

NATURAL LAW

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Oliver Wendell Holmes, the legal philosopher and judge whom Richard Posner has, with admiration, dubbed “the American Nietzsche,”¹ established in the minds of many people a certain image of what natural law theories are theories of, and a certain set of reasons for supposing that such theories are misguided and even ridiculous. While I have my own reasons for admiring some of Holmes’s work—despite, rather than because of, the Nietzscheanism that endears him to Judge Posner—I think that everything Holmes thought and taught about natural law is wrong. I have elsewhere set forth a detailed critique of Holmes’s thought,² which I will not repeat here. Rather, this Article offers a constructive account of what natural law theories are in fact theories of, explains why the idea of natural law and natural rights is far more plausible than people influenced by Holmes have supposed, and shows how natural law theories are similar to and different from leading compet-

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1. Richard A. Posner, *Introduction* to THE ESSENTIAL HOLMES: SELECTIONS FROM THE LETTERS, SPEECHES, JUDICIAL OPINIONS, AND OTHER WRITINGS OF OLIVER WENDELL HOLMES, JR., at xxviii (Richard A. Posner ed., 1992) (citing his comparison of the two in RICHARD A. POSNER, THE PROBLEMS OF JURISPRUDENCE 239–42 (1990)).

2. See Robert P. George, *Holmes on Natural Law*, in NATURE IN AMERICAN PHILOSOPHY 127 (Jean De Groot ed., 2004).

ing accounts of practical reasoning and of moral judgments that provide the justificatory basis of positive law as well as standards for its critical evaluation.

Theories of natural law are reflective critical accounts of the constitutive aspects of the well-being and fulfillment of human persons and the communities they form. The propositions that pick out fundamental aspects of human flourishing are directive (that is, prescriptive) in our thinking about what to do and refrain from doing (our practical reason)—they are, or provide, more than merely instrumental reasons for action and self-restraint. When these foundational principles of practical reflection are taken together (that is, integrally), they entail norms that may exclude certain options and require other options in situations of morally significant choosing. Natural law theories, then, propose to identify principles of right action—moral principles—specifying the first and most general principle of morality, namely, that one should choose and act in ways that are compatible with a will towards integral human fulfillment.³ Among these principles is a respect for rights people possess simply by virtue of their humanity—rights which, as a matter of justice, others are bound to respect and governments are bound not only to respect but, to the extent possible, also to protect.

Theorists of natural law understand human fulfillment—the human good—as variegated. There are many irreducible dimensions of human well-being. This is not to deny that human nature is determinate. It is to affirm that our nature, though determinate, is complex. We are animals, but rational. Our integral good includes our bodily well-being, but also our intellectual, moral, and spiritual well-being. We are individuals, but friendship and sociability are constitutive aspects of our flourishing. We form bonds with others not only for instrumental purposes, but because of our grasp of the inherent fulfillments available in joining together in a wide variety of formal and informal types of association and community. In ways that are highly relevant to moral reflection and judgment, man truly is a social animal.

3. On the first principle of morality and its specifications, see JOHN FINNIS, JOSEPH M. BOYLE, JR. & GERMAIN GRISEZ, *NUCLEAR DETERRENCE, MORALITY AND REALISM* 281–87 (1987).

