

1993

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Recommended Citation

Robert P. George, *The 1993 St. Ives Lecture - Natural Law and Civil Rights: From Jefferson's "Letter to Henry Lee" to Martin Luther King's "Letter From Birmingham Jail"*, 43 Cath. U. L. Rev. 143 (1994).
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ADDRESS

THE 1993 ST. IVES LECTURE* NATURAL LAW AND CIVIL RIGHTS: FROM JEFFERSON'S "LETTER TO HENRY LEE" TO MARTIN LUTHER KING'S "LETTER FROM BIRMINGHAM JAIL"

*Robert P. George***

Ever since Jeremy Bentham scorned the idea of natural or moral rights as no ordinary nonsense, but "nonsense upon stilts,"¹ a certain stream of thought about rights has held them to be merely conventional and historically contingent. According to the conventionalist or historicist view, moral rights cannot come as a divine gift because there is no divine giver; nor can they derive from human nature because there is no determinate human nature. Moral rights, according to conventionalists and historicists, exist only in the sense that certain people, or peoples, happen to believe—as a contingent matter of fact, that is, subjectively—that rights exist and are willing to honor them. Where people, or peoples, do not happen to believe in their existence, rights simply do not exist.

Now historicists and conventionalists do not doubt the existence of *legal* rights. For legal or "positive" rights can easily be accommodated and accounted for in historicist and conventionalist terms. What they deny, and what theorists of natural law and natural rights affirm, is that legal rights can embody or express moral rights that are not merely contingent and conventional. In other words, the issue dividing historicists and conventionalists, on the one side, and partisans of natural law and

* This Article is adapted from a lecture delivered on April 21, 1993, at the Columbus School of Law, The Catholic University of America, as part of the St. Ives Lecture Series.

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1. JEREMY BENTHAM, *Anarchical Fallacies*, in 2 THE WORKS OF JEREMY BENTHAM 489, 501 (John Bowring ed., 1962).

natural rights, on the other, is whether positive law can be designed to embody, or can validly be criticized for failing to embody, objective or true principles of justice. Such principles are principles that people, or peoples, have sound reasons to hold and honor whether or not they happen to hold and honor them in fact.

Any serious student of civil rights must inquire into the moral ground and epistemic status of civil rights. Is the mode of existence of civil rights *simply* historically contingent and conventional? That is, do civil rights come into being merely at some specific time and place, and then possibly disappear as "history" or experience unfolds?

To be sure, our civil rights, as the rights of citizens of this nation, considered as legal rights—i.e., as rights that are posited legislatively and enforceable in court—are certainly historically contingent. Laws, including laws that create rights, are human artifacts. They come into force by authoritative enactment, and they can, by authoritative act, be repealed. They may exist as legal fact at one historical moment and not at another. Their existence or nonexistence in a positive code depends on human acts of positing and enforcing them. Thus, they can and do change.

Abraham Lincoln expressed the relation between the *time-bound historicity* and the *timeless rationality* of the principle of equal rights in his 1857 speech on the *Dred Scott v. Sanford*² decision. He said of those who had written the Declaration of Independence that

[t]hey defined with tolerable distinctness, in what respects they did consider all men created equal—equal in "certain inalienable rights, among which are life, liberty, and the pursuit of happiness." This they said, and this they meant. They did not mean to assert the obvious untruth, that all were then actually enjoying that equality, nor yet, that they were about to confer it immediately upon them. In fact they had no power to confer such a boon. They meant simply to declare the *right*, so that the *enforcement* of it might follow as fast as circumstances should permit. They meant to set up a standard maxim for free society, which should be familiar to all, and revered by all; constantly looked to, constantly labored for, and even though never perfectly attained, constantly approximated, and thereby constantly spreading and deepening its influence, and augmenting the happiness and value of life to all people of all colors everywhere.³

If there are objective or true principles of justice (such as the principle of equality) that constitute a higher standard, then legislative action may

2. 60 U.S. (2 How.) 393 (1857).

