A LAW PROFESSOR'S GUIDE TO NATURAL LAW AND NATURAL RIGHTS

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Law professors nowadays mention natural law and natural rights on a regular basis, and not just in jurisprudence. Given that the founding generation universally subscribed to the idea of natural rights, this concept regularly makes a prominent appearance in discussions of constitutional law. One simply cannot avoid the concept if one is to explain Justice Samuel Chase's well-known claim in *Calder v. Bull*[1] that "[t]here are certain vital principles in our free Republican governments, which will determine and over-rule an apparent and flagrant abuse of legislative power.... An ACT of the Legislature (for I cannot call it a law) contrary to the great first principles of the social compact, cannot be considered a rightful exercise of legislative authority."[2] Nor can law professors explain to their students the reference in the Ninth Amendment to the "other" rights "retained by the people"[3] without mentioning "the pre-existent rights of nature."[4]

Yet in my experience, when law professors discuss natural rights, they typically run this concept together with that of natural law. Though these two ideas are closely related, they are not the same. This Symposium is intended to discuss the difference between natural law and natural rights. Whereas the

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1. 3 U.S. (3 Dall.) 386 (1798).

2. *Id.* at 388 (emphasis removed).

3. U.S. CONST. amend. IX ("The enumeration in the Constitution of certain rights shall not be construed to deny or disparage others retained by the people.").

4. 1 THE DEBATES AND PROCEEDINGS IN THE CONGRESS OF THE UNITED STATES [ANNALS OF CONGRESS] 437 (Joseph Gales ed., 1834) (statement of Rep. James Madison).

other contributors are taking primarily an historical and descriptive approach, my approach will be more conceptual and normative. That is, I will explain how I think the concept of natural law ought to be distinguished from that of natural rights. Nonetheless, I believe (though I will not take pains to demonstrate) that the distinction I draw between the two concepts is consistent with much of the classical usage of these terms and helps clarify such usage.

I. THE NATURAL LAW METHODS OF ANALYSIS

The idea of natural law is mysterious to us today.[5] We are accustomed to thinking of law as the command of the legislature, or perhaps the command of a government official or judge, that is enforced by a government. A natural law, whatever that might be, that was not incorporated into a command enforceable by government seems hardly worth the paper it isn't written on. How can there be a law in any meaningful sense in the absence of government recognition and enforcement?

But when we think of the disciplines of engineering or architecture, the idea of a natural law is not so mysterious. For example, engineers reason that, *given* the force that gravity exerts on a building, *if* we want a building that will enable persons to live or work inside it, *then* we need to provide a foundation, walls, and roof of a certain strength. The physical law of gravity leads to the following "natural law" injunction for human action: *given* that gravity will cause us to fall rapidly, *if* we want to live and be happy, *then* we had better not jump off tall buildings. The principles of engineering, though formulated by human beings, are not a product of their will. These principles must come to grips with the nature of human beings and the world in which human beings live, and they operate whether or not they are recognized or enforced by any government. And though they are never perfectly precise and always subject to incremental improvements and sometimes even breakthroughs, they are far from arbitrary, and we violate them at our peril.

5. This reaction is less true today, however, than at any time in the past several decades. *See, e.g.*, NATURAL LAW THEORY: CONTEMPORARY ESSAYS (Robert P. George ed., 1992); *Natural Law Symposium: Natural Law and Legal Reasoning*, 38 CLEV. ST. L. REV. 1 (1990); Symposium: *Perspectives on Natural Law*, 61 U. CIN. L. REV. 1 (1992); *Symposium on Natural Law*, 3 S. CAL. INTERDISC. L.J. 455 (1995).

The disciplines of engineering and architecture are normative in that, unlike the physical sciences on which they may be based in part, they instruct us on how we *ought* to act, given the nature of human beings and the world in which they live, and the purpose at hand. Nor need one be an engineer or an architect to formulate similar "natural law" normative principles. For example, the existence of gravity and the nature of the human body lead to the following natural law injunction for human action: *given* that gravity will cause us to fall rapidly and that our bodies will not withstand the fall, *if* we want to live and be happy, *then* we had better not jump off tall buildings.

Could it be that the "great first principles of the social compact" are natural "laws" of this type? *If* we want persons to be able to pursue happiness while living in society with each other, *then* they had best adopt and respect a social structure that reflects these principles. In the words of the influential seventeenth-century natural-law theorist Hugo Grotius, the "maintenance of the social order, which we have roughly sketched, and which is consonant with human intelligence, is the source of law."[6] According to this way of thinking, "[t]he basic requirements of an organized social life are the basic principles of the natural law."[7]

True, any such natural law principles may be more difficult to discern and consequently more controversial than the principles of engineering or architecture. Partly this is true because human beings are so amazingly complex and, unlike the materials from which buildings are constructed, are self-directed in pursuit of their own purposes. But the mere existence of controversy does not render such principles nonexistent. Nor does the fact that we cannot see, hear, taste, or touch them. After all, we cannot see, hear, taste, or touch the principles of engineering or architecture either. Both sets of principles or "laws" are humanly

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6. HUGO GROTIUS, 2 DE JURE BELLI AC PACIS LIBRI TRES 12 (Francis W. Kelsey trans., Clarendon Press 1925) (1690) (citation omitted). The passage continues:

> To this sphere of law belong the abstaining from that which is another's, the restoration to another of anything of his which we may have, together with any gain which we may have received from it; the obligation to fulfil promises, the making good of a loss incurred through our fault, and the inflicting of penalties upon men according to their deserts.

Id. at 12-13 (citation omitted).

7. STEPHEN BUCKLE, NATURAL LAW AND THE THEORY OF PROPERTY 19 (1991).

constructed concepts used to explain and predict the world in which we live.

