SOME NATURAL CONFUSIONS ABOUT NATURAL LAW†

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INTRODUCTION

Scientific theories risk instant obsolescence as knowledge advances, but moral theories, once established, seem immune to the fashions of ethics. Thus, modern physics gives an amusing air to Aristotelian discussions of the "elements" out of which matter is made, but neither Hume nor Kant nor Rawls has made *The Nichomachean Ethics* any less relevant today than it was when it was written.[1] Arguments about the good life, it seems, or about how one decides what to do, retain their vitality through time in much the way that good literature retains its value through social and cultural change. This persistence of basic ideas in ethics and literature probably has a common explanation: both enterprises address aspects of the human condition that change, if at all, too glacially to be noticed in the relatively short space of time that separates classical from modern views.

The recent resurgence of interest in natural law in both moral and legal theory illustrates this phenomenon of persistence. In legal theory, the return of natural law as a viable challenger to positivism is marked, most notably, by the work of Ronald Dworkin.[2] In moral theory, the Clarence Thomas confirmation hearings focused popular interest, often critically, on natural law as a potential guide to fundamental questions of morality or public policy.

To describe this renewed interest in natural law as a *resurgence* does imply, no doubt, that the ideas associated with the concept are too vital to be put permanently to rest; but *resurgence* also implies that natural law, for whatever reason, has been assigned the role of challenger to the reigning orthodoxy, rather than that of defending champ. By and large, this inference about the role assigned to natural law by

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1. *Compare* ARISTOTLE, *De Caelo (On the Heavens), in* THE BASIC WORKS OF ARISTOTLE 398 (Richard McKeon ed., 1941) *with* ARISTOTLE, *Ethica Nicomachea (Nichomachean Ethics), in* THE BASIC WORKS OF ARISTOTLE, *supra,* at 935.

2. Dworkin's challenge to positivism begins with the provocative essay *The Model of Rules,* 35 U. CHI. L. REV. 14 (1967), and culminates in the complex book LAW'S EMPIRE (1986).

the general public is, I think, correct. *Natural law* seems to evoke a degree of skepticism in our society that forces any theory that goes by the name to confront a higher burden of proof than is placed on other, more familiar theories. In this article, I explore some of the reasons for this skepticism — reasons that seem to me to represent confusions about what the concept entails, rather than legitimate objections to the substantive doctrines of natural law.

I call the confusions I have in mind *natural* for two reasons. First, I suggest that there are good historical or logical explanations for the confusions — indeed, in several cases, the natural law proponent has invited or perpetuated the confusion and thus helped to jeopardize the public reception of his own ideas. Second, I hope that revealing the "natural" origin of these common misunderstandings will help us to lay them aside and thus give natural law a better chance to make its case on its own terms.

I. Confusing the Moral Theory with the Legal Theory

One persistent source of confusion, which the above remarks inadvertently illustrate, is that *natural law* refers both to a moral theory and a legal theory, neither of which bears any obvious logical relationship to the other. Of these two potential referents, natural law considered as a moral theory enjoys the longer pedigree and has produced the larger body of literature, with proponents to be found among classical Greek and Roman philosophers, medieval theologians, and contemporary moral theorists. Most of these works, particularly in classical thought, emphasize the analogy between discovering moral laws by reasoning about human nature and discovering the natural laws of science. This emphasis allows us to extract at least one of the characteristics that makes a moral theory a natural law theory: namely, the insistence that moral principles are objectively valid and discoverable by reason.

By itself, this insistence on the objectivity of moral judgments, and their grounding in an understanding of human nature, would not distinguish natural law moral theories from more familiar utilitarian or Kantian-based theories.[3] Indeed, that similarity is part of the problem: explaining what makes natural law different from other "objective" theories of ethics may invite confusing a particular version of natural law (for example, a version that claims a special role for theological insight into human nature) with what is characteristic of natu-

3. For further elaboration, see Philip Soper, *Legal Theory and the Problem of Definition*, 50 U. Chi. L. Rev. 1170, 1173-75 (1983) (reviewing John M. Finnis, Natural Law and Natural Rights (1980)).

ral law in general. What *is* characteristic of natural law in general, apart from the claim of objectivity, is, however, a topic that can itself generate considerable philosophical discussion.[4] For the purposes of this article, I shall not attempt a precise definition of natural law but shall only try to show how some misunderstandings about the theory may themselves result from various implicit assumptions about what a natural law theory must be. For this purpose, the question whether a moral theory is labeled *natural law* or not is of less concern than the implications of any moral theory that, broadly speaking, endorses the classical idea that moral truths, like scientific truths, are accessible to reasoned human experience.[5]

In contrast to the moral theory, natural law as a legal theory may seem somewhat easier to characterize, partly because it takes its shape from its explicit opposition to legal positivism: the legal positivist claims that no necessary connection exists between law and morality; the natural law legal theorist denies that a sharp separation of these concepts is possible. To be sure, this brief characterization glosses over several varieties of both positivism and of natural law. But the description is accurate enough on the whole to allow one to inquire what connection, if any, might link the moral and the legal theory.

On the surface, no connection seems apparent. Thus, one might agree with the positivist that to determine "what the law is" without any essential reference to morality is always theoretically possible; yet in so agreeing, one might remain a natural law moral theorist in evaluating and appraising the law. Conversely, one might concede a connection between law and morality yet deny that the morality with which law is connected is that endorsed by the natural law moral theorist. Legal theory, in short, seems to address a question about the connection between two concepts, law and morality. Whatever the upshot of that conceptual inquiry, the question of which moral theory is true seems open to independent argument and determination.

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4. *See, e.g.*, William K. Frankena, *On Defining and Defending Natural Law, in* LAW AND PHILOSOPHY 200, 209 (Sidney Hook ed., 1964). The most persistent question raised by attempts to distinguish natural law from other, objective theories of ethics is whether natural law implies the existence of universal moral truths that make the theory incompatible with theories that recognize cultural or social variation in ethical "truth." *See, e.g.*, Joseph Boyle, *Natural Law and the Ethics of Traditions, in* NATURAL LAW THEORY 3, 18 (Robert P. George ed., 1992). A more recent question is whether natural law implies a theory of truth that is ontological, rather than metaphysical. *See* LLOYD L. WEINREB, NATURAL LAW AND JUSTICE 8 (1987) (criticizing the turn to "deontological" natural law found, for example, in FINNIS, *supra* note 3). For a discussion of this latter question, see Robert P. George, *Natural Law and Human Nature, in* NATURAL LAW THEORY, *supra*, at 31.

5. For another list of the various meanings of *natural law* which also concludes with a decision to use the term in a sense that refers to any objective ethical theory, see Michael S. Moore, *Law as a Functional Kind, in* NATURAL LAW THEORY, *supra* note 4, at 188, 190-91.

Why, then, is the same term used in both legal and moral theory, and why is it that those who begin defending a natural law moral theory so often glide, almost without notice, into the defense of a natural law legal theory as if one position entailed the other?[6]

A. *Historical Sources of Confusion*

One possible explanation is historical: Thomas Aquinas' discussion of natural law remains a classic that is, unfortunately, all too often misinterpreted.[7] Aquinas, in his theological speculations, was propounding a moral theory — a moral theory that included, as a part, a consideration of the relationship between natural law (the moral law, given by God) and man-made law. Today, we would view this question as a question of political theory: to what extent do laws, even if unjust, create moral obligations to obey? In time, however, Aquinas' discussion of this issue of political theory came to be construed as a conceptual enterprise about how to determine what law is, rather than as a moral enterprise about the power of law to create moral obligations. In part, this confusion owes to the way that Aquinas, quoting Augustine, put the point: "a law that is not just, seems to be no law at all."[8] Modern thinkers can easily see in this claim, taken out of context, a direct denial of the positivist's attempt to specify tests for legal validity without reference to concepts of justice or morality. In context, however, it is clear that Aquinas was not concerned about identifying law, or determining legal validity; he was simply making a claim about the moral force of law: unjust laws "do not bind in conscience . . . ."[9] That claim is perfectly consistent with legal positivism; indeed, the modern positivist stresses no point with more missionary zeal than that the mere identification of a norm as *law* (through the positivist's tests for legal validity) does not resolve the question of whether the law should be obeyed or has any moral force.[10]

B. *Etymological Sources of Confusion*

Another possible explanation for the tendency to connect the moral and legal uses of *natural law* is etymological: the inherent ambi-

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6. *See, e.g.*, FINNIS, *supra* note 3.