3. ABRAHAM LINCOLN, Speech at Springfield, Illinois (June 26, 1857), in 2 THE COLLECTED WORKS OF ABRAHAM LINCOLN 398, 405-06 (Roy P. Basler et al. eds., 1953).

be rationally guided and criticized in the light of those principles; and legal rights, or the absence of certain legal rights, can be judged morally good or bad. Authoritative actors in a legal system may fail to secure or enforce a right that, morally speaking, ought to be secured and enforced; or they may posit and enforce a right that ought not to be posited and enforced. For example, the law might unjustly fail to give a certain class of human beings a legal right not to be enslaved or arbitrarily killed; that is, it might unjustly confer upon another class a legal right to enslave or kill them. The justice or injustice of such acts of positive law is measured by reference to standards of the higher law, i.e., the moral law, that are objective or true eternally and universally.

Two weeks before Justice Thurgood Marshall resigned from the Supreme Court, I sat in my office in Princeton chatting with then-Judge Clarence Thomas who was in town to address a judicial education seminar. I was, at the time, putting together the volume of essays that has now appeared under the title *Natural Law Theory*,⁴ and our discussion turned to the question of natural law and civil rights. However much Judge Thomas' confirmation hearings left the public confused about his ideas of natural law and natural rights, he made his position on the issue crystal clear to me: "Those who deny natural law," he said, "cannot get me out of slavery."⁵ Of course, Justice Thomas was not suggesting that contemporary historicists or conventionalists—"those who deny natural law"—believe in slavery, and he well knows that some nineteenth century believers in natural law argued for a natural right to own slaves. His point was that the moral relativism that informs historicist and conventionalist accounts of rights precludes the proponents of such accounts from offering a rational moral argument against slavery. All they can say is that once upon a time in this country white people had the legal right to own black people, and now black people (and, indeed, all people) have the legal right not to be enslaved. For the latter proposition they can cite the Thirteenth Amendment of the United States Constitution. Their historicism and conventionalism preclude them, however, from saying that the Thirteenth Amendment embodies or gives legal force to a moral or natural right not to be enslaved. Under their account, no one would have had objective moral reasons (though some could have had economic or other instrumental or nonmoral reasons) to support the abolition of slavery. Of course, people may have believed (and acted upon their belief) in a natural right not to be enslaved, which provided a moral reason for

4. *NATURAL LAW THEORY: CONTEMPORARY ESSAYS* (Robert P. George ed., 1992).

5. Interview with Clarence Thomas, Judge, United States Court of Appeals for the District of Columbia Circuit, in Princeton, N.J. (June, 1991).

them to support abolition, but this subjective belief, under the historicist and conventionalist account, lacked a rational ground. That is to say, it was in no sense *rationally* superior to the belief of other people that no such right existed or, indeed, that they had a right to own slaves. It also follows that neither history nor convention could provide an adequate rational defense against the return in the future of some form of slavery.

Like Justice Thomas, I reject historicism and conventionalism in favor of the natural law and natural rights position. It is probably true, however, that in this respect we are in the minority in today's legal and academic communities. We can, however, take comfort at finding ourselves in agreement with America's greatest statesmen, from Jefferson to Lincoln to Martin Luther King. They—and the central philosophic tradition of which they were, in turn, our nation's principal bearers—argued that the basis of civil rights and liberties was natural law and the natural rights that derive from the natural law.

Let me pay what is due to the natural law skeptics of our day: the central tradition was by no means clear and united on the meaning or content of the natural law. But the proponents of natural law in all its varieties—from the pagan Aristotle to the Christian St. Thomas Aquinas, from Enlightenment philosophers such as Locke to Jefferson, Lincoln, and, not least of all, King—would probably all have been appalled to hear that natural law thinking is irrelevant or dangerous, which was the conventional view expressed again and again during round one of Justice Thomas' confirmation hearings.

* * * * *

If *the* official act of foundation of the American regime was the publication of the Declaration of Independence—as our Founders themselves plainly believed—then at the basis of American republicanism is the explicit recognition of “the Laws of Nature and Nature's God.”⁶ In justifying the act of independence, the Declaration says that we Americans “hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, among these are Life, Liberty and the pursuit of Happiness.”⁷ Jefferson, the author of these immortal lines, acknowledged that there was nothing new about the natural law and natural rights philosophy of the Declaration. Years later, he wrote to Henry Lee that it was

[n]ot to find out new principles or new arguments never before thought of, nor merely to say things which had never been said before, but to place before mankind the common sense of the

6. THE DECLARATION OF INDEPENDENCE para. 1 (U.S. 1776).

7. *Id.* at para. 2.

