human 
nature?" Even if you could answer that objection satisfactorily, you would 
inevitably encounter the next objection, "You are guilty of the value/fact or 
'ought'/'is' fallacy." Natural rights are obviously values, and we cannot derive a 
value from a fact; but is not human nature something factual? The interdiction of 
this fallacy is supposedly traceable to Hume, although a number of works take 
issue with this widespread interpretation of Hume. But if, in our strenuous efforts 
to avoid all fallacies, we resolutely try to avoid deriving any moral values from 
human nature, we almost inevitably end up trying to excogitate basic values on the 
basis of pure reason, something that Hume, who traced moral values back to 
"sentiments" grounded in human nature, roundly criticized.

Hume writes:

The Ultimate ends of human actions can never, in any case, be accounted for 
by reason, but recommend themselves entirely to the sentiments and affections 
of mankind without any dependence on the intellectual faculties ... Reason, 
being cool and disengaged, is no motive to action, and directs only the impulse 
received from appetite or inclination by showing us the means of attaining 
happiness or avoiding misery ... The standard of [reason], being founded on the 
nature of things, is eternal and inflexible, even by the will of the Supreme 
Being; the standard of [the sentiments], arising from the internal frame and 
constitution of animals, is ultimately derived from that Supreme Will which 
bestowed on each being its peculiar nature and arranged the several classes and 
orders of existence. 

The major contemporary theoretician of natural law and natural rights John Finnis, 
following the lead of the Thomist Germain Grisez, makes a clean break with 
Thomistic attempts — or what seem like Thomistic attempts — to derive natural law 
from human nature. His non-derivation is based on a set of seven self-evident basic 
values — knowledge, life (preservation of life, possibly also the procreation of life), 
play, aesthetic experience, sociability (friendship), practical reasonableness 
(applying one's intelligence to problems and situations), and religion and pursuit 
of ultimate questions about the cosmos and life — analyzed in the light of "practical 
reasonableness." Ironically, Finnis, whose main purpose is to develop a natural 
law theory adhering strictly to Humean requirements, ends up ignoring the "natural 
sentiments" that Hume emphasized and relying on the sort of pure rational analysis 
that Hume criticized. Finnis's analytical "baptism" of Aquinas's arguments has led
to an ongoing dispute between traditional Thomists like Henry Veatch and Ralph McInerny. More recently, Anthony Lisska tried to mediate between the two camps by discerning analogues to human nature in the concept of "natural kinds," often used in contemporary analytic philosophy.

Natural rights that are not based on nature would be equivocal. Finnis indicated this in a fall 1997 colloquium in the Marquette University Law School. When asked who would be excluded as a natural law ethicist, he was unwilling to exclude any person who held a non-relativistic ethical theory. On further questioning, he included both Bentham and Kant as "natural law theorists"! He then admitted that only on the urging of his mentor, H.L.A. Hart, did he title his book *Natural Law and Natural Rights*. He refused to answer questions about his preferred title for the book. We may surmise that Finnis, Grisez, and others share the search for objective, non-relativistic ethical principles with traditional natural law theorists.

A key problem for some natural law theorists is the *Summa theologiae*, 1-II.94.2, where Aquinas seems to derive natural laws from the tripartite aspects of human nature. He writes:

The order of the precepts of the natural law exists according to the order of natural inclinations. Because in man there is first of all an inclination to good in accordance with the nature which he has in common with all substances: inasmuch as every substance seeks the preservation of its own being, according to its nature: and by reason of this inclination, whatever is a means of preserving human life, and of wading off its obstacles, belongs to the natural law. Secondly, there is in man an inclination to things that pertain to him more specially. According to that nature which he has in common with other animals: and in virtue of this inclination. those things are said to belong to the natural law, which nature has taught to all animals, such as sexual intercourse, education of offspring and so forth. Thirdly, there is in man an inclination to good, according to the nature of his reason, which nature is proper to him: thus man has a natural inclination to know the truth about God, and to live in society: and in this respect, whatever pertains to this inclination belongs to the natural law; for instance, to shun ignorance, to avoid offending those among whom one has to live. and other such things regarding the above inclination.

