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## Contra Naturam

F. H. Buckley

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# Contra Naturam

F.H. BUCKLEY\*

*There's a revival of interest in natural law, but while its adherents claim to hold the philosophic high ground, they've failed to recognize the doctrine's weaknesses. Classical natural law holds that our moral requirements are rooted in the natural world and the instincts and preferences that form human nature. However, this runs afoul of the logical distinction between empirical and normative statements; and while other natural lawyers say they've avoided this problem, their "New Natural Law" implausibly asserts that rational self-interest will lead us to the good. It won't, because rational self-interest can't explain the duties we owe other people. As such, NNL doesn't even count as a moral theory. Of whatever stripe, natural law theories have no place in legal debates.*

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\* Foundation Professor, Scalia Law School. I am grateful to the many people who've helped me: Larry Alexander, Hadley Arkes, Brian Bix, Dan Bonevac, Jonathan Crowe, Allen Guelzo, Deal Hudson, Rob Koons, Vincent Munoz, Michael Novak, Doug Rasmussen, Stephen Smith and Maimon Schwarzschild.

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## INTRODUCTION

Recent Supreme Court appointments have revived the debate on the place of natural law in American jurisprudence. On one side, natural lawyers tell us that their principles are in accord with right reason and should inform how one interprets the law, even if the two are logically separate.<sup>1</sup> In tracing the origins of First and Second Amendment rights, courts must also rely upon authorities such as William Blackstone who themselves subscribed to natural law principles,<sup>2</sup> so that natural law might seem to sneak in through the back door.

For their part, natural law skeptics deny that natural law ideas were ever incorporated into American constitutional law. John Hart Ely rightly observed that, while the Declaration of Independence appealed to “Nature and Nature’s God,” few of the hard-nosed politicians at the 1787 Constitutional Convention were natural lawyers.<sup>3</sup> In addition, permitting judges to rest their decisions on the natural law is thought to allow them an excessive discretion, given the opacity of natural law principles.<sup>4</sup> Then there are those who

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1. Robert P. George, *Natural Law, the Constitution, and the Theory and Practice of Judicial Review*, 69 *FORDHAM L. REV.* 2269 (2001) “Natural law does not dictate an answer to the question of its own enforcement”. *Id.* at 2279

2. See STUART BANNER, *THE DECLINE OF NATURAL LAW: HOW AMERICAN LAWYERS ONCE USED NATURAL LAW AND WHY THEY STOPPED* 15 (Oxford Univ. Press 2021); *District of Columbia v. Heller*, 554 U.S. 570 (2008); *McDonald v. City of Chicago*, 561 U.S. 742, 813-14 (Thomas, J., concurring).

3. JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 39 (Harv. Univ. Press 1980).

4. See ROBERT H. BORK, *THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW* 66 (Simon & Schuster 1990) (“I am far from denying that there is a natural law, but I do deny . . . judges have any greater access to that law than do the rest of us”). See also *Griswold v. Connecticut*, 381 U.S. 479, 512 (1965) (Black, J., dissenting) (“[N]o provision of the Constitution specifically gives such blanket power to courts to exercise such a supervisory veto over the wisdom and value of legislative policies.”)

mistrust what natural lawyers have to say on such subjects as abortion and gay rights. The Catholic Church accepts natural law as a foundation of morality,<sup>5</sup> and since a majority of the present Court is composed of conservative justices who are either Catholics or who were educated as such, some have even complained that the country is lurching toward a “theocracy.”<sup>6</sup>

Natural law theories have thus become a wedge issue. Faced with society’s departures from traditional moral principles and a Supreme Court that had embraced social liberalism, conservatives seek to defend an older set of moral beliefs and tell us that only natural law provides the needed bulwark. Liberals have resisted these arguments but might nevertheless have conceded to conservatives the high philosophical ground.

What is lacking is an understanding of the intellectual weaknesses of natural law theories. They purport to move what is essentially a political question to an apolitical and loftier philosophical plain, but when natural law’s shortcomings are recognized, this is revealed to be a sleight-of-hand. The debate should return to its proper political domain, where consequences matter and rights are to be observed, without recourse to dubious ontological theories.

#### A. NATURAL LAW AND NATURAL RIGHT

Natural law and of natural rights theories are frequently encountered in our debates over contentious policy questions. They share a pre-political moral language rooted in an understanding of what it is to be human, but there the similarity ends. The two have different origins, a different set of thinkers and a different set of moral requirements. Natural law theories are older and, from Aristotle and Thomas Aquinas on, proposed an understanding of the goals and virtues for a well-ordered life. Natural rights theories, most closely associated with John Locke and Thomas Jefferson, describe entitlements from which we cannot justly be deprived.<sup>7</sup> In general, natural law theories employ a language of duties, and natural rights theories one of rights.