subject . . . [I]t was intended to be an expression of the American mind, and to give to that expression the proper tone and spirit called for by the occasion. All its authority rests then on the harmonizing sentiments of the day, whether expressed in conversation, in letters, printed essays, or in the elementary books of public right, as Aristotle, Cicero, Locke, Sidney, etc.⁸

Notice that according to Jefferson, these writers—two ancients and two moderns—described ideas of natural law in their “books of public right.” That there were significant differences among these thinkers about the content of natural law was less important than their shared confidence that there is such a moral-political reality that is accessible to reason and that supplies theoretical justification for “public right.” Jefferson was certain that the idea of natural law is “common sense”—that is, something ordinary citizens can and do understand—and that this common sense rests on certain “harmonizing sentiments of the day”—some core set of beliefs about which citizens, whatever their disagreements, could come to agreement.

Despite all the differences among the greatest minds that ever applied themselves to the fields of ethics and politics, there is one proposition on which those within the natural law tradition agree, namely, that human nature is, in significant respects, determinate, unchanging and structured. This does not mean that human nature is a closed nature;⁹ for practical knowledge—knowledge of what is morally right and good for man—is not knowledge of what is (already) the case, but, rather, knowledge of what is to be (and ought to be) done, that is, knowledge of possible human fulfillment through rationally motivated action.¹⁰ Because human beings as practically rational agents can understand and act upon *reasons* provided by the basic goods of human nature, they, unlike beings whose natures are closed, possess the capacity for free choice. Thus, human beings are capable of understanding a moral law, a law of practical reasonableness, constituted by principles of right reason in practical affairs.¹¹

The standard historicist and conventionalist argument against natural law and natural rights appeals to the brute fact of moral diversity in the

8. Letter from Thomas Jefferson to Henry Lee (May 8, 1825), in *THE POLITICAL WRITINGS OF THOMAS JEFFERSON* 88 (Edward Dumbauld ed., 1955).

9. See generally Robert P. George, *Natural Law and Human Nature*, in *NATURAL LAW THEORY*, *supra* note 4, at 31 (arguing that human nature is not a closed nature).

10. See generally Germain Grisez et al., *Practical Principles, Moral Truth, and Ultimate Ends*, 32 *AM. J. JURIS.* 99 (1987) (responding to criticisms of natural law theory).

11. On practical reasonableness, see generally JOHN FINNIS, *NATURAL LAW AND NATURAL RIGHTS* 100-33 (1980).

world.¹² Different people, and peoples, hold or have held, different and conflicting beliefs about issues such as slavery, racial segregation and abortion. From this observable fact, standard historicists and conventionalists conclude that there is no moral truth, no natural law. But this inference is unwarranted. The existence of moral truth is logically compatible with any range of moral diversity. As Leo Strauss observed:

[K]nowledge of the indefinitely large variety of notions of right and wrong is so far from being incompatible with the idea of natural right that it is the essential condition for the emergence of that idea: realization of the variety of notions of right is *the* incentive for the quest for natural right.¹³

A different objection to the idea of natural law and natural rights is its alleged incompatibility with a legitimate range of human freedom, ways of life and diversity of choices.¹⁴ But this argument fares no better. In the first place, it appears to be self-referentially inconsistent inasmuch as it presupposes a moral obligation to respect freedom and diversity as a matter not of mere convention, but of natural justice or natural rights. It is, in short, a palpably moralistic critique of moral objectivity. Second, the argument misses its target; because the belief that some choices and ways of life are objectively morally wicked does not entail the proposition that there is always a single correct choice or way of life. Natural law theorists recognize a legitimate variety of choices and ways of life that reflect the spectrum of human goods as well as the diverse opportunities and legitimate ways that people can realize and instantiate these goods. Natural law theory has never demanded uniformity or celebrated conformism.¹⁵

Now historicism and conventionalism are, so to speak, polite expressions of skepticism. They are, however, unstable. This politeness is not principled, but reflects the habits of civility or the mild temperament of

12. Versions of this argument are advanced by MELVILLE J. HERSKOVITS, *CULTURAL RELATIVISM* (Frances Herskovits ed., 1972) and J.L. MACKIE, *ETHICS: INVENTING RIGHT AND WRONG* (1977). For powerful defenses of natural law and natural rights against arguments for relativism and skepticism that appeal to moral diversity, see HADLEY ARKES, *FIRST THINGS: AN INQUIRY INTO THE FIRST PRINCIPLES OF MORALS AND JUSTICE* (1986) and JOHN FINNIS, *FUNDAMENTALS OF ETHICS* (1983).