7. For a discussion of the problems encountered in interpreting Aquinas, see *id.* at 29-36.

8. 2 THOMAS AQUINAS, SUMMA THEOLOGICA ques. 96, art. 4 (Fathers of the English Dominican Province trans., 1952).

9. *Id.*

10. This point is arguably the centerpiece of Hart's famous debate with Fuller. *See* H.L.A. Hart, *Positivism and the Separation of Law and Morals*, 71 HARV. L. REV. 593, 594-600, 615-21 (1958); *see also infra* notes 14-16, 46, and accompanying text.

guity of the word *law* itself. When classical proponents of the moral theory used the term *natural law* to describe their views, the evident analogy to scientific "laws of nature" helped underscore the central claim that moral truths were objectively discoverable by reason. Unfortunately, once the term *law* is introduced, the other sort of law — human law — becomes an equally obvious potential referent that invites analogy, not to the objective truths of science, but to norms created by fiat or will alone. Far from discouraging this possible confusion, natural law theories suggesting that God's will can itself be the source of moral truth actually help perpetuate the confusion.

Once started down this particular path — finding the source of natural law and moral obligation in fiat or will — the natural law theorist must hasten to distinguish the fiat of human will from that of God's will. This process might lead the natural law theorist to conclude that opposition to legal positivism is somehow a logical consequence of a natural law moral theory. Again, such a conclusion mistakes what positivism claims: positivism may claim that human will is the key to what law is, but how to evaluate such laws (whether by reference to God's will or reasoned principles concerning human nature) is a separate matter.

C. *Conceptual Confusions*

A final possible explanation for the tendency to slip from natural law moral theory into an antipositivist view about the nature of law is conceptual. A natural law moral theory is opposed in its central claim to theories that hold morality to be entirely conventional. The legal positivist, in contrast, insists that law, at least, is nothing but convention. In opposing conventional theories of morality, one might think that the natural law moral theorist has some logical reason also to oppose conventional theories of law. Again, to see why this should be so is not easy: no apparent contradiction exists in agreeing with the positivist that "law" is used conventionally, whereas morality is not. Nevertheless, the tendency to take the same, anticonventional stance as regards both law and morality raises the general question whether any connection exists between one's moral theory (of whatever sort) and one's legal theory. If we knew the answer to that general question, we could perhaps apply it to assess the possibility of a connection in the particular case of natural law.

D. *The General Connection Between Moral and Legal Theory*

Consider first the opposite of the natural law moral theorist: the theorist who insists that morality is entirely conventional, or, even

more strongly, that all moral judgments are either relative or meaningless. Here, at least, a logical connection might seem to exist between one's moral theory and one's legal theory. If one thinks that moral judgments are meaningless, then there is little point in advocating a theory of law that insists that one determine what law is, not just by a factual inquiry into the conventions that have been accepted, but also by reference to minimum standards of morality. If *morality* has no content or meaning, it can hardly serve as a check on the positivist's test for legal validity, any more than it could serve as a check on individual behavior.

The problem with this conclusion is that it ignores the fact that the meaning of "law" is not a matter for individuals, with varying moral theories, to determine for themselves. The above conclusion in one sense is perfectly appropriate: *the moral nihilist* could see no point in a theory that urged officials or citizens to determine law by reference, in part, to concepts of justice or morality. But the fact that the nihilist could see no point in such a theory would not prevent a society, misguided though it would be according to the nihilist, from continuing to insist on some connection between morality (as society views it) and the conventions of law. In short, even the nihilist might have to recognize that the conventional understanding about the meaning of *law* incorporates a theory of morality or justice into the test for legal validity — a theory that the nihilist thinks is pointless but that society, presumably, does not. In this case, as long as he could describe and apply society's moral theory, the nihilist could become a natural law legal theorist while remaining a moral nihilist.

One might object that the nihilist in this case (for convenience, I shall call my imagined moral nihilist *Judge Kelsen*) is not really a natural law legal theorist. Judge Kelsen may be able to invoke conventional understandings about morality in evaluating legal conventions, but he only sees those moral claims as themselves conventional. A true natural law legal theorist, it might be argued, refuses to recognize unjust law as "legal" because such laws *really are* unjust, not because they are only conventionally recognized as unjust. Judge Kelsen, it turns out, is actually only a sophisticated positivist, applying exactly the same postivist's legal test of pedigree or source to establish the "moral" standards that determine legal validity. In both straightforward positivism and Judge Kelsen's "natural law," "what law is" turns out simply to be a matter of what is conventionally accepted.

1. *The Hidden Agenda of Natural Law*

This objection is instructive, I think, because it reveals what might

be called the hidden agenda of the natural law moral theorist when it comes to doing legal theory, and it may thus help explain the tendency to find the two theories connected in the literature. The natural law moral theorist wants to use legal theory to reinforce the claims about objectivity and truth that characterize his moral theory. One way to do this is to urge that convention alone does not determine one's legal obligations, that one must also have some regard for the morality of the alleged obligation.[11] As the above objection illustrates, there would be little point in urging such a view unless one had in mind by *morality* something more than convention; thus the battle for the natural law position within legal theory is, indirectly, a battle to proselytize the objective, nonconventional view of morality that characterizes the natural law moral theory. The positivist may well urge that one separate these questions of moral and legal theory and may well protest that, when it comes to morality, he (the positivist) is every bit as persuaded of objective truth and ready to urge that unjust laws be ignored or disobeyed as the next person. But that is just the problem: the positivist leaves this question of the validity and objectivity of moral judgments (and thus the morality of law) to be settled in another arena, whereas the natural law theorist does not want to permit that luxury. By opposing legal positivism and claiming that only human directives that are not too unjust are *law,* the natural law legal theorist forces confrontation, not only with the question of what we mean by *law,* but also with the question of what we mean by morality or justice.

This explanation of the connection between the moral and legal theories, however, still seems at best to be psychological or strategic, rather than logical. Several points seem undeniable with respect to the claimed connection between the two kinds of theory:

(1) First, it still remains true that a natural law moral theorist who does not share the "hidden agenda" described above could accept the

11. This claim about the moral or legal relevance of convention should be distinguished from the different question how to decide what the convention is in the first place — a thorny problem that seems to provide a natural spawning ground for "natural law" theories of adjudication. *See, e.g.,* Ronald M. Dworkin, *Social Rules and Legal Theory,* 81 YALE L.J. 855, 867 (1972) ("[T]he social rule theory . . . believes that the social practice *constitutes* a rule which the normative judgment accepts; in fact the social practice helps to *justify* a rule which the normative judgment states."). As discussed *infra* section III.C.1, this turn to adjudication within natural law legal theory misses the point: as long as the judge's decision has the force of "law" even though wrong (i.e., even if the judge applies the wrong theory of adjudication or misapplies the correct theory), whether the standards to which he is supposed to be referring are those identified by the positivist or the natural lawyer matters little. What counts in the end is the judge's fiat (determined, presumably, in good faith). In the present context, this attempt to find a connection (in the common rejection of convention alone as a clue to truth without consulting "reason") between the moral and legal senses of natural law is misguided: the question is not *how* to determine what the social norm is but what to do with that social norm once it is determined (in whatever fashion) if the norm proves sufficiently unjust.

positivist view that law is conventional and still maintain that morality is objective, without contradiction.

(2) Second, any person holding any moral theory (not just a natural law moral theory) could have a similar "agenda," leading her to oppose legal positivism in order to advocate her own particular brand of morality as part of the test for *law*. This fact underscores the point that what we mean by *law* is, at least in part, a conceptual question and ought to be approached as such without hidden agendas; if the conceptual inquiry shows that law and morality are connected, then we will indeed have to confront the content of both in deciding "what law is" and "what one ought to do."

(3) Finally, one who accepts a purely conventional view of morality need not be only a sophisticated positivist when it comes to legal theory. Positivism may stress that law is conventional, but most theories of positivism do more than that; they also describe exactly how to distinguish the conventions of law from other conventions of society. A postivist theory of law will usually designate, for example, some official set of rules or standards as the "legal" conventions, to be distinguished not only from morality but also from other social conventions.[12] Thus, our imagined Judge Kelsen could conclude that certain basic legal standards (identified as "legal" by the positivist's basic test for legal validity) clashed with other, moral conventions of society. In that case, Kelsen could act as an antipositivist, refusing to uphold the "immoral" legal standards but maintaining that the "morality" by which such standards were gauged was itself only conventional. Although Kelsen would be determining "what law is," in the end, by reference to what is conventionally accepted, that fact by itself need not make Kelsen a positivist. To be a natural law legal theorist seems only to require that one determine legal validity by reference, not only to the positivist test of pedigree, but also by reference to morality — including conventional morality if that turns out to be the true theory of morality.[13]

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12. *See, e.g.*, H.L.A. HART, THE CONCEPT OF LAW 79-88 (1961) (offering a model that presumably could be used to distinguish a wide variety of conventional social rules: moral rules, legal rules, rules of games, etiquette, aesthetics, and so forth).