Americans at the founding of the United States well-accepted the idea that the world, including worldly governments, is governed by laws or principles that dictate how society ought to be structured, in the very same way that such natural laws dictate how buildings ought to be built or how crops ought to be planted.[8] Consider this passage from a sermon delivered by Pastor Elizur Goodrich (1734-1797) to the governor and general assembly of Connecticut on the eve of the Constitutional Convention:

> The principles of society are the laws, which Almighty God has established in the moral world, and made necessary to be observed by mankind; in order to promote their true happiness, in their transactions and intercourse. These laws may be considered as principles, in respect of their fixedness and operation; and as maxims, since by the knowledge of them, we discover those rules of conduct, which direct mankind to the highest perfection, and supreme happiness of their nature. *They are as fixed and unchangeable as the laws which operate in the natural world.*
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> Human art *in order to produce certain effects*, must conform to the principles and laws, which the Almighty Creator has established in the natural world. He who neglects the cultivation of his field, and the proper time of sowing, may not expect a harvest. He, who would assist mankind in raising weights, and overcoming obstacles, depends on certain rules, derived from the knowledge of mechanical principles applied to the construction of machines, in order to give the most useful effect to the smallest force: And every builder should well understand the best position of firmness and strength, when he is about to erect an edifice. For *he, who attempts these things, on other principles, than those of nature, attempts to make a new world; and his aim will prove absurd and his labour lost.* No more can mankind be conducted to happiness; or civil societies united, and enjoy peace and prosperity, without observing the moral principles and connections, which the

8. *See* Philip A. Hamburger, *Natural Rights, Natural Law, and American Constitutions*, 102 YALE L.J. 907 (1993). Although Hamburger presents a remarkably sensitive analysis of the evidence concerning the founding generation's understanding of natural law and natural rights with which I am in general agreement, I do not share his contention,which is beyond the scope of this article, that this generation did not think natural rights were a source of legal claims to be made in a court.

> same Almighty Creator has established for the government of the moral world.[9]

Notice that, although Goodrich identifies God as the original source of the laws that govern in the moral world, so too does he identify God as the source of the laws that govern agriculture engineering and architecture. With both types of principles and laws, once established by a divine power they become part of the world in which we find ourselves and are discoverable by human reason. Thus today one can no more disparage the idea of natural law (or natural rights) because eighteenth-century thinkers attributed their origin to a divine power than one can disparage the laws of physics because eighteenth-century scientists believed that such laws were also established by God.

Whatever the source of these moral principles or laws, however they came to be inscribed in the world in which we live, Goodrich's argument is that they must be respected if we are to achieve the end of happiness, peace, and prosperity. As Hugo Grotius wrote: "What we have been saying [about natural law] would have a degree of validity even if we should concede that which cannot be conceded without the utmost wickedness, that there is no God, or that the affairs of men are of no concern to Him."[10] Richard Tuck characterizes this passage to mean: "Given the natural facts about men, the laws of nature followed by (allegedly) strict entailment without any mediating premisses about God's will (though his will might still be an explanation of those natural facts)."[11]

When one mentions "natural law," some ask, "where are these natural laws?" Are they "out there" somewhere? Yet we do not speak of the humanly-developed principles of engineering or agriculture as being "out there," though these principles must be respected if bridges are to stand and crops to grow. The

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9. ELIZUR GOODRICH, THE PRINCIPLES OF CIVIL UNION AND HAPPINESS CONSIDERED AND RECOMMENDED: A SERMON (1787), *reprinted in* POLITICAL SERMONS OF THE AMERICAN FOUNDING ERA: 1730-1805, at 911, 914-15 (Ellis Sandoz ed., 1991) (emphasis added).

10. 2 GROTIUS, *supra* note 6, at 13. Of this passage Stephen Buckle writes:

> This brief remark, by affirming the possibility of at least a partially secularized political theory, exercised a powerful influence on subsequent political thought. In an age of intense political conflict arising from or reflected in religious differences, it also offered the prospect of peace despite continuing religious differences.

BUCKLE, *supra* note 7, at 23.

11. *See* RICHARD TUCK, NATURAL RIGHTS THEORIES: THEIR ORIGIN AND DEVELOPMENT 76-77 (1979).

"principles of society" spoken of by Goodrich are of the same status. They must be respected if people are to pursue happiness, peace, and prosperity while living in society with one another.

This natural law account of moral "principles of society" assumes, of course, that "happiness . . . peace and prosperity" are appropriate ends. While the essence or nature of happiness, peace, and prosperity may properly be controversial, should anyone question the assumption that these are desirable ends to be pursued, additional arguments will need to be presented. Every intellectual discipline, however, presupposes a commitment by those within it to certain shared ambitions or problems thought by all members of the discipline to be worthy of solution.[12] As H.L.A. Hart wrote of the human desire for survival: "We are committed to it as something presupposed by the terms of the discussion."[13] Surely, the disciplines of agriculture, engineering, and architecture are also based on the assumption that human existence and happiness are worthwhile.

The normative force of natural law can be seen therefore as the imperative of "if-then." If you want to achieve *Y*, then you ought to do *Z*. *If* you want to live and be happy, *then* you ought not jump off tall buildings or drink poison. If you want to facilitate the pursuit of happiness by those living in society with others, *then* you ought to adhere to certain basic principles. Later in this Article, I shall return to the issue of whether it is appropriate to characterize as *moral* the normative conclusions reached by a "hypothetical imperative" type of natural-law reasoning.

In describing natural law as based on if-then reasoning, however, I have omitted one crucial and problematic dimension of this approach. As was seen above, the existence of gravity provides a prefatory "given" before the if-then claim: Given that gravity will cause us to fall rapidly, *if* we want to live and be

12. For a discussion of the nature of intellectual disciplines, see STEPHEN TOULMIN, HUMAN UNDERSTANDING (1972). There he explains that "the existence and unity of an intellectual discipline, regarded as a specific 'historical entity', reflects the continuity imposed on its problems by the development of its intellectual ideals and ambitions." *Id.* at 155.

13. H.L.A. HART, THE CONCEPT OF LAW 188 (1961).

happy, *then* we had better not jump off tall buildings.[14] What distinguishes natural law reasoning from other types of if-then reasoning is the particular "given" on which it is based: the nature of human beings and of the world in which they live. So the fuller argument is: "*Given* that the nature of human beings and the world in which they live is *X*, *if* we want to achieve *Y*, *then* we ought to do *Z*." This adds yet another layer of inquiry and controversy. Do human beings have a "nature"? If so, what is it, and how does that nature suggest that, if we want to achieve *Y*, then we ought to do *Z*?

Some today may dispute the idea that human nature is "innate" or natural and insist that human nature is "socially constructed," by which is meant it is the product of complex interaction with others. For example, what it means to be *a man* or *a woman* may not be entirely biological, but rooted also in the expectations that are imbued in each of us by others from the earliest ages. While there may be much truth to this observation, it misunderstands the claim being made by natural-law theorists in two ways. First, unless one posits that this process of social construction can be willfully manipulated or altered, then the fact that human nature is a product of social processes, as opposed to innate natural qualities, is as immaterial to discerning principles of human action as the belief of classical thinkers that natural law was of divine origin. Even were processes of social construction the source of what is thought of as human nature, if these processes cannot freely be altered in any desired manner, human nature would still affect the manner by which we must accomplish our ends.