13. LEO STRAUSS, *NATURAL RIGHT AND HISTORY* 10 (1953).

14. This objection is asserted against the natural law theorizing of Germain Grisez and John Finnis in Bernard Hoose, *Proportionalists, Deontologists and the Human Good*, 33 *HEYTHROP J.* 175 (1992). For a defense of this sort of theorizing against Hoose's critique, see Robert P. George, *Liberty Under the Moral Law: On B. Hoose's Critique of the Grisez-Finnis Theory of Human Good*, 34 *HEYTHROP J.* 175 (1993).

15. On the compatibility of natural law theory with recognition of legitimate pluralism and diversity, see generally ROBERT P. GEORGE, *MAKING MEN MORAL: CIVIL LIBERTIES AND PUBLIC MORALITY* (1993).

intellectuals who happen to hold these positions. But others may be found, of stronger will and greater ambition, who reject natural law. Moreover, they are not constrained by politesse from drawing the truly radical conclusions that flow from the proposition that there are no objective standards of justice and right. They correctly reason that if man is radically free—free from any standards of practical reasonableness, which is to say, morality—then, as Nietzsche put it, “all things are permitted.”¹⁶ This suggests that men are free to pursue their desires and interests, whatever they happen to be; they are, that is to say, morally free, whether or not they are legally free, to deny freedom to others, to manipulate, exploit, even enslave them. Where reason has no sway in practical affairs, the sole question is who has the power. And the powerful have *no reason* to spare the weak. The radical or nihilist critique of moral objectivity understandably, on its own terms, denounces natural law thinking as a “slave morality.”¹⁷

The instability of historicism and conventionalism leads to a conclusion worth pondering, namely, that the choice for us is not natural law or freedom, as Clarence Thomas’ liberal critics suggested; the choice is natural law, and a morally ordered freedom based on natural law, or nihilism.

Prior to the revolution in, or as some say, the invention of, philosophy by Socrates, law (*nomos*) meant the conventional and nature (*physis*) was regarded as its opposite. We hear tentative beginnings of natural law argumentation in Plato, who puts the opposed terms “nature” and “law” together only twice, I believe, in his corpus—neither time suggesting a nonconventional rule of equity. The Platonic Socrates does not speak of natural law—for Plato a paradox—but of that which is “right by nature,” or “natural right.”¹⁸

Yet in the dialogue *Minos*, or *On Law*, Socrates does suggest that there is some unwritten transcendent standard of “worthiness” and “wickedness” that disqualifies bad laws (*nomoi*) from being considered truly

16. For two excellent analyses of Nietzschean nihilism, see STANLEY ROSEN, *NIHILISM: A PHILOSOPHICAL ESSAY* at xiii, xiii-xx (1969) and Werner J. Dannhauser, *Friedrich Nietzsche*, in *HISTORY OF POLITICAL PHILOSOPHY* 829, 842 (Leo Strauss & Joseph Cropsey eds., 3d ed. 1987).

17. In the original debate about natural justice in the western philosophic tradition, Thrasymachus in Plato’s *Republic* anticipates Nietzsche’s “transvaluation of values” when he declares under Socrates’s relentless questioning that “the just is nothing other than the advantage of the stronger.” PLATO, *THE REPUBLIC* 338C (Allan Bloom, trans., 2d ed. 1968). Cf. FRIEDRICH W. NIETZSCHE, *THE ANTICHRIST*, reprinted in *THE PORTABLE NIETZSCHE* 565, 568 (Walter Kaufmann, ed. & trans., 1954); FRIEDRICH W. NIETZSCHE, *On the Genealogy of Morals* II.17, app. 92, reprinted in *ON THE GENEALOGY OF MORALS AND ECCE HOMO* 1, 86, 168-69 (Walter Kaufmann ed., Walter Kaufmann & R.J. Hollingdale trans., 1969).

18. PLATO, *supra* note 17, at 501b.

law.¹⁹ Moreover, in Xenophon's *Memorabilia*, Socrates mentions an unwritten law against incest that is enforced by the natural penalty of having ill-begotten offspring.²⁰

Plato's more confident successor, Aristotle, developed the system of ethics from which the tradition of natural law theorizing emerged. Like Socrates and Plato, Aristotle does not speak of "natural law," yet he writes of an unchanging "law based on nature."²¹ Practical reason, in Aristotle's ethical writings, is concerned with discovering this law by rational inquiry and putting it into effect in human affairs.