13. Of course, it is possible that a particular positivist theory of law might include conventional morality as part of the test for legal validity in a way that eliminates the above distinction between legal and moral conventions. (It is sometimes suggested that Dworkin's theory of law is, in the end, just such a version of positivism in which the positivist's social-fact test for law has been broadened to include conventional or positive morality as well as the more traditional legal conventions). *See* Rolf Sartorius, *Social Policy and Judicial Legislation*, 8 AM. PHIL. Q. 151, 156 (1971); Philip Soper, *Legal Theory and the Obligation of a Judge: The Hart/Dworkin Dispute*, 75 MICH. L. REV. 473, 509-16 (1977). In this respect, a conventional moral theory might be thought compatible with positivism in a way that other moral theories are not. This conclusion, however, would not be accepted by all positivists. Hart, for example, seems willing to say that if

2. *A Possible Point of Contact*

Thus far, then, we have no reason to modify our initial suggestion that no logical connection links natural law as a moral theory to natural law as a legal theory. Still, it seems slightly unsatisfactory to suggest that the only explanation for the continued linkage of the two theories in the literature is the hidden agenda of using the legal theory to help advance the moral theory. There may be another explanation for the linkage that, unlike the suggestions made thus far, goes directly to the heart of the disagreement within legal theory itself.

The explanation I have in mind turns the hidden agenda into the central issue in legal theory. Any inquiry into the meaning of a concept must begin with some preanalytic notion of the phenomenon under investigation. Law is no exception. Inquiries into what we mean by *law* always assume some rough, preanalytic notion of law that further, more accurate analysis will clarify. In the case of the positivist, the preanalytic phenomenon has always been, roughly, the common sense idea that law is a set of official directives designed to guide conduct. Further analysis and disputes center, for example, on whether these directives are simply the coercive orders of de facto sovereigns, or the rules accepted voluntarily by a group of officials, or directives with putative normative force that is in some ways like, and in other ways unlike, the claimed normative force of ordinary moral rules. Positivism, in short, assumes from the beginning that a theory of law is supposed to provide a model for directives whose primary point is *to guide conduct.*

Only recently, I think, has it become clear that one way to explain the difference between the positivist and the natural law legal theorist is that the latter implicitly assumes a different preanalytic phenomenon from the outset. The natural law legal theorist believes that we are attempting to model directives that aim not simply to guide conduct but to guide conduct in a certain way: legal directives purport to create moral obligations of "fidelity" to the law. It is impossible to read the famous debate between Lon Fuller and H.L.A. Hart without feeling that this difference in starting point separates the two in a way that ensures that each will miss the other's point. Fuller assumes that the point of a model of law is to show what law must be to justify the

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moral standards are made part of a legal standard, as in the case of the Due Process Clause of the Constitution, then those moral standards are part of the law and consistent with positivism whether or not the reference is to conventional or "true" morality. *See* HART, *supra* note 12, at 199-200. *But see* JOSEPH RAZ, THE AUTHORITY OF LAW 45-52 (1979) (arguing that moral standards, even if explicitly incorporated in legal standards, cannot themselves be part of the positivist law). *See generally* PHILIP SOPER, A THEORY OF LAW 101-09 (1984).

claims to "fidelity" that law makes — that is why the title of his piece focuses on "fidelity to law."[14] Hart, in contrast, is eloquent in his insistence that people mistakenly think that positivism leads to a moral endorsement of hideous legal directives, including even the horrors of the Nazi legal system. For Hart, nothing could be further from the truth; positivism encourages people to exercise their critical moral faculties by separating the question of what law is from the question of its moral relevance as a guide to conduct.[15] Fuller and Hart thus start from completely opposite assumptions, one thinking that a model of law must preserve the claim to moral fidelity, the other thinking that law must be washed clean, in Holmes' cynical acid as it were, of any necessary moral content at all. If one starts with such different assumptions about the goal of a model of law, it is easy to see how further disputes about the details of the competing models might become pointless: the disagreement lies in the starting points, not in the details along the way.[16]

If Fuller was right that an adequate model of law must show how the law's claims to fidelity can be justified, then the hidden agenda of the natural law moral theorist becomes the central problem of the conceptual inquiry into the nature of law. The natural law legal theorist will not be urging that morality must function as a check on legal validity simply in order to advance his own moral theory; rather, the claim that legal norms must have moral effect will be the central claim of the law itself, and the conceptual inquiry will necessarily reflect that claim. The natural law legal theorist's insistence on testing legal conventions by objective moral standards will be one attempt to explain the preanalytic phenomenon. In this way, the natural lawyer escapes the charge that his moral theory determines his position in legal theory. In fact, under this view, the opposite turns out to be true: the legal theory leads to the moral theory as the most plausible way of defending the law's claims.[17]

Does the above argument show, then, that a connection exists between the legal and moral theory? I think not. First, of course, one might contest the question of what the correct preanalytic phenomenon is. Whether legal systems make an essential claim to moral fidel-

14. Lon L. Fuller, *Positivism and Fidelity to Law — A Reply to Professor Hart*, 71 HARV. L. REV. 630 (1958).

15. *See* HART, *supra* note 12, at 206; NEIL MACCORMICK, H.L.A. HART 160 (1981).

16. Years later Fuller finally acknowledged, in some apparent astonishment, that he and his opponents had been operating with different underlying assumptions all along. *See* LON L. FULLER, THE MORALITY OF LAW 200-07 (rev. ed. 1969).

17. For a recent example of this approach, see Michael S. Moore, *Law as a Functional Kind*, *in* NATURAL LAW THEORY, *supra* note 4.

ity, and, if so, what kind of fidelity is claimed, are difficult questions to settle and should, perhaps, be resolved at the end of the inquiry rather than taken for granted at the start. But even if one accepts the view that law makes essential moral claims that a theory of law must reflect, one is not yet committed to a natural law moral theory as the only way of modeling those claims. One might also, for example, insist that the claims are unjustified and attempt to show through a combination of legal and political theory that legal systems can and should modify or eliminate any strong claim to moral fidelity. Finally, even if one is inclined to accept the moral claims of the law as a central feature that must be accounted for in a legal theory, the law's claim to fidelity does not by itself entail an objective ethics; other moral theories besides natural law may provide the basis for such a claim.

What we have shown at best, it seems, is a possible connection between legal theory and the *claim* by legal systems that the actions of the system are morally justified. This may explain why some modern natural law theorists believe they have discovered an ally in the posture of the legal system — an ally in the form of a widespread and important practice that seems to assume an objective truth for the obligations imposed on citizens similar to the central thesis of objective duties found in a natural law moral theory. If this is indeed the posture of the legal system (and this may require demonstration and argument), then one can still note, without belittling the importance of this alliance between the claims of natural law moral theory and those of the legal system, that both claims must be tested and demonstrated. In that sense, the connection between the legal and the moral theory remains, at best, not one of logical entailment but of sympathetic partnership in the attempt to defend claims about the objectivity of moral (and legal) judgments.

II. Confusions Within the Moral Theory: The Unfortunate Connotations of Natural Law

One journalist described the reaction to the revelation that a potential Justice of the Supreme Court might actually believe in natural law "as though the man had let slip a reference to torture by thumbscrews . . . [or] had disclosed an obscure and probably sinister belief in alchemy."[18] Another suggested it was as if critics "had found [Judge Thomas] at the airport in a Hare Krishna robe."[19] Nor were only

18. Peter Steinfels, *Beliefs*, N.Y. Times, Aug. 17, 1991, at 9.

19. Stephen Chapman, *Is Thomas' Belief in Natural Law Unnaturally Odd?*, Chi. Trib., July 18, 1991, § 1, at 27.

Thomas' opponents concerned about the possible damage to his reputation — not to mention confirmation prospects — if he were branded a believer in natural law. Senator Danforth, Thomas' principal supporter in the hearings, went out of his way to put to rest the idea that the nominee "believed scary things about natural law,"[20] and Judge Thomas himself, on the opening day of the hearings, agreed with the characterization of his previous writings on the subject as just the "philosophical musings" of a "part-time" political theorist.[21] The main point, repeatedly emphasized by the nominee, was that he did not now believe, and never had, that there was any role for natural law to play in constitutional adjudication.