Thus, Aquinas makes the distinction between three aspects of "nature" in human beings and the fundamental inclinations consequent upon each aspect. First, he argues that humans are beings and, like all natural beings, are inclined to preserve themselves, to stay in being. Second, he says they are animals inclined to reproduce and rear their young. Third, their essence is distinctively and uniquely rational, so that they are naturally inclined to knowledge and social order. From these premises, Aquinas derives the fundamental natural laws of self-preservation, sexual responsibility and the duty to educate the young, and the duties to strive for knowledge of God and maintain amicable relationships with fellow human beings.
Finnis characterizes these passages as simply a “meditation” on the relationship of human life to three metaphysical levels – inorganic, organic, and mental. Finnis argues that this could not be a deduction of values, since values must be derived independently of facts, on the basis of their intrinsic self-evidence.

I am suspicious that Finnis spends fourteen pages in *Natural Law and Natural Rights* arguing for the “self-evidence” of knowledge, the first of the seven “basic values,” and twelve pages discussing the other six values. His long drawn-out and multifaceted arguments for the value of knowledge are offered as a template for the rules of self-evidence, which can be applied to the other values. But after reading these arguments, we think of the scholastic distinction between things that are self-evident *in se* and things that are self-evident *quoad nos*. Surely the moral value of the third basic value, “play,” is something that for trained philosophers is not self-evident *quoad nos*, but at most self-evident *in se*.

I suggest we take a second look at Aquinas’s triple division discussed above. On closer examination of the controversial Question 94 of the *Summa*, we may find Aquinas’s analysis is not really guilty of deriving values from facts, and is not only the clearest exposition of basic natural “laws,” but also of basic natural “rights.”

First it may be a little difficult to understand how an inclination to “self-preservation” can be predicated for beings that have no “self.” Also, the Aristotelian theory that natural “appetites” are intrinsic to all beings – sticks and stones, as well as plants and animals – may seem overly anthropomorphic. However, leaving some unstable elements of physics aside, we can generalize that natural kinds tend to stay in existence. It is almost self-evident that living beings, with all their built-in mechanisms for preserving themselves, tend to stay in being, even if we are anxious to avoid Aristotelian presuppositions about teleology. This tendency toward self-preservation is both a factual drive and a value. Natural beings are constituted to preserve themselves, and this is intrinsically good and valuable. Regarding the second natural aspect, sexuality, we may experience culture-shock, living in an era full of symbols of a contraceptive mentality. However, even the contraceptive mentality underlines our acute awareness of the connection between sexuality and reproduction and our understanding that rearing human children is much more arduous and time-consuming than rearing animal offspring. The birth of a human being does not just take place nine months after conception, but involves prolonged gestation by the family and the community, and immense amounts of education to supply for the comparative lack of instincts in humans. Again, we are faced with the drive to raise our offspring and the responsibility, spanning many years after birth, to further the material, intellectual, and spiritual welfare of our children. With the third natural aspect, rationality, we might balk at Aquinas’s extrapolation of rationality to the quest for knowledge of God, but we can have no doubt that the human desire for knowledge has no built-in limits. Aquinas also associates rationality with sociality. This tendency of dealing rationally with fellow human beings might be characterized as the basis for the *jus naturale*, but the “facts” connected with rationality are not “just” facts. They
converge with the values of expanding knowledge and increasing communality. The convergence is so close and clear in this case that discussion of the "derivation" of the values from the facts misses the point, as if some neutral hiatus exists between facts and values.

