Traditional Natural Law Theory

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In this essay, Brian Bix discusses the central tenets of traditional natural law theory. His focus is on the major figures who have defended natural law theory, from Cicero and Aquinas to Grotius. He concludes with a few reflections on the importance of natural law theory to the development of law and especially on its role in American history. Brian Bix is professor of law at the University of Minnesota Law School.

We take it for granted that the laws and legal system under which we live can be criticized on moral grounds: that there are standards against which legal norms can be compared and sometimes found wanting. The standards against which law is judged have sometimes been described as "a (the) higher law." For some, this is meant literally: that there are law-like standards that have been stated in or can be derived from divine revelation, religious texts, a careful study of human nature, or consideration of nature. For others, the reference to "higher law" is meant metaphorically, in which case it at least reflects our mixed intuitions about the moral status of law: on the one hand, that not everything properly enacted as law is binding morally; on the other hand, that the law, as law, does have moral weight. (If it did not, we would not need to point to a "higher law" as a justification for ignoring the requirements of our society's laws.)

"Traditional" natural law theory offers arguments for the existence of a "higher law," elaborations of its content, and analyses of what consequences follow from the existence of a "higher law" (in particular, what response citizens should have to situations where the positive law—the law enacted within particular societies—conflicts with the "higher law").

CICERO

While one can locate a number of passages in ancient Greek writers that express what appear to be natural law positions, including passages in Plato (*Laws, Statesman, Republic*) and Aristotle (*Politics, Nicomachean Ethics*), as well as Sophocles' *Antigone,* the best known ancient formulation of a natural law position was offered by the Roman orator Cicero.

Cicero (*Laws, Republic*) wrote in the first century B.C., and was strongly influenced (as were many Roman writers on law) by the works of the Greek Stoic philosophers (some would go so far as to say that Cicero merely offered an elegant restatement of already established Stoic views). Cicero offered the following characterization of "natural law":

> True law is right reason in agreement with nature; it is of universal application, unchanging and everlasting; it summons to duty by its commands, and averts from wrongdoing by its prohibitions. And it does not lay its commands or prohibitions upon good men in vain, though neither have any effect on the wicked. It is a sin to try to alter this law, nor is it allowable to attempt to repeal any part of it, and it is impossible to abolish it entirely. We cannot be freed from its obligations by senate or people, and we need not look outside ourselves for an expounder or interpreter of it. And there will not be different laws at Rome and at Athens, or different laws now and in the future, but one eternal and unchangeable law will be valid for all nations and all times, and there will be one master and ruler, that is, God, over us all, for he is the author of this law, its promulgator, and its enforcing judge. Whoever is disobedient is fleeing from himself and denying his human nature, and by reason of this very fact he will suffer the worst penalties, even if he escapes what is commonly considered punishment.

In Cicero's discussions of law, we come across most of the themes traditionally associated with traditional natural law theory (though, as might be expected in the first major treatment of a subject, some of the analysis is not always as systematic or as precise as one might want): natural law is unchanging over time and does not differ in different societies; every person has access to the standards of this higher law by use of reason; and only just laws "really deserve [the] name" law, and "in the very definition of the term 'law' there inheres the idea and principle of choosing what is just and true."

Within Cicero's work, and the related remarks of earlier Greek and Roman writers, there was often a

certain ambiguity regarding the reference of "natural" in "natural law": it was not always clear whether the standards were "natural" because they derived from "human nature" (our "essence" or "purpose"); because they were accessible by our natural faculties (that is, by human reason or conscience); because they derived from or were expressed in nature, that is, in the physical world about us; or some combination of all three.

As one moves from the classical writers on natural law to the early Church writers, aspects of the theory necessarily change and therefore raise different issues within this approach to morality and law. For example, with classical writers, the source of the higher standards is said to be (or implied as being) inherent in the nature of things. With the early Church writers, there is a divine being who actively intervenes in human affairs and lays down express commands for all mankind—though this contrast overstates matters somewhat, as the classical writers referred to a (relatively passive) God, and the early Church writers would sometimes refer to rules of nature which express divine will. To the extent that the natural law theorists of the early Church continued to speak of higher standards inherent in human nature or in the nature of things, they also had to face the question of the connection between these standards and divine commands: for example, whether God can change natural law or order something which is contrary to it, a question considered by Ambrose and Augustine (among others) in the time of the early Church and by Francisco Suarez more than a thousand years later.