The natural lawyer will nevertheless have a limited theory of natural rights. By positing a set of human excellences, natural law theories ground a right to practice such virtues. If piety is one of the virtues, for example, we

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5. CATECHISM OF THE CATHOLIC CHURCH III.1.iii, § 1956 (U.S. Conf. of Cath. Bishops ed., 2d ed., 2000) (“The natural law, present in the heart of each man and established by reason, is universal in its precepts and its authority extends to all men. It expresses the dignity of the person and determines the basis for his fundamental rights and duties”).

6. Linda Greenhouse, *God Has No Place in Supreme Court Opinions*, N.Y. TIMES (Sept. 9, 2021), <https://www.nytimes.com/2021/09/09/opinion/abortion-supreme-court-religion.html> [<https://perma.cc/H9D8-M8R9>].

7. See Michael P. Zuckert, *Do Natural Rights Derive from Natural Law?*, 20 HARV. J.L. & PUB. POL’Y 695 (1997). On the American understanding of natural rights at the founding, see Philip Hamburger, *Natural Law, Natural Rights, and American Constitutions*, 102 YALE L.J. 907 (1993).

have a natural right to worship according to our religion. Sophocles' Antigone was banned from performing the funeral rites for her brother, with execution as the punishment for breach. Nevertheless, she buries him, since the laws cannot "override the unwritten and unfailing statutes of Heaven. For their life is not of today or yesterday, but from all time." The natural lawyer might also recognize the prudential limits on legislating morality, as Aquinas did in finding that, while inside information should be shared between seller and buyer, insider trading was legally permissible.<sup>8</sup> But in upholding an ideal of a worthy life, natural law posits a set of degrading vices and might justify paternalistic restrictions to ban them. By contrast, the natural rights theorist might be agnostic about the good for man, and in any event is likely to be an anti-paternalist.

That explains how people line up, in support of one or the other theory. Natural lawyers are apt to be social conservatives such as Harvard Law Professor Adrian Vermeule.<sup>9</sup> Natural rights theorists, by contrast, are more likely to be anti-paternalist libertarians such as Robert Nozick.<sup>10</sup> Whether the state should interfere with individual preferences is a vexed question, but it's not the subject of this article. Neither will I discuss the extent to which, if at all, natural law or natural rights theories do in fact inform the content of American law. Instead, this article seeks to rescue legal arguments from bad philosophizing and a facile acceptance of naturalism in law and ethics.

I have argued elsewhere that natural rights theories cannot ground an obligation to obey the law based on the subject's implicit promise or consent.<sup>11</sup> Briefly, promissory explanations fail because they cannot account for obligations to obey the law without first explaining why promises create morally binding obligations. A promise to perform promises obviously won't do the trick, for where did the obligation to perform the first promise come from? What makes promises binding must come from outside promising, and this must be the existence of linguistic or legal conventions which themselves require a non-promissory and consequentialist political justification.<sup>12</sup> Consent explanation do not face the same problem, since consent doesn't assume a background convention of promising. But if my consent to a past trespass binds me, it does not require me to consent to future trespasses. Consent obligations are defeasible and cannot explain why I should continue to be bound

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8. ST. THOMAS AQUINAS, *SUMMA THEOLOGICA* II.II, q.77 a.3, <https://www.newadvent.org/summa/>.

9. See, e.g., Adrian Vermeule, *A Christian Strategy*, *FIRST THINGS* (Nov. 1, 2017), <https://www.firstthings.com/article/2017/11/a-christian-strategy> [<https://perma.cc/U3GL-FFTX>].

10. ROBERT NOZICK, *ANARCHY, STATE, AND UTOPIA*, 331-34 (Basic Books 1974).

11. F.H. BUCKLEY, *JUST EXCHANGE: A THEORY OF CONTRACT*, 3-21 (2005).

12. DAVID HUME, *A TREATISE OF HUMAN NATURE* 516 (Selby-Bigge ed., 1967); John Rawls, *Two Concepts of Rules*, 64 *PHIL. REV.* 3 (1955).

to a state. In addition, my residence in a state does not amount to a consent to be governed by its laws if I did not have any real choice in the matter.<sup>13</sup>

And so, I will confine my attention to the very different literature on natural law principles. The appeal of natural law derives from the thought that moral and legal judgements cannot stand alone, that they require some more fundamental support from outside of morality and law, to be found in a well-articulated conception of human nature. Short of this, they say, the alternative is a relativism that is destructive of all moral claims and a legal positivism that denies the moral basis for law. But all such theories must be rejected. *Classical Natural Law* theories derive normative statements about what we ought to do from empirical statements about what our nature is. As such they ran afoul of the No-Is-From-Ought fallacy, in purporting to infer a moral “ought” from an existential “is.” More recently, *New Natural Law* (NNL) scholars have conceded the point and base their arguments upon theories of rational choice. We are always directed to do that which is best for ourselves, they say, and that that will take us to the same place as classical natural law. But as rational self-interest fails to explain the duties we owe other peoples, NNL does not even count as a moral theory.