Some who believe that human nature is a product of social construction may indeed think that it may be deliberately altered or manipulated. That is, they believe that if a particular social construction of human nature is *X* and we prefer it to be *Y*, we can change social processes to accomplish this objective. But while it seems clear that some widespread beliefs or prejudices can, with great effort, be changed, the types of human characteristics on which natural law reasoning is or ought to be based cannot be so affected. For example, persons

14. There are of course many "givens" implicit in this claim. For example, given the fragility of the human body, it is not the fall that kills but the sudden stop at the end. This simply illustrates the complexity of if-then claims.

have access to personal and local knowledge and are pervasively ignorant of the personal and local knowledge of others. People also have a tendency to prefer their own interests and the interests of those for whom they have affection to the interests of those who are remote to them. The physical resources that people need to use to pursue happiness are scarce. These and other facts of human nature and the nature of the world in which we live that greatly influence the principles that order society, for better or worse, cannot be changed. They can only be dealt with.[15]

Second, some who speak of social construction in this context are objecting to basing claims simply on an alleged natural tendency of persons to act in certain ways. They deny that such behavioral tendencies are "natural" and therefore inevitable or unalterable, much less good. If natural law is based on how human beings "naturally" or normally act, then it is based on a fallacy, for human nature, they argue, is as much a product of social attitudes and practices as it is of any "innate" human nature. This response to natural law reasoning is based on a misunderstanding of natural law reasoning.

The concept of "human nature" that is the basis of natural law is not limited to how persons "naturally," normally, or instinctively behave. Natural tendencies play only a very small role in such reasoning, though passages from writings on natural law sometimes suggest otherwise. Indeed, John Locke explicitly denied that natural inclinations were the same as natural laws. He rejected the view of those who "seek the principles of moral action and a rule to live by in men's appetites and natural instincts rather than in the binding force of a law, just as if that was morally best which most people desired."[16]

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15. In STRUCTURE OF LIBERTY, *supra* note *, I identify several of the relevant characteristics and organize them into three categories of social problems: problems of knowledge, of interest, and of power. These problems, I argue, must be addressed by recognizing certain rights associated with the liberal conception of justice and certain principles of legality associated with the rule of law. A summary of a portion of this analysis appears in Randy E. Barnett, *The Function of Several Property and Freedom of Contract*, 9 SOC. PHIL. & POL'Y 62 (1992).

16. JOHN LOCKE, ESSAYS ON THE LAW OF NATURE 213 (W. von Leyden ed., 1954) (1660). Although Grotius thought, as did Aquinas and unlike Locke, that human inclinations tended to the good, like Locke he too thought that

> [t]he law of nature has its beginnings in instinctive nature, but it is certainly not a mere cloak of rectitude over our instincts. Rather, reason is our highest

Though classical natural law reasoning is not based on the natural instincts of people, to the extent such instincts exist and cannot be changed, whether or not such instincts are the product of social construction, they may very well influence what human laws can and cannot accomplish. For example, if humans instinctively do crave survival, a legal system that required tremendous personal sacrifice under ordinary circumstances is likely to be resisted by many. Or because human beings normally try to overcome obstacles put in the way of their chosen projects, the prohibition of certain pleasurable activities is likely to lead to an illegal or black market to supply these activities, and this illegal market, in turn, will likely lead to corruption of law enforcement. Any legal system that ignored these likely human reactions to certain laws will reap unfortunate consequences.

The nature of human beings and the world in which they live from which "principles of society" are derived goes far beyond whatever natural instincts people may have. In addition to their psychological makeup, this nature includes the physical needs and abilities of human beings and the physical properties of the physical world in which humans must live. True, the natural law mode of analysis does require us to generalize about these features of social life—to abstract from the particulars. And though this process is very much one of "construction," it is no more or less so than any other theoretical effort. All theories are constructed, if by constructed it is meant that they are the fallible product of human thought and are not somehow "out there" written in the stars.[17]

None of this is simple or easy. To the contrary, natural law reasoning is highly contestable because it depends on what we think are the "facts of human life," both the makeup of human beings and the world in which they live, and what generalizations we choose to make from these facts. Having made these factual generalizations (*X*), it then depends upon a claim that given *X*, if you want to accomplish *Y*, then you must

> characteristic good, and so the law of nature must in some way reflect our rational nature .... The law of nature is, then, the law of our nature, and thus of rational nature: it is not merely the transformation of instincts into laws.

BUCKLE, *supra* note 7, at 25.

17. If by "constructed" it is meant consciously devised as a whole, then this is rarely true of human theories. Most theories evolve with only incremental refinements contributed by individual theorists. *See* TOULMIN, *supra* note 12.

do Z. Each step of this analysis is subject to error and dispute. But it is the nature of human life that we must act (this is one of those pesky generalizations), and, given this imperative, we must decide how to act, and we ought to act as best we can. Adopting a natural-law mode of reasoning does not guarantee that we will act wisely, but it does, I think, point in the direction of wisdom. It tells us what we should be looking for. As important, a proper theory of natural law explains what we usually do look for and why.

Though I have drawn a parallel between natural laws in engineering and those which concern the governance of society, this version of natural law does not succumb to H.L.A. Hart's criticism that some natural-law proponents confuse two different uses of the term law: so-called natural laws that can be "broken" by human beings and physical laws that cannot. According to Hart, though human beings can disobey so-called natural laws,

> [i]f the stars behave in ways contrary to the scientific laws which purport to describe their regular movements, these are not broken but they lose their title to be called 'laws' and must be reformulated .... So, on this view, belief in Natural Law is reducible to a very simple fallacy: a failure to perceive the very different senses which those law-impregnated words can bear.[18]

In the conception of natural law I have sketched here, "scientific" laws influence the formation of "natural-law" principles of society in the same way they bear on the normative principles of agriculture, architecture, and engineering. *Given* facts about human nature and the nature of the world (including, but not limited to, such "scientific" laws as the law of gravity), *if* you want to accomplish certain ends, *then* you should do X. While a human actor cannot "break" the law of gravity or the natural law principles that apply to human social interaction in the sense of *repealing* them, one pays a price for violating them none-the-less.

Unsurprisingly then, while Hart rejects the identification of natural law with physical laws, he endorses a conception of natural law whose analytic structure is much the same as the natural-law theories I have cited above:

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18. HART, *supra* note 13, at 183.