A self-conscious commitment to the idea of natural law is more fully evidenced, however, in the writings of Cicero, who mentions it repeatedly. He says, for example, that

"law . . . is the highest reason implanted in nature, which prescribes those things which ought to be done, and forbids the contrary." And when this same reason is confirmed and established in men's minds, it is then law.

[The Romans] therefore conceive that prudence is a law, whose operation is to urge us to good actions, and restrain us from evil ones.²²

Now remember that these early natural law philosophers were ignorant of the revealed teachings of Sacred Scripture. Therefore, we may put to rest the oft-expressed objection that belief in natural law is a sectarian religious doctrine. To the contrary, on its own terms, whether advanced by pagans, Christians, or Jews,²³ natural law philosophy seeks to vindicate principles accessible to, and thus binding upon, every reasonable person. If natural law is based upon "faith," it is a faith in reason, and in the possibility of practical reason in particular. It is as much the opponent of religious doctrines that deny the power of practical reason and make all ethical principles nothing but matters of divine command as it is the enemy of the nihilist doctrine that replaces the quest for rationality in ethics with the pure will to power.

It is precisely because the natural law is held to be accessible to reason and thus binding on all rational persons irrespective of religious faith or its absence that St. Paul can say in his *Letter to the Romans* that

19. PLATO, MINOS 314e, reprinted in *THE ROOTS OF POLITICAL PHILOSOPHY: TEN FORGOTTEN SOCRATIC DIALOGUES* 53, 55-56 (Thomas L. Pangle ed. & trans., 1987).

20. XENOPHON, *MEMORABILIA AND OECONOMICUS* IV.iv.17-23 (E.C. Marchant trans., 1923).

21. ARISTOTLE, *ON RHETORIC* I.1373b (George A. Kennedy trans., 1991).

22. CICERO, *On the Laws* I.vi.12-19, reprinted in *THE TREATISES OF M.T. CICERO* 398, 406 (C.D. Yonge trans., 1878).

23. On natural law in the Jewish tradition, see DAVID NOVAK, *JEWISH SOCIAL ETHICS* 22-44 (1992).

it is not the hearers of the law who are righteous before God, but the doers of the law who will be justified. When the Gentiles who have not the law do by nature what the law requires, they are a law to themselves, even though they do not have the law. They show that what the law requires is written on their hearts, while their conscience also bears witness²⁴

Of course, once the revealed teachings began to challenge paganism, the tradition of classical philosophy could not avoid its impact, and the natural law tradition became integrated into (and enriched by) Christian thought in the writings of St. Augustine and especially St. Thomas Aquinas. In the most comprehensive expression of the premodern teaching on natural law, Aquinas says in his *Summa Theologica*: “[The human being] has a share of the Eternal Reason, whereby it has a natural inclination to its proper act and end: and this participation of the eternal law in the rational creature is called the natural law.”²⁵

Since many people today think of natural law thinking as a distinctively Catholic phenomenon, it is worth observing that the Anglican divine Richard Hooker adopts Aquinas’ teaching on the subject with very little change.²⁶ And, despite his distrust of rationalism, Martin Luther is careful not to dismiss “[t]he noble gem called natural law and reason [which] is a rare thing among the children of men.”²⁷ Even John Calvin acknowledges “that internal law, which, . . . is in a manner written and stamped on every heart,”²⁸ though, to be sure, Calvin was Calvinist enough to insist that it had been grossly distorted and obscured by sin.

I would not deny that there is a fundamental division in moral and political thought between the ancient and medieval philosophers, on the one side, and the moderns, on the other. What is of interest here, however, is not the profound points of divergence, but, rather, the common belief in a natural law of personal and political morality that enabled Jefferson to speak of ancient and modern authors together as responsible for the “elementary books of public right”²⁹ whose teachings informed his Declaration.

24. *Romans* 2:13-15.

25. ST. THOMAS AQUINAS, *SUMMA THEOLOGIAE* IaIIae Q. 91, art. 2 (Fathers of the English Dominican Province trans., 1948).