## B. CLASSICAL NATURAL LAW

While classical natural law identifies goodness with what is natural, a moment’s reflection about some of our less than noble motives should disabuse us of this. It also argues that, as it can account for our moral language, no other theory can do so. There is natural law and there is moral nihilism, and that is it. However, that is the fallacy of affirming the consequent, of assuming that which is to be proven. Further, classical natural law appeals to a factual basis to our moral claims, but that weakens rather than strengthens it. Finally, classical natural law is guilty of a logical error in improperly seeking to derive an “ought” from and “is.” As David Hume pointed out, one cannot infer what one *ought* to do from an empirical statement about what *is* the case.

### 1. CONTRA NATURAM

Classical natural law theories are bolstered by the way we identify nature with goodness when we are at the produce section. *A Consumer Reports*

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13. DAVID HUME, *Of the Original Contract*, in HUME: POLITICAL ESSAYS 186, 193 (K. Haakonssen ed., 1994); Hannah Pitkin, *Obligation and Consent—1*, 59 AM. POL. SC. REV. 990, 995-97 (1965); Ronald Dworkin, *The Original Position*, in READINGS RAWLS 18 (Norman Daniels ed., 1975) (“What really matters to Locke is that the government is of such a quality that a rational person *would* consent to its authority”); A. JOHN SIMMONS, ON THE EDGE OF ANARCHY: LOCKE, CONSENT, AND THE LIMITS OF SOCIETY 215 (Marshall Cohen ed., 1993).

survey found that more than half of consumers seek out products with a “natural” food label.<sup>14</sup> In fact, many foods so labelled contain “artificial” chemicals to which purists object, as though chemicals were not to be found in all foods, and as though artificial ingredients might not serve a useful purpose.

The thought that natural ways are good ones may therefore mislead, as it did Ezra Pound, who ascribed society’s ills to the abandonment of natural processes of creation. Real wealth, as opposed to the financial wealth of stock jobbers, came from the wool grown on the sheep, the house built by the stonemason, and the picture of paradise painted on a church wall. But all this had been marred by capitalism and usury. The same sentiments have been expressed by other anti-capitalists, but never so poetically as Pound did in his *Usura Canto*.

Usura slayeth the child in the womb  
It stayeth the young man’s courting  
It hath brought palsey to bed, lyeth  
between the young bride and her bridegroom  
CONTRA NATURAM

The hatred of usury came from the crackpot Social Credit theories of Major Douglas, and the antipathy to democracy from his admiration for raw power and fascism. During the Second World War he made hundreds of broadcasts from Italy to express his support for Mussolini and Hitler and his hatred of Jews. When the war ended, he was arrested as a traitor and confined to St. Elizabeth’s mental asylum in Washington D.C. Pound never moderated his views and greeted people with a fascist salute when he returned to Italy in 1958.<sup>15</sup> But in his madhouse, even Pound must at times have wondered about the limits of nature.

The *Usura Canto* celebrated the great trecento painters, but after the collapse of Renaissance humanism, a new generation of writers took a more skeptical view of things. Michel de Montaigne peered into a mirror and reported that he saw:

Every sort of contradiction ... in me, depending on  
some twist or attribute: timid, insolent; chaste, lecherous;  
talkative, taciturn; tough, sickly; clever, dull;

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14. Andrea Rock, *Peeling Back the ‘Natural’ Food Label*, CONSUMER REPS. (Jan. 27, 2016), <https://www.consumerreports.org/food-safety/peeling-back-the-natural-food-label/> [<https://perma.cc/2RMW-DLNG>].

15. See generally DANIEL SWIFT, *THE BUGHOUSE: THE POETRY, POLITICS, AND MADNESS OF EZRA POUND* (Farrar, Straus, & Giroux 2017).

brooding, affable; lying, truthful; learned, ignorant;  
generous, miserly and then prodigal.<sup>16</sup>

French moralists such as François de La Rochefoucauld and Blaise Pascal, saw the same mixture of contrarities in our nature. We are a bit of a mess, neither wholly good nor bad, and if the natural lawyer identifies nature with the good, he's cherry-picking. We simply have too many conflicting impulses, and the more introspective we are the more we will recognize this. Even apparently innocuous instincts, such as our laughter, reveal a hidden nastiness. Hobbes defined it as "sudden glory,"<sup>17</sup> and said it arose from recognizing our superiority over a butt.

Since then, our dark side has continued to fascinate scholars and writers. In *Civilization and its Discontents*, Sigmund Freud concluded that our most basic instincts are vicious and are usefully repressed. "Civilization ... obtains mastery over the individual's dangerous desire for aggression by weakening and disarming it and by setting up an agency within him to watch over it, like a garrison in a conquered city."<sup>18</sup> But this comes at a cost. We experience our perverse instincts as irresistible psychic impulses, and their repression is largely responsible for our misery. If we could return to our pre-civilized primitive state and satisfy our instincts, we'd be much happier.

Even with a dark side, that might not matter if amongst our instincts we could always distinguish the good from the bad. And so we can, claims the natural lawyer. We might have immoral desires, but it is enough if by nature, we always know the right thing to do. But what that might be was not clear to Pound, and it will not be to anyone who is self-deceived about his goodness.<sup>19</sup> Self-deception is a challenge for any theory of morals, but it is especially problematical for natural lawyers who tell us that knowledge of the good is written on our hearts.