> Reflection on some very obvious generalizations, indeed truisms, concerning human nature and the world in which men live, show that as long as these hold good, there are certain rules of conduct which any social organization must contain if it is to be viable.... Such universally recognized principles of conduct which have a basis in elementary truths concerning human beings, their natural environment, and aims, may be considered the *minimum content* of Natural Law, in contrast with the more grandiose and more challengeable constructions which have often been proffered under that name.[19]

Hart takes as "given" five contingent facts about "human nature and the world in which men live"[20]: (a) human vulnerability; (b) approximate equality; (c) limited altruism; (d) limited resources; and (e) limited understanding and strength of will.[21] He then assumes, on the basis of observation, the additional contingent fact that most people desire to survive: "survival has... a special status in relation to human conduct and in our thought about it, which parallels the prominence and the necessity ascribed to it in the orthodox formulations of Natural Law."[22]

Hart concludes that, *given* these five factual conditions, *if* persons desire to survive, *then* their legal systems ought to have such features as rules that "restrict the use of violence in killing or inflicting bodily harm";[23] "a system of mutual forbearance and compromise";[24] "some minimal form of the institution of property (though not necessarily individual property), and the distinctive kind of rule which requires respect for it";[25] rules that "enable individuals to create obligations and to vary their incidence";[26] and the imposition of sanctions by an "organization for the coercion of those who would... try to obtain the advantages of the system without submitting to its obligations."[27]

A natural law method of analysis need not be confined to the facts Hart takes as given, nor limited to the objective of survival.

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19. *Id.* at 188-89.
20. *Id.* at 188.
21. *Id.* at 190-193.
22. *Id.* at 188.
23. HART, *supra* note 13, at 190.
24. *Id.* at 191.
25. *Id.* at 192.
26. *Id.*
27. *Id.* at 193.

Nevertheless, for a natural-law method of analysis to yield answers to the question of how human beings are to survive, and pursue happiness, peace, and prosperity while living in society with others, it must be based on some such generalized features of human beings and the world that are common to all persons who are interacting with one another. With all this in mind, what then is the difference between natural law and natural rights?

II. NATURAL LAW ETHICS VERSUS NATURAL RIGHTS

As I have sketched it here, natural law describes a *method of analysis* of the following type: "*Given* that the nature of human beings and the world in which they live is *X*, *if* we want to achieve *Y*, *then* we ought to do *Z*." The subject of any particular natural law analysis fills in the "if." When the subject is agriculture, the "if" might be "if we want to raise crops so that human beings may eat." When the subject is engineering the "if" might be "if we want to build a bridge so that human beings may cross a river." By the same token, the study of *ethics* may be conceived as an inquiry into the question of "given the nature of human beings and the world in which they live (*X*), *if a person wants to live a good life* (*Y*), then he or she ought to do *Z*." Whether we attempt to feed ourselves, build bridges, or live a good life is a matter of choice (though human nature may impel a certain choice[28]). How we go about making our attempts and whether they succeed or fail will be constrained by natural law.

Thus, applying a natural-law method of analysis to the ethical question of how people ought to live their lives would begin with an inquiry into the nature of a "good life," resting this judgment, at least in part, on human nature. Then, given a conception of the good life, a "natural-law ethics" could potentially address nearly every choice a person confronts. Should I go to school? Which one? What should I study? Should I use drugs? With whom should I have sex? Each one of these

28. Aristotelians and Thomists contend that it is part of man's nature to pursue the good, and I take no stance on this issue. *See e.g.*, THOMAS AQUINAS, SUMMA THEOLOGICA pt. I-II, q. 94, art. 2, *reprinted in* 20 GREAT BOOKS OF THE WESTERN WORLD 222B (Robert Hutchins ed., Encyclopædia Britannica 1952) ("[I]n man there is an inclination to good in accordance with the nature which he has in common with all substances; that is, every substance seeks the preservation of its own being, according to its nature.").

questions can potentially be addressed by the natural-law method of "given-if-then" analysis.

Does a natural-law approach to ethics also entail that human law coercively mandate every ethical or moral action recommended by a natural-law analysis and punish every immoral or unethical act? Do the constraints on action recommended by a natural-law ethics imply coercively imposed legal constraints on virtue and vice? Because some think the answers to these questions are yes, they associate a commitment to natural-law reasoning about virtue and vice with authoritarian political theory. Yet even the father of modern natural law analysis, Thomas Aquinas, did not hold to so conservative a view. In answer to the question, "Whether human law prescribes acts of all the virtues," he wrote:

> [H]uman law does not prescribe concerning all the acts of every virtue, but only in regard to those that can be ordered to the common good, either immediately, as when certain things are done directly for the common good, or mediately, as when a lawgiver prescribes certain things pertaining to good order, by which the citizens are directed in the upholding of the common good of *justice and peace.*[29]

And, after asking "whether it pertains to human law to repress all vices," he answered:

> Now human law is framed for a number of human beings, the majority of whom are not perfect in virtue. Therefore human laws do not forbid all vices, from which the virtuous abstain, but only the more grievous vices, from which it is possible for the majority to abstain, and chiefly those that are to the *hurt of others, without the prohibition of which human society could not be maintained*; thus human law prohibits *murder, theft and the like.*[30]

In this manner, Aquinas anticipated a distinction that later came to be made by classical liberal political theorists. While a natural-law analysis could be applied to a variety of questions, including the question of *how human beings ought to act* (for example, vice and virtue), the question of *how society ought to be structured* is a separate and quite distinct inquiry. Given the various problems that arise when humans live and act in society

29. *Id.* at 232B (emphasis added).
30. *Id.* at 232A (emphasis added).

with others, the classical liberal answer to the latter question[31] was that each person needed a "space" over which he or she has sole jurisdiction or *liberty* to act and within which no one else may rightfully interfere. The concepts defining this "liberty" or moral space came to be known as *natural rights.*

Unlike a natural law approach to ethics, then, natural rights do not proscribe how rights-holders ought to act towards others. Rather they describe how others ought to act towards rights-holders. As explained by seventeenth-century natural-rights theorist Dudley Digges:

> If we looke back to the law of Nature, we shall finde that the people would have had a clearer and most distinct notion of it, if common use of calling it *Law* had not helped to confound their understanding, when it ought to have been named the *Right* of nature; for *Right* and *Law* differ as much as Liberty and Bonds: *Jus,* or right not laying any obligation, but signifying, we may equally choose to doe or not to doe without fault, whereas *Lex* or law determines us either to a particular performance by way of command, or a particular abstinence by way of prohibition; and therefore *jus naturae,* all the right of nature, which now we can innocently make use of, is that freedome, not which any law gives us, but which no law takes away, and lawes are the severall restraints and limitations of native liberty.[32]

Thus it is a mistake, and an all-too-common one, to equate natural law with natural rights. Natural law is a broader term referring to the given-if-then *method* of evaluating choices based on the "given" of human nature and the nature of the world. A natural-law approach to *ethics* uses a given-if-then analysis to evaluate the propriety of any human action. In contrast, a natural-*rights* analysis uses a natural law given-if-then methodology to identify the *liberty* or space within which persons ought to be free to make their own choices. It seeks to determine the appropriate social structure within which people ought to be free to do as they please.