These reactions reveal two possible concerns about natural law. The first concern is about the moral theory itself and the manner in which one determines moral truths by reasoning about human nature. The second concern is peculiar to the judicial institution and points out that, whatever one thinks about the moral theory, something about a natural law view is inconsistent with the role of judges within legal systems in general, or at least within a constitutional democracy such as our own. This latter apprehension reveals, I think, the most interesting set of confusions about what the term *natural law* entails, and I shall consider this problem in some depth in the next section. Before doing so, however, it is worth briefly acknowledging some of the unhappy connotations that the moral theory itself often has.

A. *The Religious Connection*

If the central idea of a natural law moral theory were simply the claim that moral truths are objectively valid and knowable by reason, there would be no more reason to react skeptically to the theory than to any other "objective" theory of morality.[22] Indeed, as some commentators during the Thomas hearings rushed to point out, natural law could easily be used to describe the moral theories that many in

20. *See* David G. Savage, *Thomas Backs Off Abortion, Natural Law Statements,* L.A. TIMES, Sept. 11, 1991, at A1 (quoting Sen. John C. Danforth (R.-Mo.)).

21. *See The Nomination of Clarence Thomas to the Supreme Court,* Federal News Service, Sept. 10, 1991, *available in* LEXIS, Nexis Library, Wires File.

22. There is some disagreement about whether a utilitarian theory could be an example of a natural law theory. This disagreement stems in part from the view that natural law posits the existence of moral principles that are absolute and universal in a way that is inconsistent with the utilitarians' suggestion that any moral principle, however apparently inviolable, may in theory have to yield to the greater social good. *See* Soper, *supra* note 3, at 1175 n.21; *see also supra* note 4. Resolving this question is unnecessary for purposes of this article, particularly since the issue is not what will count as a natural law moral theory, but, rather, how such a theory differs from other, widely accepted theories that assume an objective morality.

our society would accept without skepticism.[23] The putative concern over the theory in Judge Thomas's case, it was suggested, simply masked the real concern about Judge Thomas' actual values — particularly with respect to abortion.[24]

This defense of natural law as a moral theory identified by the insistence on the objectivity of moral judgments certainly puts the theory back into the mainstream of ethical thought (at least within society, if not among philosophers). It also leaves natural law with the same problems that have always confronted any moral theory that claims truth for its judgments: how to substantiate those claims and account for value disagreement. If we accept that natural law is just another way of claiming that ethical statements can be true or false, then we will have to recognize that people who accept the theory can nevertheless reach different conclusions about fundamental moral questions with no clear way of judging among them. Indeed, the commentators during the Thomas hearings who rushed to defend this view of natural law were quick to point out that the theory did not dictate any particular position on the morality of abortion, particular sexual practices, or other aspects of human nature that have often historically been associated with a natural law theory.[25]

The reference to unfortunate historical connotations points to one reason for the skepticism about natural law. As previously noted, the theory has often failed to distinguish between faith and reason as the basis for one's claim about moral truth. As long as the doctrine is associated with a particular version of natural law — for example, one that finds the source of moral truth in revelation, or, even more narrowly, revelation through a particular church — it will be easy to understand why those who do not share the faith greet the theory with distrust.[26]

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23. For one of the best clarifications of the issue in the press during the Thomas hearings, see the Steinfels article which appeared in the New York Times:

> [R]aising questions about a specific version of natural law or its relevance to judicial review is different than raising eyebrows at the very idea. For all its variations, the broad notion of natural law is straightforward: Objective standards of right and wrong that human reason can discern as inherent to the nature of humans and the world about them.

Steinfels, *supra* note 18 (citing as examples of illustrative proponents: Locke, Montesquieu, Jefferson, Adams, Abraham Lincoln, and Martin Luther King (among others)).

24. *See, e.g.*, Michael Moore, *Perspectives on the Supreme Court; Unnatural Brawl over Natural Law*, L.A. TIMES, Sept. 3, 1991, at B5.

25. *See id.*

26. I do not mean to deny that one can have reason to wonder whether natural law, in any particular case, is being used in a religious or secular sense. Indeed, it is because the historical connotation still flourishes that doubts were raised in Judge Thomas' case. *Compare* Patrick Riley, *Thomas' Nod to Natural Law Is No Crime*, L.A. TIMES, July 22, 1991, at B5 (director of governmental affairs of the Catholic League, urging a religious interpretation of natural law, in opposition to secular, humanist, and positivist interpretations) *with* Danny Goldberg, *Perspec-*

B. *The Secular Substitute for Revelation: Self-Righteousness and Self-Evidence*

Modern versions of a natural law moral theory that stake claims to moral truth on reason, rather than on faith, should not confront any greater degree of skepticism than any other objective ethical theory. In practice, however, one often finds that natural law theorists meet the great problem of an objective ethics — the problem of proof, or how one knows what is true — in a way that seems, to some, to be the secular equivalent of the claim to special insight through personal revelation. Thus, if the test for truth in a natural law theory is that a proposition is "self-evident," those who disagree seemingly must admit to being either immoral or stupid.[27] The resulting perception of self-righteousness may explain why a hostile reaction to the term *natural law* arises even when the proponent intends no particular theological connection.

Again, it should be clear that this aversion to natural law is not a justified reaction to the theory itself but is, at best, a plausible response to particular versions of the theory or to the zeal with which particular advocates of natural law press their views. In this respect, natural law is no different from other objective theories. Explaining how one knows the truth will be a problem for any such theory, and even "self-evidence" as the ultimate test for truth has a long, if contentious, history in moral philosophy. If natural law theorists have difficulty loosening themselves psychologically from the historical connection with the sense of "God given truths,"[28] that may explain their tendency to be overconfident about their views; it does not explain why the theory itself should be suspect.

III. Confusions Within the Legal Theory: The Dilemma of Natural Law

A. *Introduction*

From the point of view of legal theory, where *positivism* and *natu-*

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tives on the Supreme Court; It's Religion in Sheep's Clothing, L.A. Times, Sept. 3, 1991, at B5 (According to the chair of the ACLU Foundation of Southern California: "The idea of a 'natural law' that superseded human law is not a judicial concept but is fundamentally a theological concept. It directly contradicts many of the deepest concerns about religious intolerance that led to . . . the Bill of Rights. . . .").

27. For further discussion, see Soper, *supra* note 3, at 1178-79.

28. *See, e.g.,* Linda P. Campbell, *Thomas' Belief in 'Higher Law' at Center Stage,* Chi. Trib., Aug. 18, 1991, § 4, at 1 ("One of the great dangers of a natural-law philosophy is that individuals hold their views with great certainty and rigidity because they are thought to be God given truths." (quoting Erwin Chemerinsky, People for the American Way, Clarence Thomas' Natural Law Philosophy 8 (1991))).

ral law have long had rather specialized meanings, the reactions revealed during the Thomas hearings point to one of the more intriguing and least-explored dilemmas that confront any natural law legal theorist. I shall call this the *natural law dilemma,* though I shall postpone its description and investigation for the moment to focus first on certain other misconceptions about the role of natural law within the judiciary itself.

In order to avoid further confusion with the various senses in which *natural law* is used within moral theory, I shall simply use *morality* to talk about the issue that assumed central importance in the Thomas hearings: to what extent should a judge's view of morality (whatever kind it is, natural law or otherwise) affect his decision in a legal case?

One point on which Judge Thomas and Senator Biden seemed to agree was that no judge should ever retreat to natural law to reach a result inconsistent with the result required by the Constitution or by positive law. It was this possible connotation of natural law that Biden, among others, wanted to be sure Judge Thomas did not embrace.[29] Moreover, it was this possible connotation — that natural law meant a "higher law" than the Constitution, on which a judge was free to draw in opposition to the clear mandates of the Constitution and laws, that the media often took to be the critical definition of belief in natural law.[30]

1. *Confusing the Natural Law Debate with the Interpretivism Debate*

Note that Biden (and Thomas too, for that matter) seemed to concede that some provisions of the Constitution, of course, could only be interpreted by reference to fundamental, objective moral truths.[31] In this respect, Biden, at least, was siding with those who oppose the idea

29. *See* Joseph R. Biden, Jr., *Law and Natural Law: Questions for Judge Thomas,* WASH. POST, Sept. 8, 1991, at C1 ("If Clarence Thomas believes that the Supreme Court should apply natural law above the Constitution, then in my view he should not serve on the Court.").