Self-deception has been a favorite theme of French moralists. "There are only two kinds of men," wrote Blaise Pascal. "The just who think themselves sinners and the sinners who think themselves just."<sup>20</sup> The greatest novel on the subject is Albert Camus' *The Fall* (*La chute*). Jean-Baptiste Clamance had been a highly successful defense lawyer who defended widows and orphans without fee. But then one day, walking on a bridge, he saw

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16. MICHEL DE MONTAIGNE, *On the Inconsistency of our Actions*, in MICHEL DE MONTAIGNE—THE COMPLETE ESSAYS 377 (M.A. Screech ed., trans., 1991).

17. THOMAS HOBBS, *LEVIATHAN*, I.vi, at 43 (Richard Tuck, ed.), Cambridge Univ. Press, rev. student ed. 1996.

18. SIGMUND FREUD, *CIVILIZATION AND ITS DISCONTENTS* 114 (Samuel Moyn ed., James Strachey trans., 2010).

19. On self-deception, see, e.g., JON ELSTER, *ALCHEMIES OF THE MIND: RATIONALITY AND THE EMOTIONS* (Cambridge Univ. Press 1999); ARTHUR R. MELE, *SELF-DECEPTION UNMASKED* (Princeton Univ. Press 2001).

20. BLAISE PASCAL, *II ŒUVRES* 754, at *Pensée* 483 (Michel Le Guern, ed.), Gallimard, 2000.



a woman about to commit suicide. He might have saved her but fails to do so. The incident stays with him, and he comes to realize that all his pretended virtues were really vices.<sup>21</sup> Unless you see something of yourself in Clamance, you've missed the point, said Camus.<sup>22</sup> For each one of us, there is a person whom we were meant to rescue and whom we failed to save.

## 2. PETITIO PRINCIPII

Natural lawyers claim that they and only they provide a safe harbor against theories that are destructive of all moral claims.<sup>23</sup> If they can explain a moral rule, they say, it follows that others cannot. We are put to an election between their objective truths and the subjectivist's moral nihilism. To justify natural law, for example, the late Michael Novak was fond of asking people whether they thought that slavery was wrong before it was abolished by the Thirteenth Amendment.<sup>24</sup> He meant to divide people between natural lawyers who believed that slavery was immoral, and legal positivists who did not. Either you're a natural lawyer or you will tolerate slavery, he implied.

Novak could indeed point to abolitionists who framed their appeal in terms of natural law. For example, Abraham Lincoln said that the Founders had stated "an abstract truth, applicable to all men and all times," that all men are created equal, from which it followed that slavery was wrong.<sup>25</sup> But non-natural lawyers like John Stuart Mill also thought slavery wrong. Novak had committed the *petitio principii* fallacy since his conclusion (anti-slavery implies natural law) was taken for granted in the premise (slavery is immoral). He had *affirmed the consequent* ("if  $x$ , then  $y$ ;  $y$ , therefore  $x$ "), and that is an easy-to-spot logical fallacy. That's also an example of the fallacy of the excluded middle, that idea that things are binary and either one thing or the other, and that moral beliefs must either reflect objective properties in our nature or amount to mere subjectivism, with nothing in between.

That is not a little arrogant. Suppose that I have a group of friends who are well-known for their virtue, kindness and empathy for others. If I want to know what I ought to do, I might follow them around and see what they do.

21. ALBERT CAMUS, THÉÂTRE, RÉCITS, NOUVELLES 1518 (Gallimard, 1962).

22. ALBERT CAMUS, III CARNETS 240-41 (Gallimard, 1962).

23. GERMAIN GRISEZ, THE WAY OF THE LORD JESUS: CHRISTIAN MORAL PRINCIPLES 104 (Franciscan Press, 1983 ("Because it grounds morality in human nature, [the natural law] is an improvement over all the other theories considered up to now.... Unlike the subjectivist theory... this theory confronts our freedom with objective norms.")). See also JOHN FINNIS, NATURAL LAW AND NATURAL RIGHTS 112 (Paul Craig ed., 2nd ed. 2011) (as a general strategy of moral reasoning, utilitarianism and consequentialism are irrational).

24. Conversation with author. In his confirmation hearings, Justice Thomas said that he came to adopt natural law principles for the same reason. *Hearings Before the Committee on the Judiciary*, 102d Cong. 112-14 (1993).

25. ABRAHAM LINCOLN, *Letter to Henry L. Pierce, Apr. 6, 1859*, in LINCOLN: SPEECHES AND WRITINGS 1859-1865 19 (Don E. Fehrenbacher ed., Libr. of Am. 1989).