26. See Duncan B. Forrester, *Richard Hooker*, in *HISTORY OF POLITICAL PHILOSOPHY*, *supra* note 16, at 356, 358-59.

27. MARTIN LUTHER, *Commentary on Psalm 101*, in *13 LUTHER’S WORKS* 146, 161 (Jaroslav Pelikan & Helmut T. Lehmann eds., Alfred von Rohr Saver trans., 1956).

28. JOHN CALVIN, *INSTITUTES OF THE CHRISTIAN RELIGION* 16 (Henry Beveridge trans., 1966) (1536) (construing *Romans* 2:1-16).

29. Letter from Thomas Jefferson to Henry Lee, *supra* note 8, at 8.

If St. Thomas Aquinas is the classic premodern natural law thinker, the modern *par excellence* is John Locke. Echoing the dispassionate rhetoric of “the judicious Hooker,” Locke wrote that “[t]he *State of Nature* has a Law of Nature to govern it, which obliges every one: And Reason, which is that Law, teaches all Mankind, who will but consult it, that being all equal and independent, no one ought to harm another in his Life, Health, Liberty, or Possessions.”³⁰ Unfortunately, few men are “studiers” of the natural law, yet “every *Man hath a Right to punish the Offender, and be Executioner of the Law of Nature.*”³¹ Thus, the urgency to escape the uncertainties of the state of nature and institute governments that will secure life, liberty, and property rights in part by creating a governmental monopoly of the executive power.³² Like Locke, Algernon Sidney wrote partly in response to the arguments for tyranny in Robert Filmer’s book *Patriarcha*.³³ Both Sidney and Locke maintain that a sound account of natural law provides the most persuasive bulwark against oppression. Sidney writes:

[N]othing but the plain and certain dictates of reason can be generally applicable to all men as the law of their nature; and they who, according to the best of their understanding, provide for the good of themselves and their posterity, do all equally observe it. He that enquires more exactly into the matter may find, that reason enjoins every man not to arrogate to himself more than he allows to others, nor to retain that liberty which will prove hurtful to him; or to expect that others will suffer themselves to be restrain’d, whilst he, to their prejudice, remains in the exercise of that freedom which nature allows. He who would be exempted from this common rule, must shew for what reason he should be raised above his brethren; and if he do it not, he is an enemy to them. This is not popularity, but tyranny;

30. JOHN LOCKE, *TWO TREATISES OF GOVERNMENT* 289 (Peter Laslett ed., 2d ed. 1967) (3d ed. 1698).

31. *Id.* at 290.

32. With thanks to Professor Russell Hittinger of Catholic University’s School of Philosophy for bringing my attention to this point, I cannot avoid noting that according to Locke—who is often thought of as America’s philosopher—when government refuses to secure the natural rights of the people to life, liberty, and property, it effectively dissolves itself and restores the state of nature. But this also brings back its “inconveniences,” such as private acts to punish or prevent the violation of third party natural rights, examples of which include the shooting of abortionists and suspected child abusers by private citizens. When individuals feel compelled to reassume their original Lockean right to execute the natural law because government has unravelled the social contract by giving up its monopoly of the executive power, one Lockean inconvenience is the blurring of the line between aggressor and defender as the state of nature comes to resemble a state of war.

33. SIR ROBERT FILMER, *PATRIARCHA AND OTHER WRITINGS* (Johann P. Sommerville ed., 1991) (1679).

and tyrants are said . . . to throw off the nature of men, because they do unjustly and unreasonably assume to themselves that which agrees not with the frailty of human nature, and set up an interest in themselves contrary to that of their equals, which they ought to defend as their own.³⁴

Tyrannicide is a legitimate remedy, according to Sidney, when violations of natural rights by leaders chosen to secure those rights become systematic and intolerable. "The tree of liberty," wrote Thomas Jefferson, Sidney's disciple in the White House, "must be refreshed from time to time with the blood of patriots and tyrants."³⁵ Notice that Sidney's defense of liberty, like any plausible defense of liberty, is a natural law defense. His critique of tyranny, like any plausible critique of tyranny, is openly moralistic. What is wrong with tyranny is not that it is unpopular or economically inefficient or contrary to tradition; what is wrong with tyranny is that it is unjust and, therefore, morally wrong.