According to this distinction, when discussing moral virtues and vices—or the problem of distinguishing *good* from *bad* behavior—the imperative for which is supposedly based on human nature, natural-law ethics is the appropriate term

31. I am not suggesting that this was Aquinas's answer.

32. DUDLEY DIGGES, THE UNLAWFULNESSE OF SUBJECTS, TAKING UP ARMES AGAINST THEIR SOVERAIGNE sig. B3v. (1644), *quoted in* TUCK, *supra* note 11, at 102-03.

(though such principles are sometimes referred to simply as natural law). When discussing the contours of the moral jurisdiction defined by principles of justice—or the problem of distinguishing *right* from *wrong* behavior—which is supposedly based on the nature of human beings and the world in which they live, the appropriate term would be natural rights. Whereas natural law ethics provides guidance for our actions, natural rights define a moral space or liberty—as opposed to license—in which we may act free from the interference of other persons.

In short, *natural-law ethics instructs us on how to exercise the liberty that is defined and protected by natural rights.* Although principles of natural-law ethics can be used to guide one's conduct, they should not be enforced coercively by human law if doing so would violate the moral space or liberty defined by natural rights. Thus, one can reject a natural-law approach to proscribing the *ethics* or propriety of human conduct, and still accept the usefulness of a natural-rights approach to specify the appropriate principles of *justice* that comprise a social structure within which people can pursue happiness, peace, and prosperity.

Justice is a concept—a concept that is used to evaluate the propriety of using force. We resort to justice to tell us how persons ought to act, not generally as a natural-law ethics may do, but specifically when they seek to use force against others. The classical liberal approach defines justice in terms of particular natural rights, for example, the rights of several property, freedom of contract, self-defense, and restitution, for various reasons that are beyond the scope of this Article.[33] This classical liberal conception of justice (and the rule of law) is then used to evaluate critically and to correct human laws that are enforced coercively.

Defining justice in terms of rights, especially natural rights, will invite confusion, however, unless we are clearer about what it means to call something a right. A nice description is provided by Allen Buchanan:

> [A]ssertions of rights are essentially *conclusory* and hence *argumentative.* An assertion of right is a conclusion about what the moral priorities are. At the same time, because it is a

33. I will present these reasons in STRUCTURE OF LIBERTY, *supra* note *. I provide a brief and quite incomplete summary in Barnett, *supra* note 15.

> conclusion, it is an admission that it is appropriate to demand support for this conclusion, reasons why such priority ought to be recognized. And it is vital to recognize that there is a plurality of different kinds of considerations that can count as moral reasons to support a conclusion of this sort and that the conclusion that an assertion of a right expresses will usually be an all-things-considered judgment, the result of a balancing of conflicting considerations.[34]

Thus, to call something a natural right is to assert one's conclusion; it is no substitute for presenting the reasons why this conclusion is justified. What makes natural rights *natural* is the type of given-if-then reasons that are offered in support of its conclusions, based as they are on the "givens" of human nature and the nature of the world in which humans live. What makes such concepts *rights* is the "natural *necessity*,"[35] to use H.L.A. Hart's felicitous term, of adhering to them if we are to solve certain pervasive social problems that must be solved somehow if persons are to achieve their objectives.

Why the conclusions reached by a natural-rights analysis are properly called rights is more easily grasped if we distinguish between "background" and "legal" rights. *Background rights* are those claims a person has to legal enforcement that are *justified*, on balance, by the full constellation of relevant reasons, whether or not they are actually recognized and enforced by a legal system. *Legal rights*, by contrast, are those claims that some actual legal system will recognize as valid.[36] The legal rights that a

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34. ALLEN BUCHANAN, SECESSION: THE MORALITY OF POLITICAL DIVORCE FROM FORT SUMTER TO LITHUANIA AND QUEBEC 151 (1991).

35. HART, *supra* note 13, at 195 (emphasis removed from word "natural"). Hart uses this term while discussing the imperative to have coercive sanctions in a legal system, as well as rules protecting bodily integrity, property, and contractual commitments:

> We can say, given the setting of natural facts and aims, which make sanctions both possible and necessary in a municipal system, that this is a natural necessity; and some such phrase is needed also to convey the status of the minimum forms of protection for persons, property, and promises which are similarly indispensable features of municipal law.... [A] place must be reserved, besides definitions and ordinary statements of fact, for a third category of statements: those the truth of which is contingent on human beings and the world they live in retaining the salient characteristics which they have.

Id.

36. I have loosely adopted this from Ronald Dworkin's distinction between "background" and "institutional" rights: "Any adequate [political] theory will distinguish ... between background rights, which are rights that provide a justification for political decisions by society in the abstract, and institutional rights, that provide a justification for a decision by some particular and specified political institution." RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 93 (1977). Unfortunately, this helpful distinction has disappeared from

particular legal system recognizes as valid may or may not conform to the background rights specified by the liberal conception of justice. Natural-rights reasoning is a method of identifying background rights against which the legal rights of any particular legal system can be assessed. If done properly, then, a natural-rights analysis provides reasons why legal rights *ought* to correspond as closely as possible with natural rights. As H.L.A. Hart put it:

> In considering the simple truisms which we set forth here, and their connexion with law and morals, it is important to observe that in each case the facts mentioned afford a *reason* why, given survival as an aim, law and morals should include a specific content. The general form of the argument is simply that without such a content laws and morals could not forward the minimum purpose of survival which men have in associating with each other.[37]

In my view, a natural-rights analysis should also take as its objective, not only the "purpose of survival which man have in associating with each other," but also the pursuit of happiness, peace, and prosperity. As I explain elsewhere,[38] to structure society so as to pursue these ends, human beings must somehow come to grips with the problems of knowledge, interest, and power. Doing so will require adherence to the rights and procedures that define the liberal conception of justice and the rule of law. According to this natural-law argument, *given* the pervasive social problems of knowledge, interest, and power confronting every human society, *if* human beings are to survive and pursue happiness, peace, and prosperity while living in society with others, *then* their laws must not violate certain background natural rights or the rule of law.