Or I might ask them for advice. But when I ask them to explain what prompts them to do good, all they say is that it is the right thing to do. They deny that moral requirements are related to theories about human nature. “Is such a man to be classed with a kleptomaniac, a poor sneak-thief who doesn’t know what goodness is?” asked Stephen Toulmin. “How laughable.”<sup>26</sup>

### 3. WHAT’S TRUTH GOT TO DO WITH IT?

Had classical natural lawyers paid much attention to other parts of the philosophy department, they would have discovered their affinities with a parallel literature called *cognitivism* (or moral realism).<sup>27</sup> Cognitivists believe moral claims are either true or false, and if classical natural lawyers rest their beliefs on a conception of human nature they seem bound to agree with them. They’d be *naturalist cognitivists* who believe that moral claims state facts in the natural world.

Sometimes moral disputes really are factual ones in disguise. An argument about raising the minimum wage might really be about whether this would painfully increase unemployment. If the parties could answer that question, they might find themselves in agreement.<sup>28</sup> However, the naturalist cognitivist makes the stronger claim that all moral disputes are like that, and that they can be resolved by testing them against an objective correlative provided by the natural world. If I say the ceiling is seven feet tall, and you say it’s eight, we can break out the tape measure and resolve the matter. For classical natural lawyers, the tape measure is our nature and the innate preferences with which we’re endowed. Statements about them might either be true or false.

What cognitivism has going for it is that some moral claims are non-contestable. One can’t disagree with a person who tells you that genocide is evil. But that doesn’t make such claims true, and turning moral claims into factual ones doesn’t elevate them. Instead, it trivializes moral faults by making them merely intellectual errors. People who make misrepresentations about matters of fact may be mistaken, but they are not to be blamed unless they did so intentionally or negligently and someone came to harm thereby. If I tell you (incorrectly) that the ceiling is 10 feet tall, I might be in error but I’m ordinarily not at fault. If I tell you that stealing is okay, I’m at fault but not in error.

Worse still, naturalism permits one to dispense with the language of morality. That’s because moral claims could always be restated in non-

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26. STEPHEN TOULMIN, AN EXAMINATION OF THE PLACE OF REASON IN ETHICS 23 (Cambridge Univ. Press, 1964).

27. 2 DEREK PARFIT, ON WHAT MATTERS 264 (Oxford Univ. Press 1st ed. 2011); 3 DEREK PARFIT, ON WHAT MATTERS 2-3 (Oxford Univ. Press 1st ed. 2017).

28. See 3 PARFIT, *supra* note 27, at 236, where he and naturalist cognitivists whittled down much of their disagreement.

normative, naturalistic terms. We would never have to say, “you ought to do  $x$ .” It would suffice to say, “ $x$  is the case.” All the language of oughts and shoulds, of good and evil, would be superfluous and we wouldn’t miss them if they were dropped from our vocabularies. Which is why, concluded Derek Parfit, naturalist cognitivism—and implicitly natural law theories—are close to nihilism.<sup>29</sup>

That’s why other moral realists, such as Parfit, are *non-naturalist cognitivists* who think that moral claims are truth-functional but that their truthfulness doesn’t depend on empirical facts.<sup>30</sup> With their appeal to truth, what they seek to deny is a subjectivism that is destructive of all moral language. They take aim at logical positivists such as A.J. Ayer who wrote that, “If I say to someone, ‘You acted wrongly in stealing that money,’ I am not stating anything more than if I had simply said, ‘You stole that money.’”<sup>31</sup> Or else they reject an *emotivism*, which holds that all that is signified when you accuse someone of stealing is that (a) the person stole something and (b) you don’t like stealing. It makes you upset.<sup>32</sup>

Neither subjectivism or emotivism explain how we use our moral language. When two people disagree about the morality of theft, they contradict each other. One tells me that  $x$  is wrong, the other tells me it’s permitted, and they can’t both be right.<sup>33</sup> If I accuse you of stealing, I’m not saying, “I think that’s wrong, but that’s just me.” Instead, I’m blaming you for a moral fault.

The question, therefore, is what the possibility of contradiction must entail; and for non-naturalist cognitivists the answer is that moral claims might be true or false even if there’s no real-world tape measure to verify them. Correct moral beliefs such as “stealing is wrong” are simply true and that’s all there is to it. They are both normative and truthful, but they can’t be reduced to statements about the natural world.

The problem is that this would seem to lead to the ontologically queer world of non-natural facts, where moral requirements, aesthetic judgments and geometric axioms might all be true or false. At best, non-naturalist cognitivists are giving an idiosyncratic definition to the word truth. What they might mean is that “no one would disagree with this.” Or else they might mean, “ $x$  is wrong, whether or not someone might disagree.” But how is that

29. 2 PARFIT, *supra* note 27, at 368.

30. *Id.* at 266-67, 295-310; T.M. SCANLON, WHAT WE OWE EACH OTHER 2 (Harv. Univ. Press 1998); ALLAN GIBBARD, MEANING AND NORMATIVITY 232 (Oxford Univ. Press 2012) (“We quasi-realists allow that normative claims are true or false—where this is truth in a deflationary sense”).