As I have conceded, there are different and conflicting accounts or theories of natural law and natural rights. There are particularly profound differences on crucial points between the ancient and medieval thinkers and the moderns. For what it is worth, I agree with the ancients and medievals on some of these points, particularly their perfectionist concern with the inculcation of virtue, and with the moderns on others, such as the importance of civil and, particularly, religious liberty.³⁶

Nevertheless, virtually all the philosophers of the central tradition that fed the American Founding shared with the authors of "the books of public right" a belief in an order of natural law and justice (which the moderns refer to aptly in terms of natural rights) that is what it is because human nature, and therefore the human good, is what *it* is, and that this moral order was constituted by principles accessible to reason that transcend tastes, preferences, or subjective will.

When Jefferson claims that the Declaration of Independence was based on the common sense of the ancients and moderns that provided a harmonizing sentiment, it is clear that natural law philosophy is at the very core of this common sense.

When Madison pleads for New York to ratify the proposed Constitution, he returns in the forty-third *Federalist* paper "to the great principle of self-preservation; to the transcendent law of nature and of nature's God, which declares that the safety and happiness of society are the ob-

34. ALGERNON SIDNEY, DISCOURSES CONCERNING GOVERNMENT ii.20 (Thomas G. West ed., 1990) (London, J. Toland 1698).

35. Letter from Thomas Jefferson to William S. Smith (Nov. 13, 1787), in THE POLITICAL WRITINGS OF THOMAS JEFFERSON, *supra* note 8, at 68, 69.

36. See GEORGE, *supra* note 15.

jects at which all political institutions aim, and to which all such institutions must be sacrificed."³⁷ The foundation of America's regime of freedom and equality, the world's first liberal democracy, would be incomprehensible in terms that reject the idea of natural law and natural rights.

The idea of "civil rights" currently enjoys a great deal of prestige in our culture. Reverend King's prophecy from the Birmingham jail is already being fulfilled:

One day the South will know that when these disinherited children of God sat down at lunch counters, they were in reality standing up for what is best in the American dream and for the most sacred values in our Judaeo-Christian heritage, thereby bringing our nation back to those great wells of democracy which were dug deep by the founding fathers in their formulation of the Constitution and the Declaration of Independence.³⁸

Unlike earlier generations, no one would be afraid today to be described as a "civil rights leader," or even a "civil rights commissioner." In large measure, we owe the fulfillment of Reverend King's prophecy to his own words and actions. But it is important to keep in mind in reflecting on the nature of civil rights and the future of the cause of civil rights that King himself was careful to anchor the defense of civil rights, and of his own actions in their behalf, in the idea of natural law and natural rights. The supreme expression of his view is his *Letter from Birmingham Jail*, the Pauline echo of which could hardly be accidental in the thought of a Protestant minister. The entire letter, in my view, is a meditation on natural law and civil rights. Reverend King reminds his fellow clergymen that in the tradition to which they, as Protestants, Catholics, and Jews, all in one way or another participate:

[T]here are two types of laws: just and unjust. I would be the first to advocate obeying just laws. One has not only a legal but a moral responsibility to obey just laws. Conversely, one has a moral responsibility to disobey unjust laws. I would agree with St. Augustine that "an unjust law is no law at all."³⁹

King slightly exaggerates his case here. We are not always morally obligated to disobey unjust laws and it is sometimes the case that we are morally obligated to obey them, their injustice notwithstanding. This is, however, a quibble. Seriously unjust laws never bind in conscience and laws that require people to *do* that which is unjust may never rightly be

37. THE FEDERALIST NO. 43, at 316 (James Madison) (Benjamin F. Wright ed., 1961).

38. Martin Luther King, Jr., *Letter From Birmingham Jail*, in WHAT COUNTRY HAVE I? POLITICAL WRITINGS BY BLACK AMERICANS 117, 130 (Herbert J. Storing ed., 1970).

39. *Id.* at 121.

obeyed.⁴⁰ Civil disobedience in the face of seriously unjust laws is often permissible and is sometimes required. And that, I take it, is Reverend King's point.