AQUINAS

The most influential writer within the traditional approach to natural law is undoubtedly Thomas Aquinas (*Summa Theologiae*), who wrote in the thirteenth century. The context of Aquinas's approach to law, its occurrence within a larger theological project that offered a systematic moral system, should be kept in mind when comparing his work with more recent theorists.

Aquinas identified four different kinds of law: the eternal law, the natural law, the divine law, and human (positive) law. For present purposes, the important categories are natural law and positive law.

According to Aquinas, (genuine or just) positive law is derived from natural law. This derivation has different aspects. Sometimes natural law dictates what the positive law should be: for example, natural law both requires that there be a prohibition of murder and settles what its content will be. At other times, natural law leaves room for human choice (based on local customs or policy choices). Thus, while natural law would probably require regulation of automobile traffic for the safety of others, the choice of whether driving should be on the left or the right side of the road, and whether the speed limit should be set at 55 miles per hour or 65, are matters for which either choice would probably be compatible with the requirements of natural law. The first form of derivation is like logical deduction; the second Aquinas refers to as the "determination" of general principles ("determination" not in the sense of "finding out," but rather in the sense of making specific or concrete). The theme of different ways in which human (positive) law derives from natural law is carried on by later writers, including Sir William Blackstone (*Commentaries on the Laws of England,* Vol. I [1765]), and, in modern times, John Finnis.

As for citizens, the question is what their obligations are regarding just and unjust laws. According to Aquinas, positive laws which are just "have the power of binding in conscience." A just law is one which is consistent with the requirements of natural law—that is, it is "ordered to the common good," the lawgiver has not exceeded its authority, and the law's burdens are imposed on citizens fairly. Failure with respect to any of those three criteria, Aquinas asserts, makes a law unjust; but what is the citizen's obligation in regard to an unjust law? The short answer is that there is no obligation to obey that law. However, a longer answer is warranted, given the amount of attention this question usually gets in discussions of natural law theory in general and of Aquinas in particular.

The phrase *lex iniusta non est lex* ("an unjust law is not law") is often ascribed to Aquinas, and is sometimes given as a summation of his position and the (traditional) natural law position in general. While Aquinas never used the exact phrase above, one can find similar expressions: "every human law has just so much of the nature of law, as it is derived from the law of nature. But if in any point it deflects from the law of nature, it is no longer a law but a perversion of law"; and "[unjust laws] are acts of violence rather than laws; because, as Augustine says,

a law that is not just, seems to be no law at all." (One also finds similar statements by Plato, Aristotle, Cicero, and Augustine—though, with the exception of Cicero's, these statements are not part of a systematic discussion of the nature of law.)

Questions have been raised regarding the significance of the phrase. What does it mean to say that an apparently valid law is "not law," "a perversion of law," or "an act of violence rather than a law"? Statements of this form have been offered and interpreted in one of two ways. First, one can mean that an immoral law is not valid law at all. The nineteenth-century English jurist John Austin (*The Province of Jurisprudence Determined* [1832]) interpreted statements by Sir William Blackstone (for example, "no human laws are of any validity, if contrary to [the law of nature]") in this manner, and pointed out that such analyses of validity are of little value. Austin wrote,

> Suppose an act innocuous, or positively beneficial, be prohibited by the sovereign under the penalty of death; if I commit this act, I shall be tried and condemned, and if I object to the sentence, that it is contrary to the law of God . . . the Court of Justice will demonstrate the inconclusiveness of my reasoning by hanging me up, in pursuance of the law of which I have impugned the validity.

Though one must add that we should not conflate questions of power with questions of validity—for a corrupt legal system might punish someone even if shown that the putative law was invalid under the system's own procedural requirements—we understand the distinction between validity under the system's rules and the moral worth of the enactment in question.

A more reasonable interpretation of statements like "an unjust law is no law at all" is that unjust laws are not laws "in the fullest sense." As we might say of some professional, who had the necessary degrees and credentials, but seemed nonetheless to lack the necessary ability or judgment: "she's no lawyer" or "he's no doctor." This only indicates that we do not think that the title in this case carries with it all the implications it usually does. Similarly, to say that an unjust law is "not really law" may only be to point out that it does not carry the same moral force or offer the same reasons for action as laws consistent with "higher law." This is almost certainly the sense in which Aquinas made his remarks, and the probable interpretation for nearly all proponents of the position. However, this interpretation leaves the statement as clearly right as under the prior (Austinian) interpretation it was clearly wrong. One wonders why such declarations have, historically, been so controversial.