31. A.J. AYER, LANGUAGE, TRUTH AND LOGIC 115 (Dover Publ’ns 1952) (1936).

32. CHARLES L. STEVENSON, FACTS AND VALUES: STUDIES IN ETHICAL ANALYSIS (Greenwood Press 1963).

33. Peter Geach, *Assertion*, 74 PHIL. REV. 449 (1964) (“They also run into the Frege-Geach problem under which, from the statement “it is wrong to lie,” one can infer that “it is wrong to get your little brother to lie.” That wouldn’t follow if all that the first statement did was to express your feelings about lying.”).

different from *non-cognitivism*, which asserts that moral statements don't assert truths but are nevertheless meaningful?

That's why most of the leading moral philosophers of the last 100 years have been non-cognitivists who deny that moral claims are truth-functional.<sup>34</sup> Moral disagreements are irreducibly normative, in the sense that they can't be resolved by an appeal to the evidence or to anything else. There are conflicting moral visions, and a libertarian who thinks that taxation is theft and welfare is immoral would never come to terms with a socialist, even if both have full knowledge about the consequences of adopting their policies. We can say that one of them is simply wrong, without having to say that her belief is false. Even if there are some moral claims with which no one would disagree (e.g., "one shouldn't torture people for fun"), that's not same thing as saying that they're true.

Truth has nothing to do with it—and if it did that would weaken it.

#### 4. NO-UGHT-FROM-IS

Naturalist cognitivism and natural law are examples of what G.E. Moore called the naturalistic fallacy, the belief that the good can be identified with anything else. Assume that you think the good might be defined as *x* (perfect income equality, for example). As Moore noted, however, it's always meaningful to ask, "Is *x* really good?" That's an open question. And so, in *Principia Ethica* (1903), he wrote that "if we set ourselves seriously to find out what things are good, we shall see reason to think ... that they have *no* other property, both common and peculiar to them, beside their goodness—that, in fact, there is no criterion of goodness."<sup>35</sup> Moore was thus a non-cognitivist who thought that moral claims were meaningful but not truth-functional.

Moore's *Principia Ethica* was one of the leading works in moral philosophy in the last century. It's not gone without criticism,<sup>36</sup> but one element of the Moore's thesis that is widely accepted is its restatement of the "No-Ought-From-Is" (NOFI) fallacy. That was the mistake that John Stuart Mill made in his defense of utilitarianism. Happiness, and only happiness, is

34. See, e.g., G.E. MOORE, *PRINCIPIA ETHICA* (Thomas Baldwin ed., Cambridge Univ. Press 2d ed. 1993) (1903); R.M. HARE, *THE LANGUAGE OF MORALS* (Oxford Univ. Press 1991) (1963); R.M. HARE, *MORAL THINKING: ITS LEVELS, METHOD, AND POINT* 209 (Oxford Univ. Press 1981). See Allan Gibbard, in 3 Parfit at 205.

35. MOORE, *supra* note 34, at 137-38.

36. David P. Gauthier, *Moore's Naturalistic Fallacy*, 4 *AM. PHIL. Q.* 315 (1967); Bernard H. Baumrin, *Is There a Naturalistic Fallacy?*, 5 *AM. PHIL. Q.* 79 (1968); Charles Pigden, *Naturalism*, in *A COMPANION TO ETHICS* 421 (Peter Singer ed., 1991). Moore thought that goodness was an undefinable "simple," but if that were the case we couldn't explain why, in a particular case, we felt we ought to perform an act. And yet we give reasons for action all the time (because I'll be happier, because it will make others better off, and so on). HENRY B. VEATCH, *FOR AN ONTOLOGY OF MORALS* 27-28 (Nw. Univ. Press 1971).

desirable, said Mill, and then he said that the only evidence that something is desirable is that people actually do desire it.<sup>37</sup> But saying that people desire happiness is an empirical claim while the claim that they ought to do so is logically quite different, and nearly 300 years ago David Hume demolished the pretended link between the two. From an empirical statement about what *is* the case, he said, you can never derive a normative proposition or prescriptive rule about what *ought* to be the case. An existential “is” statement describes how things are, while a normative “ought” statement tells us how they should be. Some moralists write that some thing or other “is” so, and that therefore you “ought” to do it. They try to slip that in, but one thing doesn’t follow from the other.<sup>38</sup>

We shouldn’t ask the NOFI fallacy to carry too much baggage, however. It doesn’t assert that there is an absolute barrier between existential and normative claims. Were that the case, moral oughts would be unrelated to the world as it is—and would therefore be devoid of interest. We employ oughts for their prescriptive force in praising or blaming people for their actions, and those actions are matters of fact. Similarly, if morality has something to do with making people better off, as utilitarians claim, we’d want to listen to economists who can tell us about wealth creation. It is therefore more accurate to say that, while moral oughts cannot logically be derived from statements of fact, moral claims must nevertheless be *grounded* in factual claims. Thus R.M. Hare thought that moral claims consist of (a) a naturalistic descriptive element and (b) a prescriptive element. And what is wrong with naturalistic theories is that they leave out the prescriptive element.<sup>39</sup>

Natural lawyers might seek to avoid the NOFI fallacy by positing an intrinsic teleology in nature, which directs us to live an excellent life. Or they might identify the good with some idealized conception of human nature. But that side-steps the is-ought problem by assuming an ought at both ends. We ought to follow our nature because our nature is good and we’ll make good choices if we follow it. To see how that goes off the rails consider the argument that, if Joe is a plumber, he ought to do everything a plumber should do. The problem is that this assumes that plumbing is good. It wouldn’t work if Joe were a thief, since we wouldn’t want him to be a good thief. So the argument comes down to “we ought to do what we ought to do,” which

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37. MOORE, *supra* note 34, at 118. As it is not restricted to claims that identify the good with the empirical world, the naturalistic fallacy is broader the NOFI fallacy.