30. *See, e.g.,* Katherine Bishop, *Diverse Group Wants Juries to Follow Natural Law,* N.Y. TIMES, Sept. 27, 1991, at B16 ("Natural law, the theory that written law is invalid if it is contrary to universal moral principles, has been much in the news lately, given Judge Clarence Thomas's remarks on the topic.").

31. Biden, *supra* note 29 ("[T]he American tradition of natural law has been to protect the rights of individuals to make decisions about matters of moral significance . . . ."). In the end, Thomas' position about whether natural law could be used to interpret the vague clauses of the Constitution remained unclear. Despite rejecting a "higher law" approach to constitutional adjudication, he suggested that the "liberty component of the Due Process Clause" reflected the Framers' natural law ideas and would require an interpretation in accordance with "our history and our tradition." *The Nomination of Clarence Thomas to the Supreme Court,* Federal News Service, Sept. 12, 1991, at 16, *available in* LEXIS, Nexis Library, Wires File.

of strict construction, either because it is not really possible to discern original intent, or because the Constitution reveals an intent to permit judicial enforcement of unenumerated fundamental values. What we have here, of course, is an old, if recently revived, debate about judicial review and how to interpret the Constitution, made new only because of the suggestion that somehow we are talking about "natural law," rather than about "strict construction" or "interpretivism."

That this debate is not peculiar to natural law was made clear in the exchange that took place on the op-ed page of the *New York Times* between Professors Laurence Tribe and Michael McConnell. Tribe, in a letter raising critical questions about Judge Thomas, suggested that recourse to natural law had last occurred over eighty years ago during the now discredited *Lochner* era of judicial activism.[32] McConnell, in response, chided Tribe for inconsistency: "Judge Thomas's opponents cannot have it both ways. They cannot attack Judge Bork for his refusal to recognize rights based in natural law and then attack Judge Thomas for supporting those rights."[33] Tribe retreated (or clarified): "As Mr. McConnell knows, my objection is not necessarily to 'natural law' thinking, which I agree has a venerable history and much to commend it. My concern is with how Judge Thomas deploys natural-law approaches."[34] Once again, how the theory is applied, rather than the theory itself, is the concern.

The question, then, whether or not the Constitution permits or authorizes judges to look for values beyond those enumerated is a question independent of whether one is a natural law legal theorist or a positivist. Indeed, the strongest argument for interpreting the Constitution by reference to fundamental moral values is itself a positivist's argument: namely, that the text itself, in such vague standards as the Due Process Clause, or the Ninth Amendment, inevitably requires recourse to moral principles in order to determine the law.[35]

2. *Natural Law as "Higher Law"*

What about Biden's concern that natural law would conflict with clear directives of positive law? Once we get beyond the debate about original intent and interpretivism, should we worry that a judge who

32. Laurence H. Tribe, *Clarence Thomas and "Natural Law,"* N.Y. TIMES, July 15, 1991, at A15.

33. Michael W. McConnell, *Trashing Natural Law,* N.Y. TIMES, Aug. 16, 1991, at A23.

34. Laurence H. Tribe, Letter to the Editor, *The Case Judge Thomas Shouldn't Have Heard,* N.Y. TIMES, Aug. 30, 1991, at A22.

35. *See, e.g.,* HART, *supra* note 12, at 199-200 (noting that the U.S. Constitution, by this incorporation of moral principles, makes morality relevant to determining the law in a manner fully consistent with positivism).

believes in natural law might substitute his own moral views even where the text is clear — not because he is interpreting or applying the Constitution, but in direct disregard of the Constitution?

We should first note that we have now moved into a world in which the terms *natural law* and *positivism* are being used with very different meanings than those they normally carry within legal theory. If anything, the positivist should concern someone like Senator Biden, because the positivist insists that deciding what law is has no necessary bearing on the moral question of what one ought to do about it. Whether the citizen ought to obey the law or, for that matter, whether the judge *ought* (as a moral matter) to follow or apply the law, rather than try to subvert it if he can, is a separate question for the positivist, who urges judge and citizen alike to consider this issue seriously after having decided what "the law is."[36] *Positivism,* as used by Biden and, indeed, much of the media — meant something else altogether: it tended to be used as a synonym for the *originalist* side of the interpretivism debate, with those who believe only in written or textual authority being labeled *positivists.* Or it tended to be equated with a moral theory that made human law obligatory, regardless of its moral worth — exactly the claim that positivists vigorously contest as a misunderstanding of their theory.

But we can overlook the difference in terminology and still ask the central question that so concerned Biden: What is the obligation of a judge, once the law is found? Can the judge, if she thinks the law sufficiently immoral, substitute her views for the legal mandate? This question is one that both positivists and natural law theorists alike must confront — not as a question within legal theory, but as a question of political or moral theory. It may well be that if one considers the issue as a problem in political theory, one will conclude that judges have a moral responsibility to "apply the law." But that conclusion will not be based on the fact that the law so requires — an obvious circularity. The conclusion will have to be based on some general moral or political theory about the obligations inherent in the role of a judge, balanced against the evil a judge believes she will help promote if she carries out her role.[37] Or one may decide that the oath of office

36. *See* Hart, *supra* note 10, at 618; *see also supra* notes 10, 14-16, *infra* note 46, and accompanying text.

37. *See* DWORKIN, LAW'S EMPIRE, *supra* note 2, at 404-07 ("inclusive integrity" theory "define[s a judge's] powers against those of other institutions and officers"); Robert P. George, *Judges and Natural Law,* WASH. POST, Aug. 12, 1991, at A17 (noting that natural law theory may itself require judges to "recognize the limits of their own authority out of respect for the rule of law"); *see also* David O. Brink, *Legal Positivism and Natural Law Reconsidered,* 68 THE MONIST 364, 376-84 (1985) (arguing that judges could *not* have a moral obligation to apply law that is too unjust).

(the only theory suggested by Biden) yields the obligation to apply the law, right or wrong, though the theory about promissory obligation on which this conclusion is based will strike many people as unconvincing.[38]

This is not the place to tackle the problems in political theory that these issues raise. It is enough to note that the issues are independent of the natural law/positivism debate within legal theory. But even if we do not actually undertake to answer the question of the limits of a judge's duty when faced with unjust law, we can at least use this problem to illustrate what I began by calling the natural law dilemma.

B. *The Natural Law Dilemma*

To paraphrase a famous question, what does a natural law theorist want? What, for example, would it mean for a legal system self-consciously to accept a natural law legal theory? How would that acceptance affect how judges decide cases or how the legal system operates?

As the above discussion suggests, the natural law legal theorist's central idea seems to be that a judge will juxtapose his or her assessment of objective morality or justice against the result apparently required by the social facts constituted by the authoritative positivist legal materials (constitutions, statutes, legal precedents). Because the positivist might also urge, as a matter of political theory, that judges ignore or subvert very immoral texts, the only practical difference between positivist and natural law systems is this: what the positivist contemplates as a possibility within political theory, the natural law theorist wants to describe as a possibility *permitted (or required) by law itself.* For the natural law theorist, the judge will not be facing conflicting duties, one imposed by the duty to find and apply the law, the other imposed by the moral duty to avoid evil results. Rather, the judge will be reaching "moral" results within the role of the judge precisely because the positivist's texts are not all there is to "law."

This difference between the natural law and positivist positions often seems merely verbal. Judges will be urged to act the same way in both systems, with only the question whether the judge has departed from his or her "legal" role distinguishing the two. Of course, accepting the natural lawyer's way of posing the issue could have considerable practical consequences: judges who ignore "immoral" legal

38. A promise to enforce law cannot be interpreted to be open-ended, so that any law, however unjust, is within the scope of the promise. *See, e.g.*, David Lyons, *Justification and Judicial Responsibility*, 72 CAL. L. REV. 178, 192 (1984); *see also* Steven D. Smith, *Why Should Courts Obey the Law?*, 77 GEO. L.J. 113 (1988) (discussing complications in the judicial duty to enforce the law).

texts could not be criticized for violating their legal duty and thus would run less risk of losing their jobs or their prestige. Even if such judges were reversed or replaced, they would still, according to society's own definition of their role, be "doing their job." They might be doing their job poorly, but they would still be doing their job.