III. NATURAL RIGHTS AND THE OBLIGATORINESS OF HUMAN LAWS

Is this given-if-then conception of natural rights robust enough to create a *moral* obligation that they be respected? Are those persons who do not accept the "if" in this given-if-then analysis morally bound to adhere to natural rights? Michael

Dworkin's later writings, and it is nowhere to be found in RONALD DWORKIN, LAW'S EMPIRE (1986).

37. HART, *supra* note 13, at 189.

38. *See* Barnett, STRUCTURE OF LIBERTY, *supra* note *.

Zuckert pointedly identifies this difficulty for Hugo Grotius's given-if-then conception of natural law:

> Grotius appears able, at best, to generate a hypothetical obligation: to live according to one's nature, one ought to obey the natural law. But where is the obligation to live according to nature? . . . . As Grotius concedes in a key place, perhaps the best one can really say is that it is "wise" to live according to the promptings of nature; he cannot establish the obligatoriness of natural law.[39]

This difficulty may be recast as follows: in what sense are natural rights, conceived in the way I do here, *obligatory* requirements of *justice* as opposed to mere prudential guides to conduct? Are persons obligated to respect them, particularly, if they reject the purposes they serve?

For reasons I shall explain in this section, I think this response overstates the distinction between justice and prudence. In this matter I agree with Phillipa Foote, who wrote: "That moral judgments cannot be hypothetical imperatives has come to seem an unquestionable truth. It will be argued here that it is not."[40] The distinction between a hypothetical imperative and a categorical imperative was made by Immanuel Kant:

> All *imperatives* command either *hypothetically* or *categorically*. Hypothetical imperatives declare a possible action to be practically necessary as a means to the attainment of something else that one wills (or that one may will). A categorical imperative would be one which represented an action as objectively necessary in itself apart from its relation to a further end.[41]

Categorical imperatives "tell us what we have to do whatever our interests or desires, and by their inescapability they are distinguished from hypothetical imperatives."[42]

Foote questions whether categorical imperatives are really any more "imperative" than hypothetical ones. A moral man "has moral ends and cannot be indifferent to matters such as

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39. MICHAEL ZUCKERT, NATURAL RIGHTS AND THE NEW REPUBLICANISM 191 (1994).

40. Phillipa Foote, *Morality as a System of Hypothetical Imperatives*, 81 PHIL. REV. 305, 305 (1972).

41. IMMANUEL KANT, GROUNDWORK OF THE METAPHYSICS OF MORALS 82 (H. J. Paton trans., Harper & Row 1964) (1785). The meaning of this passage may be clarified by substituting the term "desire" for the word "will" as some translations do.

42. Foote, *supra* note 40, at 308.

suffering and injustice."[43] He does not have these ends because they are dictated by categorical imperatives but because he is moral and cares about morality, including the morality dictated by categorical imperatives. Foote argues that, despite the efforts of philosophers to show otherwise, the mere existence of a categorical imperative does not provide a reason for an amoral person to adopt a moral demand.

> If he is an amoral man, he may deny that he has any reason to trouble his head over this or any other moral demand. Of course, he may be mistaken, and his life as well as others' lives may be most sadly spoiled by his selfishness. But this is not what is urged by those who think they can close the matter by an emphatic use of "ought." My argument is that they are relying on an illusion, as if trying to give the moral "ought" a magic force.[44]

In short, only if one cares about morality will one care about a categorical imperative.

I shall not attempt to summarize further Professor Foote's argument here, nor wager an opinion on whether hypothetical imperatives are just as "moral" as categorical ones. Instead, I will supplement her argument with several reasons why, regardless of whether one accepts her conclusion, the hypothetical imperatives provided by the sort of natural-rights analysis I am describing were of moral significance. For the real issue may be not so much whether background natural rights are morally obligatory, but the moral obligatoriness of human laws that infringe upon them.

The term "law" can be used descriptively or normatively. Descriptively, it can refer to commands by a recognized law-maker which, if disobeyed, will result in the imposition of a legal sanction, whether or not such commands are just. Even the natural-law theorist Thomas Aquinas was quite capable of distinguishing, as a descriptive matter, between those human laws that were just and those that were unjust, when he declared that "[l]aws framed by man are either just or unjust."[45] Whether just or unjust, Aquinas described both as "laws."

Rather, for Aquinas and other natural law thinkers, the issue of lawfulness is not purely descriptive or "value-neutral" as it is

43. *Id.* at 315

44. *Id.*

45. AQUINAS, *supra* note 28, at 233A.

for modern legal positivists,[46] but normative. Only just laws "have the power of binding in conscience."[47] It is this issue of "binding in conscience" that informs his endorsement of Augustine's statement that "that which is not just seems to be no law at all; therefore the *force* of a law depends on the extent of its justice."[48] By "force" he meant *moral* force of a law to bind in conscience. As John Locke wrote, "we should not obey a king just out of fear, because, being more powerful, he can constrain (this in fact would be to establish firmly the authority of tyrants, robbers, and pirates), but for conscience' sake."[49] Locke concluded from this that, "[h]ence the binding force of civil law is dependent on natural law; and we are not so much coerced into rendering obedience to the magistrate by the power of the civil law as bound to obedience by natural right."[50] Unless they adhere to natural law, "the rulers can perhaps by force and with the aid of arms *compel* the multitude to obedience, but put them under an *obligation* they cannot."[51]

Unlike some philosophers, persons who make laws are not content to employ a merely descriptive "value-free" conception of law. When they use the term law to describe their commands they typically claim that others *do* have a moral duty to obey them. It is legitimate therefore to assess the validity of their claim. Do their commands really create a duty of obedience? H.L.A. Hart correctly acknowledged that the challenge for legal positivism is to explain how a legal command is different than a command of a gunman—a "gunman situation writ large."[52] To this he responded by invoking (albeit without acknowledgment) Locke's distinction between *being obliged* to obey a command in the sense that one will be coerced into obedience, and *having an obligation.*[53] While one was obliged—or to use Locke's word,

46. *See, e.g.*, JOSEPH RAZ, THE AUTHORITY OF LAW 39-40 (1979) ("A jurisprudential theory is acceptable only if its tests for identifying the content of the law and determining its existence depend exclusively on facts of human behavior capable of being described in value-neutral terms, and applied without resort to moral argument.") (emphasis added).