To say that an unjust law is not law in the fullest sense is usually intended not as a simple declaration, but as the first step of a further argument. For example: "this law is unjust; it is not law in the fullest sense, and therefore citizens can in good conscience act as if it was never enacted; that is, they should feel free to disobey it." This is a common understanding of the idea that an unjust law is no law at all, but it expresses a conclusion that is controversial.

There are often moral reasons for obeying even an unjust law: for example, if the law is part of a generally just legal system, and public disobedience of the law might undermine the system, there is a moral reason for at least minimal, public obedience to the unjust law. This is Aquinas's position (he stated that a citizen is not bound to obey "a law which imposes an unjust burden on its subjects" if the law "can be resisted without scandal or greater harm"), and it has been articulated at greater length by later natural law theorists (for example, by John Finnis).

Finally, it should be noted that the proper interpretation of certain basic aspects of Aquinas's work remains in dispute. For example, there is debate within the modern literature regarding whether Aquinas believed moral norms could be derived directly from knowledge of human nature or experience of natural inclinations, or whether they are the product of practical understanding and reasoning by way of reflection on one's experience and observations.

NATURAL LAW IN EARLY MODERN EUROPE

In the period of the Renaissance and beyond, discussions about natural law were tied in with other issues: assertions about natural law were often the basis of or part of the argument for individual rights and limitations on government. Such discussions were also often the groundwork offered for principles of international law. Hugo Grotius and Samuel Pufendorf (writing in the early and late seventeenth

century, respectively) were prominent examples of theorists whose writings on natural law had significance in both debates. (Grotius and Pufendorf, along with other prominent seventeenth-century theorists, Francisco Suarez, Thomas Hobbes, and John Locke, were also central in developing the concept of individual rights in the modern sense of that term.)

A further significance of Grotius' work was its express assertion that natural law, the higher law against which the actions of nations, law-makers, and citizens could be judged, did not require the existence of God for its validity. (However, one can find hints of such a separation of natural law from a divine being at least as far back as the fourteenth-century writings of Gregory of Rimini.) From that time to the present, an increasingly large portion of the writing on questions of natural law (and the related idea of "natural rights") was secular in tone and purpose, usually referring to "the requirements of reason" rather than divine command, purpose, will, or wisdom.

PERSPECTIVE

It is normally a mistake to try to evaluate the discussions of writers from distant times with the perspective of modern analytical jurisprudence.

Cicero, Aquinas, and Grotius were not concerned with a social–scientific-style analysis of law, as the modern advocates of legal positivism could be said to be. These theorists were concerned with what legislators, citizens, and governments ought to do, or could do in good conscience. It is not that these writers (and their followers) never asked questions like "what is law?" However, they were asking the questions as a starting point for an ethical inquiry, and therefore one should not be too quick in comparing their answers with those in similar-sounding discussions by recent writers, who see themselves as participating in a conceptual or sociological task.

Natural law has, from time to time and with varying degrees of importance, escaped the confines of theory to influence directly the standards created and applied by officials. For example, natural law (or standards and reasoning that appear similar to natural law, but which are characterized as "substantive due process," "natural justice," or simply "reason") has been offered as the source of legal standards for international law, centuries of development in the English common law, and certain aspects of United States constitutional law. Natural law also appears to have played a significant role in American history, where its reasoning, or at least its rhetoric, has been prominent (among other places) in the Declaration of Independence, the Abolition (anti-slavery) movement, and parts of the modern Civil Rights movement.

REVIEW AND DISCUSSION QUESTIONS

1. What are the central tenets of traditional natural law theory, as exemplified in the writings of Cicero?
2. Describe the four types of law, according to Aquinas.
3. What does Bix think is the most reasonable interpretation of the idea that an unjust law is not a law?
4. What was Grotius' contribution to traditional natural law theory?
5. Describe how Bix thinks natural law has affected American history.
6. "Natural law theory merely confuses what the law is with what it ought to be." Discuss that claim in light of Bix's article.