If this is what is at stake in the arguments between positivists and natural lawyers — namely whether judges will be permitted, as part of their job description, to consider the morality of legal directives — the difference between the two theories is likely to disappear in any society, like ours, in which the basic legal texts already incorporate moral standards as guides for evaluating other legal standards. If the Due Process Clause, or the Ninth Amendment, or the various penumbra of the Bill of Rights (or some combination of the three) is interpreted to invite judges to declare and enforce fundamental if unenumerated values, then any judge can resort to his or her assessment of fundamental values without being guilty of straying from his or her duty as judge. That is why arguments such as Biden's have an air of self-contradiction: Biden, like many others, rejects the view of strict constructionists and accepts a view of the Constitution that is open to fundamental moral argument; at the same time, however, he insists that judges have a duty to follow the law and not set it aside where it conflicts with their own views about morality. In context, this seems to be a difference without a distinction.[39]

Here, then, is one possible candidate for the difference that it might make to be a natural law legal theorist as opposed to a positivist: the natural law theorist might suggest that what is merely a contingent question for the positivist (does a particular legal system include a general fundamental morality clause to control the interpretation and enforcement of other legal texts?) becomes, for the natural law proponent, a conceptual and necessary matter. Every legal system, in order to justify the moral claims that it makes for law, must potentially invite judges to test legal conventions by true morality. Although the difference between natural law and positivism will be

39. Biden's position would be less confused if he really meant that judges interpreting the vague moral clauses of the Constitution should still be confined to implementing the positive morality of our society, rather than substituting their own moral views for those of the community. This would make Biden like the sophisticated positivist who takes the test for law to include, in appropriate cases, conventional morality as well as other legal conventions, but not ultimate or critical morality. *See supra* note 13. *But see* Ronald Dworkin, *Hard Cases,* 88 HARV. L. REV. 1057, 1105-06 (1975) (explaining how even a nonpositivist (natural law?) judge might also be forced to reach decisions inconsistent with the judge's own moral views). In any event, it is unlikely that most people who reject strict constructionism intend by that rejection simply to replace one sort of convention (the Framers' declared intent) with another (positive morality); most probably they mean that judges should look to critical (true) morality to implement these provisions.

undetectable in a system that happens (contingently) to have a fundamental morality clause in its basic Constitution, the difference will be detectable in general legal theory and will have implications for legal systems that lack such a clause. In these latter systems, natural law legal theory will, in essence, read into every basic constitution the same fundamental morality clause that is explicitly adopted by some, ignoring any explicit directive to the contrary.

I doubt that many natural law theorists would be happy to conclude that the above explanation is the complete account of the difference it would make to be in a natural law society as opposed to a positivist one. For one thing, the question whether moral assessment of law enters by way of political theory, rather than by way of the judge's job description, seems too subtle a distinction to justify the amount of energy that has been and is still devoted to the debate between positivism and natural law. Something larger seems to be at stake, and, indeed, most of the recent writing in natural law legal theory proceeds as if something larger were at stake. But that assumption is, I think, unwarranted until one confronts and resolves the following natural law dilemma. Natural law opposes the suggestion that "mere" convention, or human fiat, has the last word in determining the "legal" obligations within a society. These conventions are, according to the natural lawyer, to be tested by reference to "true morality" and enforced only if they do not depart too far from what such moral standards require. The dilemma is that only human institutions can do the testing. A legal system might adopt natural law legal theory, and self-consciously encourage officials and citizens to test legal validity by reference to true morality. Yet in *governing* its citizens, the state and its representatives still must act on their own best assessment of what true morality requires. Thus, in the end, any decision about what morality requires will be made by fallible human institutions and, if enforceable as law, will be enforced just because someone says so, not necessarily because the decision is right. Fiat, it seems, must either always control — or it can never control (the law can never be said to impose obligations just because some person, including a judge, has decided it is morally appropriate). In the former case, natural law's protest against fiat is irrelevant; in the latter case, legal obligations collapse entirely into moral obligations.

This dilemma is, in some respects, familiar. It represents a charge that natural law legal theorists have always confronted; namely, that their theory has a built-in bias toward anarchy that is just as unfortunate as the positivist's built-in bias toward authoritarianism. Because this charge against natural law seems simply to reverse the charge

against the positivist, we may benefit from reviewing the positivist's response to the charge of undue authoritarianism.

The modern positivist, we have noted, denies that his theory has any bias that lends moral support to legal convention just because it is the convention. Indeed, the positivist responds, the whole point of his theory is to separate the question of what law is from the question of its moral worth or its practical implications. Elsewhere I have suggested that this response of the positivist reveals a paradox. Oddly, positivism's goal of providing an accurate account of the normative claims of law leads positivism to depict legal systems as essentially claiming what positivism denies; namely, that a necessary connection exists between law and morality.[40]

The dilemma for natural law legal theory arises in exactly the opposite fashion from this paradox of positivism. The positivist's self-imposed stricture on engaging in substantive moral theory means that he cannot account for (justify) the normative claims of law that he observes but can only point to and describe those claims. The consequence is that the positivist's own distinctive thesis (the denial of a connection between law and morality) must itself remain in doubt until one actually tests it through political theory. Natural law, in contrast, has no trouble with the normative claim of law because it starts by assuming a true connection (not just a claimed one) between law and morality — exactly the claim that law seems to make. The dilemma of natural law is that, though it insists that the "higher law" of morality be used to test the claims of human institutions to determine obligations through law, the theory does not offer any advice about how to implement this "higher law" test in an actual legal system. Thus, even if one embraced the natural law idea, one could not escape the fact that the "higher law," by reference to which positive law is to be judged, must ultimately be invoked and interpreted by fallible human institutions, judicial or otherwise. Since humans can always be wrong in making these judgments, fiat (in the positivist's sense) will inevitably remain the last stop in any argument about what should be done from the legal point of view.

In short, positivism emphasizes the fiat element of law, taking little or no account of the reasons behind fiat that might justify the state's normative claims; natural law emphasizes that the state's normative claims about law must be justified by reasons, but ignores the inevita-

40. *See* Philip Soper, *Making Sense of Modern Jurisprudence: The Paradox of Positivism and the Challenge for Natural Law*, 22 CREIGHTON L. REV. 67 (1988).

ble role of fiat in the process of discovering and applying those reasons.

C. *Illustrating the Dilemma: What Natural Law Is* Not

The above general remarks can be illustrated by considering recent developments within natural law legal theory. These developments represent arguments for natural law that do not, it seems to me, yield any recognizable difference in the way a legal system would operate — at least not any difference that would reflect the central natural law idea that morality, not convention alone, is to have some role in determining a citizen's legal obligations. In the next section, I shall consider just how that central idea *could* be implemented (and might make a difference).

1. *Natural Law as a Theory of Adjudication*

The dominant tendency among recent revivals of natural law alternatives to positivism is to suggest that natural law theory demonstrates that judges must reach "very deep into political and moral theory"[41] in deciding a case. This suggestion is intended to be anti-positivist in character because, presumably, the positivist would limit judges to interpreting and applying accepted conventional rules, regardless of the rules' moral merit. But depicting natural law as an alternative theory of adjudication threatens to trivialize the natural law insight for the reasons just discussed: if the only point of a natural law theory is to permit judges to take account of moral standards, as well as conventional legal ones, nothing will have been gained *if, in the end, the judge's application of those moral standards becomes the authoritative and binding legal decision.* All that will have been done is to shift the controlling fiat from that of the legislature (or the prior judicial precedent in a common law case) to that of the judge in the instant case.

One may have reasons for thinking that judges in general are better able to assess the moral merits of a case than are legislatures, or that judges in the present are better able to assess rules than judges in the past who created the purportedly binding precedent. But the arguments from political theory required to defend those beliefs are not likely to persuade many. Consider, if nothing else, the familiar arguments from political theory that explain why judges in a democracy should be subservient to legislative judgments. In short, this version of natural law is simply an undefended argument about whose fiat is bet-

41. Dworkin, *supra* note 11, at 877.

ter — the legislature's or the judge's. It is not an argument for the superiority of moral truth over conventional views, but merely an intramural squabble about which branch's moral judgments shall be authoritative.[42]

It is easy to see why natural law legal theorists might be misled into thinking that the point of their theory is to develop a nonpositivist theory of adjudication. The claim that legal obligations, like moral ones, must reflect some objective reality (a "higher law") invites the claim that a citizen's complaint about the state's coercion of her must be measured by some true assessment of her moral and political rights, not just by what is conventionally accepted. So far, well and good. Such a theory is antipositivist in one sense: positivists have spent so much time insisting that one can determine legal validity without reference to morality that it is valuable to contest positivism's account of how judges actually do and should decide cases. But to stop here is to miss the main point of a positivist theory of law. The main point has always been that, in the end, it is human will and fiat that determines what law is. As long as the judge's decision becomes legally binding, the system remains positivist in the most significant sense, with the judge simply serving as the sovereign in place of the legislature.