47. *Id.*

48. *Id.* at 227 (emphasis added).

49. LOCKE, *supra* note 16, at 189.

50. *Id.*

51. *Id.* at 119 (emphasis added).

52. HART, *supra* note 13, at 7.

53. *See* HART, *supra* note 13, at 80: "There is a difference . . . between the assertion that someone was obliged to do something and the assertion that he had an obligation to do it."

"compelled"—to obey the gunman, one had no obligation to do so. But whence comes an obligation to obey the law?

Hart departed from nineteenth-century legal-positivist John Austin (as well as from Oliver Wendell Holmes[54]) by acknowledging that legal obligation is typically perceived by individuals, not merely as a command from a superior to a subject or as a way to predict the imposition of a legal sanction, but also as a *reason* for personal conduct. This "internal" point of view cannot be explained entirely by the physical coercion attached to noncompliance.[55] For Hart, the perception of obligation was based either on the widespread acceptance of "primary rules" regulating individual conduct[56] or on the widespread acceptance of "secondary rules" that regulate the making of primary rules.[57] And what, according to Hart, accounted for such popular acceptance of primary or secondary rules?

> Rules are conceived and spoken of as imposing obligations when the general demand for conformity is insistent and the social pressure brought to bear upon those who deviate or threaten to deviate is great.
>
> . . .
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> . . . The rules supported by this serious social pressure are thought important because they are believed to be necessary to the maintenance of social life or some highly prized feature of it.[58]

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54. *See* Oliver Wendell Holmes, Jr., *The Path of the Law*, 10 HARV. L. REV. 457, 459 (1897) (emphasis added):

> If you want to know the law and nothing else, you must look at it as a bad man, who cares only for the material consequences which such knowledge enables him to predict, not as a good one, who finds his reasons for conduct, whether inside the law or outside of it, in the vaguer *sanctions of conscience.*

55. *See* HART, *supra* note 13, at 86-88. As he summarized this point, for the majority of society, "the violation of a rule is not merely a basis for the prediction that a hostile reaction will follow but a reason for hostility." *Id.* at 88.

56. *Id.* at 91. For Hart's description of these "primary rules," see id. at 89-91. Hart's description sounds a lot like the liberal conception of justice I defend elsewhere (see, e.g., Barnett, *supra*, note 15): "If a society is to live by such primary rules alone, there are certain conditions which, granted a few of the most obvious truisms about human nature and the world we live in, must clearly be satisfied. The first of these conditions is that the rules must contain in some form restrictions on the free use of violence, theft, and deception to which human beings are tempted but which they must, in general, repress, if they are to coexist in close proximity to each other." *Id.* at 89.

57. *Id.* at 91. For Hart's description of these "secondary rules," see *id.* at 91-95.

58. *Id.* at 84-85.

Legal obligation in Hart's scheme, then, is largely, if not entirely, a matter of perception. Legal rules create obligations of obedience when they are "*thought* important because they are *believed* to be necessary."[59]

But at most Hart's account explains the general *perception* in a given society of an obligation to obey the law, not whether there truly *is* such an obligation. When a law-making authority claims that we are obligated (not merely obliged or compelled) to obey its commands, we are entitled to ask whether this claim is warranted. When a normative conception of law entailing a moral obligation to obey is invoked, whatever quality a law must have to make binding in conscience, we are entitled to demand that this *quality goes in before the name "law" goes on.*

In sum, to determine whether legal rules are *really* obligatory we must ask whether they are *in fact,* as Hart put it, "necessary to the maintenance of social life." And this is exactly what a natural-rights inquiry attempts to do. If adherence to natural-rights is indeed essential for the maintenance of social life, as natural rights theorists maintain, then laws are obligatory only if they are consistent with natural rights. By this account, commands may be "law" in the descriptive sense that they are issued by a recognized law-maker, but they are only *law,* in the normative sense of a command that binds in conscience on the citizenry, if such commands do not violate the background rights of persons. Thus, for human laws to be obligatory, they should not violate natural rights.[60] For human beings in society with others, to be able to pursue happiness, peace, and prosperity, certain background natural rights must be recognized as enforceable legal rights.[61]

This account of the obligation to obey the law suggests yet another reason why human law or legal rights should respect certain natural rights. At the same time law makers claim that subjects of their laws have a moral duty of obedience, they also invariably claim that their laws advance the general welfare or

59. *Id.* at 85 (emphasis added).

60. Although it may be necessary that laws not violate rights for them to be obligatory, this may not be sufficient. Along with requirements of justice, requirements of legality specified by the rule of law must also be respected.

61. Once again, I discuss the particular rights to which I think adherence is necessary, and the reasons why this is so, in my forthcoming book, *supra* note *.

the common good. Indeed, if pressed, many would advance the latter claim in defense of the former, that is, people have a duty to obey the laws *because* adherence to the laws does advance the general welfare. Yet if the analysis presented in favor of certain rights as natural is correct, then laws that violate these rights do *not* advance the general welfare or common good. Indeed, they harm it. Thus human laws that violate natural rights are not obligatory, and only those human laws that respect natural rights can be obligatory.

Finally, this previous observation suggests yet another basis for legal rights to adhere to natural rights. We have all heard that the legitimacy of law making is grounded on the "consent of the governed" to the law-making regime. Yet the analysis just presented suggests that the obligation of law makers to respect natural rights rests, at least in part, on the "consent of the governors" to respect these rights. For do not law makers explicitly or implicitly claim that their laws promote the common good and are not unjust? By doing so, are they not consenting to adhere to any principles of justice that, if violated, would thwart the common good? For example, the preface to the United States Constitution explicitly claims that its purpose was to "establish Justice, insure domestic Tranquility, . . . promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity."[62] Do not lawmakers in the United States who take an oath to uphold the Constitution explicitly obligate themselves to pass laws that actually *do* establish justice, *do* ensure peace, *do* promote the general welfare, and *do* secure liberty? Therefore, if the argument in favor of certain natural rights holds, then these background rights must be respected by lawmakers in devising legal rights if for no other reason than because they have promised or consented to do so.