38. HUME, *supra* note 12, at 469-70. See also HARE, THE LANGUAGE OF MORALS, *supra* note 34, at 28-31, 92-93. Reason does not tell us how we ought to act, said Hume, because we are motivated to perform our acts by our passions and not by our reason. *Id.*, at 581. For a highly technical analysis of the many meanings that can be given to inferences, logical and otherwise, as well a discussion of just what Hume meant, see the essays in HUME ON IS AND OUGHT (Charles R. Pigden ed., 2010).

39. HARE, THE LANGUAGE OF MORALS, *supra* note 34, at 82. See Samuele Chilovi & Daniel Wodak, *On the (In)significance of Hume’s Law*, 179 PHIL. STUD. 633 (2022).

doesn't take us very far, and runs up against the fallacy of a benign nature. At a minimum, we're permitted to ask natural lawyers how they came up with their list of virtues.

### C. NEW NATURAL LAW

Beginning with Germain Grisez, recent natural lawyers have come to accept that classical natural law commits the NOFI fallacy. "Scholastic natural law theory must be rejected," wrote Grisez. "It moves by a logically illicit step—from human nature as a given reality, to what ought or ought not to be chosen."<sup>40</sup> Grisez then went on to develop a different natural law theory which he said would avoid the NOFI fallacy, and this has come to be called *New Natural Law* (NNL).

Grisez' NNL purports to sidestep the NOFI problem by identifying a set of goods that are not merely desired but desirable because they are life's intrinsic goods. How we choose is a two-step process which begins with an examination of all our pre-moral basic tendencies.<sup>41</sup> This is an "is" stage, since our inclinations might be either virtuous or not. In the second or "ought" stage, we select from amongst these the moral choices that are "compatible with a will toward integral human fulfillment."<sup>42</sup>

NNL's list of goods aren't derived through an understanding of human nature, as the classical natural lawyer would have it. Instead, they are our deepest and most completely satisfying goods, and self-evidently known to be such by our practical reason. The entire procedure, says Grisez, is "by its very nature ought-thinking,"<sup>43</sup> so that NNL cannot be faulted for deriving an ought from an is. We desire what we ought to desire.

#### 1. IS NEW NATURAL LAW NATURAL LAW?

NNL has been adopted by many of the leading's natural lawyers, but it's neither especially new, natural nor legal. It isn't new, insofar as its supporters say it can all be found in Aquinas. And it's not natural, in the sense that it provides a fulfilling life plan that everyone is supposed is to follow. It does posit a set of moral sentiments that represent universal goods, but as

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40. GRISEZ, *supra* note 23, at 105.

41. GERMAIN GRISEZ, *CONTRACEPTION AND THE NATURAL LAW* 63 (The Bruce Publ'g Co. 1964) ("What in fact are all the goods which man can seek? ... The answer to the question ... is to be found only by examining all of man's basic tendencies."). *See also* FINNIS, *supra* note 23, at 34. For Grisez, however, all non-moral basic tendencies might be good in themselves if exploited proportionately. GRISEZ, *supra* note 41, at 72.; Patrick Lee, *The New Natural Law*, in *NATURAL LAW ETHICS* 76, 81 (Tom Angier ed., 2019).

42. GRISEZ, *supra* note 23, at 184.; Germain Grisez, *The First Principle of Practical Reason*, in *AQUINAS: A COLLECTION OF CRITICAL ESSAYS* 340, 353 (Anthony Kenny ed., 1976).

43. GRISEZ, *CONTRACEPTION AND THE NATURAL LAW*, *supra* note 41, at 60.

principles for action these are tailored specially for each individual.<sup>44</sup> It's not legalistic either, and with Grisez recognizes that "classical moral theology is vulnerable to the charge that it is too much concerned with laws and too little with persons."<sup>45</sup> Rule-following does indeed provide a limited understanding of what goodness requires of us. We might follow all the commandments and still be mean-spirited, thick and insensitive. In addition to negative duties, we also have positive ones to make things better for others, and these can't be expressed as laws. Instead, they are the numberless acts of affection or decency that make others happy, by smiling at strangers on the street or showing respect for them, by entertaining them or even by raising a laugh.