Some legal realists, of course, have always recognized this point, and have built elaborate theories largely around this simple insight; if the judge's say is final and legally authoritative, it is more realistic to accept that law is really whatever judges say, rather than what the "paper rules" say. Positivists, like Hart, resist this attempt to debunk legal standards,[43] but others seem sympathetic to the point, at least with respect to the *authority* of a legal system.[44] Small wonder, then, that the natural law legal theorist who simply takes sides in this dispute seems indistinguishable from the positivist or the realist.

What would a natural law legal theorist have to do to avoid this collapse into a positivism of a different kind — one that promotes judges, rather than legislators, as sovereigns? The tempting answer is that the natural law theorist must refuse to let anyone's fiat — judge's or legislator's — determine a citizen's actual legal duty or justify the

42. Oddly enough, the argument that legislative judgments should be seen as having no authority (except in the theoretical sense, as examples of legislative advice about the best thing to do), is made by both positivists and natural law legal theorists. *Compare* JOSEPH RAZ, THE MORALITY OF FREEDOM 28-31, 48-53 (1986) (making positivist argument) *and* Joseph Raz, *Authority and Justification,* 14 PHIL. & PUB. AFF. 3, 14, 18 (1985) (same) *with* Heidi M. Hurd, *Sovereignty in Silence,* 99 YALE L.J. 945 (1990) (taking natural law position).

43. *See* HART, *supra* note 12, at 120-50.

44. *See* RAZ, MORALITY OF FREEDOM, *supra* note 42, at 26; Raz, *Authority and Justification, supra* note 42, at 5.

imposition of sanctions. I shall explore the implications of this suggestion in the next section. For now it is enough to note that even Ronald Dworkin, the most influential of recent natural law theorists, has almost nothing to say about the binding force of a judge's decision. However erroneous the judge's decision, that decision presumably has the force of law, in both the moral and coercive senses, even though the decision's gravitational effect as a precedent may be severely limited.[45] Natural law theorists like Dworkin, in short, use theories of mistake only to get the correct stock of legal/moral standards, rather than to limit the force of human (judicial) fiat in any particular case.

2. *Natural Law as a Call for the Sovereignty of Individual Conscience*

If any theory of adjudication that permits a human decision to have the force of law is, in the end, a positivist legal theory, one possible explanation for what a natural law theory must be is this: a natural law legal theorist must admit that no decision has the force of law just because someone said so — judge or legislator. The point of the theory is to urge the citizen to recognize that fiat must always in theory yield to the citizen's own assessment of the reasons for and against action.

Of course, the dilemma one faces in taking this position is the one noted earlier: forced to retreat from a theory that simply displaces the point at which fiat becomes legally (and morally) effective, the natural law theorist seems to have nothing left to offer but a call for a kind of anarchy. There is no "law," in the conventional sense, but only judgments about what is best to do, made by legislators, judges, and citizens. Often, of course, citizens will have good reasons for deferring to the judgments of officials; but even then, they do so only in the exercise of their own judgment. So these cases, too, do not involve acknowledging the force of law for its own sake. The only "law" is what the final judgment of history (or God) will prove *in fact* to have been the right thing to do.

This is an unhappy position for a natural law theorist to take. For one thing, modern positivists, many of whom make exactly the same claim, will once again eagerly accept, rather than resist, such a position. The point of a positivist theory of law is to preserve the sovereignty of individual conscience by clarifying the separation between the fact of law and its relevance to what one ought to do.[46] The more

45. *See* DWORKIN, LAW'S EMPIRE, *supra* note 2, at 108-13.

46. *See* MACCORMICK, *supra* note 15, at 158-62; Neil MacCormick, *A Moralistic Case for A-Moralistic Law?*, 20 VAL. U. L. REV. 1, 10-11 (1985); *see also supra* notes 10, 14-16, 36, and

critical problem is that this position, bordering as it does on anarchy, underscores what is missing in natural law legal theory: recognition of the possibility that fiat (however wrong) may have moral force of exactly the kind that legal systems claim. Without actually engaging in the moral theory that will test the extent to which fiat may trump reason (for good reasons of its own), the natural law theorist cannot know whether conventional, positivist tests for law will or will not yield, as a matter of correct political theory, "true" political and moral rights.

D. *Resolving the Dilemma: What Could Natural Law Be?*

1. *The Parameters of a Natural Law Theory*

What, then, could a natural law theory expect to accomplish if explicitly accepted by a legal system? How could it avoid simply becoming another kind of positivism or a call for individual anarchy and the end of law?

While I shall not attempt here to answer this question definitively, enough has been said to sketch some possibilities. First, a brief review of what seem to me the critical parameters:

(a) A natural law legal theory must be a claim about the limits of the ability of convention or fiat to serve as the basis on which a state can justify the moral claims it makes about its legal directives.

(b) To avoid simply being another version of positivism's suggestion that convention is one thing and the morality of convention another, the natural law theorist must be able to *build into the actual operation of the legal system* the very claim about the limits on convention that both the natural lawyer and the positivist *qua* political theorist accept.

(c) To build the limits on fiat into a theory of law requires more than just shifting around the point at which the moral assessment of legal standards is made. Legislatures, if they are acting in good faith, presumably think their legal standards are moral; judges would have similar confidence in their reassessments of the morality of a legal standard, and citizens would similarly trust their own efforts to "second-guess" the morality of official directives. The limits on fiat must themselves be *officially recognized* exceptions to the claims legal systems make about their directives.

(d) Presumably, the exceptions that a legal system must recognize to the force of fiat are those that a correct political theory about the

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accompanying text. *See generally* Philip Soper, *Choosing a Legal Theory on Moral Grounds*, SOC. PHIL. & POLY., Autumn 1986, at 31.

limits of the state's coercive power would justify. If a correct political theory shows that the anarchist is right — states cannot justify *any* of their coercive acts or moral claims — then all law should be recognized as having no moral force *qua* law and no moral claims about legal norms are appropriate. But if political theory establishes state authority beyond what the anarchist will admit, then the claim that legal norms have moral force (even if the norm is wrong) is appropriate *to that extent;* natural law becomes a way of pointing to the limits on the authority of the state's claims that any state should itself be able to accept.

The attempt to implement a program that meets these conditions must confront two initial problems. (1) Exactly what are the claims a state makes about its legal norms? (2) How can a state, without contradiction or paradox and without sliding into anarchy, limit those claims?

2. *The Claims of the State*

I began by suggesting that the point of a model of law might be not only to identify the legal standards of a society, but also to reflect the moral claims that the state makes for those standards. On this, both natural law theorists and modern positivists agree. But modern positivism is content with a model that simply notes that law makes moral claims; the positivist does not address whether those claims are justified.

The positivist's aloofness on the question of justification might be appropriate if the state's claims were just ordinary moral claims. Thus, any person who consciously acts against the interests of another presumably, if he thinks about it, believes that what he does can be morally justified. His belief is one thing; whether he is right is another. So, too, with the state. The state may believe that its laws are just and punish those who disobey; whether its belief is correct is a separate issue.

But this analogy between the ordinary claim to justice that characterizes any serious action and the state's claims fails in a way that is critical to legal theory: the state's claim to justice asserts not *only* that the content of its laws is just, but also, and characteristically, that even if the content is wrong, the state is nevertheless justified in acting on its assessment and, for example, punishing those who disobey. It is not clear that the ordinary citizen makes a comparable claim. If I believe myself justified in striking you in self-defense or in order, say, to protect a third, innocent party, I do not normally think that even if I am wrong, I was nevertheless justified in my action *just because it was my*

belief that I was right.[47] In contrast, many think the critical aspect of the state's claim is that certain actions are morally permitted, or required, just because the law (convention) so requires. That is why the positivist faces a paradox in developing a supposed theory of law that fails to confront the essential normative claim that legal systems actually make.

What are the claims that a state makes about its legal conventions, just because of their conventional status? There are two main possibilities: (i) The state claims the right to punish when the conventional laws are broken, regardless of whether the content of the laws is correct; (ii) The state claims that citizens have obligations to obey conventional laws, just because they are "the law."