He continues:

Now, what is the difference between the two? . . . To put it in the terms of St. Thomas Aquinas: An unjust law is a human law that is not rooted in eternal law and natural law. Any law that uplifts human personality is just. Any law that degrades human personality is unjust. All segregation statutes are unjust because segregation distorts the soul and damages the personality. It gives the segregator a false sense of superiority and the segregated a false sense of inferiority. . . . Hence segregation is not only politically, economically and sociologically unsound, it is morally wrong and sinful. . . . I can urge [disobedience to] segregation ordinances, for they are morally wrong.⁴¹

Note that the violation of natural law, according to Reverend King, has its worst effects by distorting the character of human beings. It is the harm done to properly human powers in their proper development that makes for the moral wrong of segregation. The harm would be in no way ameliorated if, as a matter of false consciousness, the strong had persuaded the weak of the "justice" of segregation and made them content with their condition. A happy slave is no less degraded in his nature by his condition of servitude than is a rebellious one. The goods of human nature are, as I have maintained, determinate. Human nature lacks the plasticity and malleability to which the nihilist appeals in defense of the will to power.

King then articulates the principle of justice whose violation in segregation laws accounts for their injustice:

An unjust law is a code that a numerical or power majority group compels a minority group to obey but does not make binding on itself. . . . By the same token, a just law is a code that a majority compels a minority to follow and that it is willing to follow itself.⁴²

Now, as we have seen, Reverend King perceived that natural law enjoins human beings to obey just laws and just authority. And even in the defiance of unjust laws, he rejects the Nietzschean maxim that "everything is permitted":

In no sense do I advocate evading or defying the law, as would the rabid segregationist. That would lead to anarchy. One who

40. See FINNIS, *supra* note 11.

41. King, *supra* note 38, at 121-22.

42. *Id.* at 122.

breaks an unjust law must do so openly, lovingly, and with a willingness to accept the penalty. I submit that an individual who breaks a law that conscience tells him is unjust, and who willingly accepts the penalty of imprisonment in order to arouse the conscience of the community over its injustice, is in reality expressing the highest respect for law.⁴³

King saw, as no political or civil rights leader before or after him has seen, that securing the civil rights of the descendants of those unjustly enslaved under the "peculiar institution" of slavery was implicit in the natural law principles to which America aspired but which, from the beginning, she had failed to live up to.

Although his struggle was not easy and ultimately cost him his life, it is unsurprising that Reverend King so accurately predicted the success of the civil rights struggle that he embodied and has come to symbolize. When the proponents of civil rights occupy the high ground of natural law, and reject the nihilism that reduces everything to power, there is no moral space left for the enemies of civil rights to occupy.

After King's martyrdom, however, many in the civil rights movement lost the moral compass that King's philosophy of natural law and natural rights provided. As traditional liberalism collapsed under the radical critique that has produced such phenomena as postmodernism, deconstructionism, radical feminism, and the like, many veterans of the civil rights struggle bought into the moral radicalism of what former Vice President Quayle accurately labeled a "cultural elite." For this elite, "natural law" is a mere euphemism for legitimizing the status quo, thus reinforcing structures of domination and power. At the same time, elite opinion rejects as, at best, benighted the idea of objective moral truth. Thus, no truly rational critique of racism and other forms of unjust discrimination is possible. There is, quite simply, the brute struggle for power. And the noble cause of civil rights, to the extent that its advocates and spokesmen accept this nihilistic outlook, is reduced to the status of a mere interest group. Moreover, the eclipse of natural law thinking among those who speak for the civil rights movement makes it difficult to say anything very compelling about the problems of irresponsibility, drug abuse, promiscuity, crime, and collapsing family structures in poor minority communities. In the absence of a natural law philosophy of civil rights, the politics of victimhood becomes understandable and perhaps even inevitable. But it is an altogether inadequate philosophy to guide those who would complete the task Reverend King so notably advanced.

43. *Id.*

Unlike the politics of victimhood, natural law philosophy implies rights *and responsibilities*. It is evenhanded in its condemnation of prejudice, irrationality and injustice, whether of the right or the left. Its principles are universal. A right is a right, whether the holder of the right is white, black, or yellow; a wrong is a wrong, whether the perpetrator of that wrong is male or female, rich, poor, or middle class.

Some people today say that the civil rights revolution has stalled. Some call for a new philosophy of civil rights. What is needed, however, is not a new philosophy but an old one, albeit an old one refreshed and revived. As we suffer the relativism and nihilism that have become orthodox in sophisticated political and academic circles (but whose consequences bear hardest on the poor, the powerless, and the most vulnerable of our people), we await the next Jefferson, Lincoln, or Reverend King to recall us to the higher law that each of them so eloquently invoked in the cause of ordered liberty and civil rights.