For all these reasons, even if natural rights generated only a "prudential" or "hypothetical" obligation, this would be very significant. For the hypothetical obligation at issue is: *if we want a society in which persons can survive and pursue happiness, peace, and prosperity*, then we should respect the liberal conception of justice (as defined by natural rights) and the rule of law. Who

62. U.S. CONST. preamble.

among us would not accept this as their political goal? What lawmaker would deny that he or she desires this objective? Responding to those who would consider as dangerous and subversive a view of justice that depends on the contingent fact that people happen to care about certain shared objectives, Phillipa Foote observed:

> But it is interesting that the people of Leningrad were not similarly struck by the thought that only the *contingent* fact that other citizens shared their loyalty and devotion to the city stood between them and the Germans during the terrible years of the siege. Perhaps we should be less troubled than we are by fear of defection from the moral cause; perhaps we should even have less reason to fear it if people thought of themselves as volunteers banded together to fight for liberty and justice and against inhumanity and oppression.[63]

Of course, in suggesting that legal rights should correspond with background rights, I claim neither that we can use natural rights to *derive* legal rights, nor that we can always *know* what a particular person's background rights are independent of the processes that produce legal rights. Background natural rights are highly abstract, and many different sets of rules or laws may be consistent with them. Further, theorists speculating about background rights usually, if not always, take the legal rights with which they are familiar as starting points. A legal system operating according to certain procedures associated with the rule of law may be needed to generate a set of legal rights that can serve as a necessary starting point of any theory of background rights. And, if these rule of law procedures are sound, then the starting points they provide may not be entirely arbitrary. In determining the content of background rights, legal rights generated by a sound legal process may even be entitled to presumptive legitimacy.

Yet despite these caveats, a natural rights analysis attempts to provide knowledge of certain "principles of society" that must be respected if persons are to pursue happiness, peace, and prosperity while living in society with others. Though they may often be more controversial than principles of engineering, architecture, and agriculture, these principles have the same status.

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63. Foote, *supra* note 40, at 315-16.

IV. NATURAL RIGHTS AND UTILITY

Is a natural rights analysis *utilitarian*? Although I do not have a strong view on this question, for what it is worth, my answer depends on how the term "utilitarian" is used. If utilitarian is viewed as a *consequentialist* approach that evaluates practices by their consequences, then the conception of natural rights sketched here appears to be consequentialist, though only indirectly.[64] Some rights are thought to be natural because adherence to them is necessary to solve serious social problems. For this reason, these rights (not an assessment of utility) are then used to evaluate the justice of human laws.

I must hasten to add, however, that though a given-if-then argument provides reasons to favor natural rights, these reasons may well be reinforced and bolstered by other equally valid "nonconsequentialist" types of analysis.[65] Moreover, the argument presented here assumes that the goal of enabling persons to survive and pursue happiness, peace, and prosperity, while living in society with others, is worthwhile. If this goal needs to be defended, then it must be on some other grounds—and such grounds need not be consequentialist.

If utilitarianism is viewed as a general *theory of ethics* or morality, however, then the natural-rights approach presented here, though consequentialist, is not utilitarian. The approach presented here does not provide a theory of how persons ought to pursue the good life, the traditional province of ethics. Many but not all natural rights theorists also take a natural-law approach to this question, but historically a natural-law approach to ethics has been more teleological—that is, based on the natural end or good for human beings[66]—than utilitarian.

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64. *See* Larry Alexander, *Pursuing the Good, Indirectly*, 95 ETHICS 315, 317 (1985) ("An indirect consequentialist is one who, whatever his theory of the Good, believes the Good is not best attained by conscious attempts to achieve it each time we act."); John Gray, *Indirect Utility and Fundamental Rights*, 1 SOC. PHIL. & POL'Y 73 (1984).

65. *See* Randy E. Barnett, Foreword: Of Chickens and Eggs, The Compatibility of Moral Rights and Consequentialist Analyses, 12 HARV. J. L. & PUB. POL'Y 610, 611-35 (1989).

66. *See, e.g.*, HART, *supra* note 13, at 185 (describing the association of natural-law thinking with "the teleological conception of nature as containing in itself levels of excellence which things realize"). For an example of such a natural law approach to ethics, see HENRY B. VEATCH, FOR AN ONTOLOGY OF MORALS (1971). For two contemporary examples of a teleological, natural-law defense of natural rights, see DOUGLAS B. RASMUSSEN & DOUGLAS J. DEN UYL, LIBERTY AND NATURE (1991); HENRY B. VEATCH, HUMAN RIGHTS: FACT OR FANCY? (1985).

Perhaps most importantly, if utilitarianism is taken as a *method of decisionmaking* in which the effects of various policies are assessed by determining their effects on the sum of all individual's subjective preferences, then the view of natural rights described here is decidedly not utilitarian. For the indirect consequentialist analysis presented here suggests that respecting natural rights, not the calculation and aggregation of subjective preferences, promotes the common good. And the common good is viewed, not as a sum of preference satisfaction, but as the ability of each person to pursue happiness, peace, and prosperity while in acting in close proximity to others.

V. CONCLUSION

By running natural law together with natural rights, law professors typically miss the subtleties of natural law and natural rights arguments. How then, in a nutshell, should law professors distinguish between natural law and natural rights? We can sum up the preceding analysis as follows.

Natural law refers to the given-if-then *method of analysis* where the "given" is the nature of human beings and the world in which they live. This method can be applied to a number of distinct problems, the "if." When discussing moral virtues and vices, or the problem of distinguishing *good* from *bad* behavior, the imperative for which is supposedly based on human nature, natural-law *ethics* is the appropriate term (though such principles are sometimes referred to simply as natural law). When discussing the contours of the moral jurisdiction defined by principles of justice, or the problem of distinguishing *right* from *wrong* behavior, which is supposedly based on the nature of human beings and the world in which they live, the appropriate term would be *natural rights.*

In short, *natural-law ethics instructs us on how to exercise the liberty that is defined and protected by natural rights.* Whereas natural-law ethics provides guidance for our actions, natural rights define a moral space or liberty, as opposed to license,[67] in which we may act free from the interference of other persons. Although principles of natural-law ethics can be used to guide individual

67. *See* JOHN LOCKE, TWO TREATISES OF GOVERNMENT 311 (Peter Laslett ed., Cambridge Mentor rev. ed. 1965) (1690) ("[T]hough this be a State of Liberty, yet it is not a State of License.").

conduct, they should not be enforced coercively by human law if doing so would violate the moral space or liberty defined by natural rights. And human laws that violate natural rights do not bind the citizenry in conscience.

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