Of these two claims, the first seems to me undeniable as an empirical matter and the one claim that a legal system can least afford to give up consistent with other normative practices. It is obvious that the consequences visited upon people in the name of the law (the taking of property, liberty, and life) cannot be approved unless one thinks they are morally justified. Whether the state also claims that citizens are morally obligated to obey the law regardless of content is more problematic — both as an empirical matter and as a matter of normative consistency. I have suggested elsewhere that legal systems typically do make such claims,[48] but the question is admittedly controversial. For one thing, though legal systems might be incrementally more effective if based on a widespread belief in and official claim of a duty to obey, positivists are probably correct to observe that legal systems could function well enough with coercion alone. If the coercion, then, is morally justified, the additional claim of a duty to obey could be dropped without normative inconsistency or practical incoherence.[49] Second, the empirical evidence for whether legal systems *do* make this claim is clouded by the fact that the state will, of course, always claim that citizens have a *content-dependent* duty which the state, believing that its laws are correct, will claim is triggered in any particular case. For these reasons, without meaning to prejudice the possible claim of a duty to obey, I shall limit the argument in the remainder of this article

47. One may plead that one's action should be excused, even if it was not justified, if it was the best one could do under the circumstances. In this respect, there may be a greater parallel between the actions of ordinary individuals and the state than is often recognized; i.e., even the state may be claiming, not content-independence for its norms, but only the right to be wrong that is entailed in the recognition that individuals can only act on the basis of their best beliefs, and may thus commit no moral wrong, even if an act later turns out to have been immoral.

48. *See* Philip Soper, *Legal Theory and the Claim to Authority,* 18 PHIL. & PUB. AFF. 209 (1989).

49. In deciding whether the law does or should claim a duty to obey, more needs to be said about the relative appeal (moral?, aesthetic?) of societies that do/do not make such claims.

to the minimal moral claim that every legal system must make: the claimed right to enforce laws, simply because those laws are believed (conventionally) to be just.

It is not difficult to explain how a state could justify punishment regardless of the content of the laws. The state's claim combines two familiar ideas: (1) Somebody ("officials") must decide controversies within society; (2) As long as the authorized official has made the decision in good faith, the resulting action is justified (no moral wrong is done), even if one later discovers the decision itself was wrong.

The first claim, that someone must decide, seems to me the easy point to establish through classical political theory — far easier than the claim that the state has the authority to determine one's moral obligations. Almost all political theory begins with the recognition, most obvious in Hobbes, that the whole rationale for the state lies in the need to centralize the decisionmaking apparatus and control of force, as an alternative to the state of nature that would otherwise exist. This simple point cannot be refuted by protesting that the state has only a limited role to play, as per classical "nightwatchman" theories;[50] the point will still remain that someone will have to decide even these disputes about the proper role of the state, where *decided* means to take action based on one's own best judgment about the appropriate role of the state. The decision to leave some choices to the private arena, if it becomes controversial enough to require an institutional resolution, is itself, in short, a state decision.

That somebody must decide is, then, the quick defense of fiat — fiat is inevitable. Particular legal systems will fix the decision point at which some official's judgment becomes final differently. Some will place fiat with the legislature, some with the courts; and some may even allow citizens to make the decision, with officials playing only an advisory role (in which case, presumably, no law, and hence no punishment, prevents the citizen's acting on his or her own lights). But however this decision is made, once it *is* made, the legal system, in acting on the decision, is simply exercising the basic right to decide that must be implicit in any theory about the state that rejects anarchism.

The second claim — that the state has the right to punish just because it is the law — also seems to me a straightforward idea. Indeed, it is almost a definition of *the right to decide,* which, if it means anything, must mean more than just *the right to give advice.* That this

50. *See, e.g.,* JOHN LOCKE, TWO TREATISES ON GOVERNMENT 374-94 (Peter Laslett ed., 1985) (1698); ROBERT NOZICK, ANARCHY, STATE AND UTOPIA 25-27 (1974).

claim is dependent only on the state's acting in its own best moral judgment, and is not defeated because the law turns out to be wrong, is a familiar feature of legal systems. Think of how often process (good faith attempts to get at the truth) trumps substance in any legal system. Innocent persons may be imprisoned for years, only to discover that a factual error was made and no crime committed. For the most part, such persons seldom have a claim for reparation as of right, rather than being dependent on legislative grace for redress. We justify, in short, mistakes in applying the law on the grounds that we did our best. How much easier, then, to justify laws correctly applied and believed at the time to be just, but later determined to be unjust? Here, too, the defense that we did our best at the time to act as we thought justice required seems easy to accept.[51]

The case for fiat justifying punishment is, in short, strong. It is reflected in a variety of familiar legal doctrines: without some end to the question of whether the law was really morally just, there could be no finality to decisions, and no ex post facto defense for those who rely on legal conventions, accepted as just at the time, but later denounced as unjust and made illegal (or legal as the case may be). With such a large morally justifiable role for fiat, natural law theory faces the danger of proving to be a theory about nothing. It purports to contrast the moral claims based on convention with "true" legal and moral claims, but if the "truth" is that convention really does justify much of what the law does in the various ways just mentioned, then the positivist's model will prove correct, *and,* at the same time, the claims of legal systems will be justified.

3. *Limiting the State's Claims*

The problems just uncovered point the way to the most plausible effect of a conscious adoption of the natural law view. The difference that natural law would make, if any, must be found in the effect that the theory would have on certain concepts internal to law (rather than on theories about which particular institution should make the final determination) — concepts such as the finality of legal decisions or the legitimacy of ex post facto legislation. This last observation suggests an obvious analogy to the Nuremberg principles: the idea that the

51. So, too, many think that Korematsu v. United States, 323 U.S. 214 (1944), which held that the internment of Japanese citizens during World War II was consistent with constitutional guarantees, was wrongly decided. But few suggest that the decision and the resulting sanction, if reached in good faith, is somehow vitiated by the recognition of the mistake that was made. The recent decision overturning the judgment was on procedural grounds. *See* Korematsu v. United States, 584 F. Supp. 1406 (N.D. Cal. 1984) (vacating conviction because of prosecutorial misconduct).

justifications for fiat (including the right to punish) reach a limit when the content of the law is so unjust as to override the excuse "we did as we, in good faith, thought best." Transgression of these limits would then serve as a theoretical limit on the state's ability to justify its actions on the basis of convention alone.

The cases where this theoretical limit is reached will be rare for two reasons: (1) it is only serious moral error (which no reasonable person could in good faith dispute) that would limit law's normative power — an unusual situation in any reasonably decent society; and (2) the decision that even this limit has been reached will itself have to be made by a potentially fallible, human institution (either a different tribunal, or a later tribunal, but in either case, still a fallible human institution). For both reasons, the conscious adoption of natural law would probably have no obvious effect except to serve as a symbolic reminder of the extremes to which even persons acting in good faith can sometimes be led.

To reach a conclusion that in some ways is so familiar, and in others has so little practical implications for any decent society, may be disappointing. The conclusion is what one often hears: that truly unjust laws do not obligate and have no moral power either to justify punishment or to excuse those who act in reliance on the law. That the idea is worth keeping alive is borne out, not just by the horrors detailed at Nuremberg, but, more recently, by potential criminal prosecutions in West Germany (and elsewhere) against those who, allegedly, committed acts against humanity in the name of purportedly lawful conventions. Solace, if any, for such a mild conclusion should perhaps be sought in the fact that the persistence of such simple ideas may be a reflection of their truth, however disappointing it may be that the truth here is less complex than natural law theorists often like to think.

CONCLUSION

In one of his justly famous early articles, Lon Fuller called attention to the role that must be allowed for both reason and fiat in law.[52] Fuller's apparent object at the time he was writing was to restore the role of reason in adjudication during a time when fiat seemed to dominate the approach to legal theory and to common law adjudication.[53]

Today, the imbalance seems to have shifted in the opposite direc-

52. Lon L. Fuller, *Reason and Fiat in Case Law*, 59 HARV. L. REV. 376 (1946).

53. This is Summers' interpretation. *See* ROBERT S. SUMMERS, LON L. FULLER 63-70 (1984).

tion. Too little respect is given to the role of fiat in law — not just the role that positivists have always emphasized in their quest for a model of legal validity, but now, too, in the role that fiat plays in justifying the moral claims of the state.

The natural law dilemma results from starting at the opposite end from the positivist in constructing a model of law — focusing on the reasons for accepting rules rather than on the rules that have been accepted. But the dilemma leads to the same point reached in considering the paradox of positivism; natural lawyers must confront political theory to determine the limits on the state's power to create obligations or justify punishment through (reasoned) fiat. Until they do so, they cannot rule out the possibility that social facts (in the positivist's sense) play the dominant role in establishing the connection between law and morality that has always been the natural law legal theorist's central concern.