Second, in common parlance, we hear about the "law of self-preservation," so existence of such a "law" is a truism. But the self-preservation of the individual is both a duty and a right, the right to life. Self-preservation implies, for example, the duty and right to maintain health and security, the duty and right to avoid euthanasia and assisted suicide; some people even speak of a duty and a right toward things like the primary or secondary inhalation of cigarette smoke. The dutiful implications of sexual reproduction are for us more problematic than the duties of self-preservation. As the global population reaches six billion, some people speak conversely about a solemn duty "not" to reproduce. If we examine this position more closely, we find the real concern is that "poor" people stop reproducing. They cannot assure us that if poor people have fewer children, the ratio of poor people to rich people in the world will change for the better. We ask ourselves if the biblical injunction to "increase and multiply, and fill the earth" (Genesis 1:28) has any meaning at this time. Have we not filled the earth? Not really. The world has plenty of room for everyone. One political scientist has calculated that if the population of the world lived in Texas, there would be a little over 1,300 square feet for each individual. If an "over-population" problem exists, it is not because of too little space. What we call "overpopulation" has to do with politics and the problems of distributing the world's resources. The natural "right" of the poor and the rich to reproduce must be recognized, with the understanding that the duty of having offspring is limited, and, as Aquinas observed in regard to the status of celibates, it is not a duty for everyone. However, we should not concentrate solely on the physical procreation of human beings, for whom the "gestation period" goes well beyond nine months. Corollary with reproductive rights and duties are the right and the duty of working for a living wage to support our offspring. The most important rights and duties are to nurture and educate them, once we bring them into the world, a task many parents are unwilling to entrust completely to the state or to a third party. Finally, in the third natural aspect, we see the clearest convergence of right and duty. Our development of rational capacities and the pursuit of knowledge and social concord are not only inalienable rights that we must constantly defend, but they are irrevocable duties that cannot be shirked without a loss of our humanity.

You will note that many of the rights listed in the Universal Declaration of Human Rights – the rights to life, security of person, marriage and protection of family life, the ownership of property, work, education, protection against unemployment – are connected with the rights we have just discussed. But what about freedom? The Universal Declaration also mentions liberty, freedom of thought, conscience, and religion. For the modern consciousness, these rights have a certain precedence and preeminence. Is there such a thing as a natural law or a
natural right of pursuing freedom? We should be aware that freedom in the modern sense does not appear in ancient and medieval philosophy. Explicit discussion of freedom in our sense is not found in the writings of classical natural law theorists. Yet freedom and the right to freedom is implicit in Aquinas. While he does not explicitly mention an inclination to freedom, in the Thomistic Aristotelian context, where the will is the “appetite” of the rational/intellectual faculty, an impetus toward freedom is implied. If the development of rationality is a right and a duty, then the acknowledgment and exercise of freedom is indispensable to rational living. This falls short of Jean-Paul Sartre’s attempt to base all values on freedom and of the emphasis on freedom in the Western world and in modernity in general. Here the issue of the hierarchy of values becomes relevant. Reflection on the Thomistic hierarchy, which begins with the law/right of self-preservation, may be particularly timely for us. In our era of nuclear armament, as warheads are multiplied, as great nations like India and Pakistan force their way into the “nuclear club,” and as potentially terrorist groups are enthusiastically acquiring “backpack” and “suitcase” atomic bombs, we could argue the “law of self-preservation” has become the chief and the most relevant natural law. The world now is faced with the pressing obligation of either eliminating its nuclear arsenals or facing imminent destruction from an accidental or intentional triggering of World War III. But this obligation of self-preservation is at the same time a right that must be claimed by the citizens of the world, despite government reluctance to change the “status quo” of “Mutually Assured Destruction.” If a hierarchy of values exists, life and survival may be even more important than freedom, since they are the sine qua non for the existence of freedom. John Finnis’s mentor, the legal positivist, H.L.A. Hart, although no proponent of natural law, suggested that survival is “the central indisputable element which gives empirical good sense to the terminology of Natural Law.” This is an interesting convergence of legal positivism and natural law theory.

Notes