Now, the last thing we'd want is a moral theory that tells us that there's only one way to live. But while that makes NNL seem liberal and tolerant, there must be limits to its ability to incorporate different life plans. It's a theory of natural law, not natural laws, and must uphold a list of goods to which it directs everyone without exception. But when one considers the very different ways in which people might thrive, and think that all these lives might have moral worth without having anything much in common, NNL seems put to an election: natural law or dissimilar natural laws? And the latter is a denial of the former.

NNL might not even be able to tell us what we ought to do, in a particular case. At any moment, there might be a variety of moral choices open to us, and it may be difficult or even impossible to say which is best. Each points to a different life plan, and every one might be a worthy choice. There isn't a single good, says NNL's John Finnis. Instead, we're presented with a list of incommensurable goods, such as friendship, knowledge, play and religion, and there is no objective way to say which is best. "Each is fundamental. None is more fundamental than any of the others."<sup>46</sup>

That gives individuals a range of free choices about what they ought to do, and makes natural law seem easier to swallow. But if we're willing to go along with this, it's at the cost of the idea that we're talking about a law. Aquinas thought that, for something to count as a law, it should be the same

44. FINNIS, *supra* note 23, at 84-85; Douglas B. Rasmussen, *Human Flourishing and the Appeal of Human Nature*, in HUMAN FLOURISHING 5 (Ellen Frankel Paul, Fred D. Miller & Jeffrey Paul eds., 1999) ("Human flourishing is individualized and diverse. It is dependent on *who* as well as *what* one is.").

45. GRISEZ, *supra* note 23, at 106; GRISEZ, CONTRACEPTION AND THE NATURAL LAW, *supra* note 41, at 71.

46. See FINNIS, *supra* note 23, at 93.; John Finnis, *Commensuration and Public Reason*, in INCOMMENSURABILITY, INCOMPARABILITY AND PRACTICAL REASON 215 (Ruth Chang ed., 1997); Germain Grisez, *Natural Law, God, Religion, and Human Fulfilment*, 46 AM. J. JURISPRUDENCE 3, 14-15 (2001); JOSEPH BOYLE, *Free Choice, Incomparably Valuable Options, and Incommensurable Categories of Good*, in NATURAL LAW ETHICS IN THEORY & PRACTICE: A JOSEPH BOYLE READER 61 (John Liptay & Christopher Tollefson eds., 2020).

for everyone.<sup>47</sup> If not, how can it even be called a law?<sup>48</sup> As Philip Soper asks, why doesn't the natural lawyer simply call it a "moral theory."<sup>49</sup>

## 2. WHAT ABOUT SELF-DECEPTION?

NNL assumes that its goods are self-evidently known to be such, but as we saw they're not if we can be self-deceived about what we're called on to do. Moreover, there shouldn't be any disagreement about the list of self-evident goods. Except there is. Religion and piety weren't on Aristotle's list of virtues, and yet Aquinas called him "The Philosopher." And while humility is a Christian virtue, Aristotle thought his great-souled man should be proud. These aren't quibbles that might be resolved if people sat down to think about it. Instead, they reveal profound disagreements by the people to whom NNL looks up as foundational thinkers and suggests the need for a final end such as happiness by which their inclusion in the list may be justified.

## 3. DOES IT ALL COME DOWN TO HAPPINESS?

NNL might not represent an advance over classical natural law if it all comes down to happiness in the end. And why shouldn't it? Imagine being told by a natural lawyer that a particular activity is one of life's ultimate goods. Will it make me happy, I ask? No, I'm told. It's painful, and it's going to leave you in a permanent blue funk. But do it anyway. That's not very persuasive. At a minimum, people should not have unwanted goods foisted on them.

Natural law theorists look to Aristotle and Aquinas for guidance, but both of them thought that something like happiness was the ultimate good. Aristotle didn't think that his virtues were good in themselves and desirable as ends. Instead, they were desirable only insofar as they led to *eudaimonia*, which is usually (if inexactly) translated as happiness.<sup>50</sup>

[W]e call final without qualification that which is  
always desirable in itself and never for the sake of

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47. AQUINAS, *supra* note 8, at I.II, q.94 a.4.

48. "Natural law must be law-like. It must be the sort of thing that can order human affairs in the forceful way that law does." Jeremy Waldron, *What is Natural Law Like?*, in REASON, MORALITY AND LAW: THE PHILOSOPHY OF JOHN FINNIS 73, 75 (John Keown & Robert P. George eds., 2013). Finnis tries to rescue NNL from the charge of indeterminacy by arguing that sometimes only experienced and mature people are capable of making the right choice. FINNIS, *supra* note 23, at 32-32. That leaves Finnis open to the charge of esoterism, however.

49. Philip Soper, *Legal Theory and the Problem of Definition*, 50 U. CHI. L. REV. 1170, 1175 (1983).

50. JOHN FINNIS, AQUINAS: MORAL, POLITICAL, AND LEGAL THEORY 102 (Oxford Univ. Press 1998). "We could translate those words by 'happiness.' Provided we meant not simply a state of good feelings." *Id.*



something else. Now such a thing happiness (*eudaimonia*), above all else, is held to be; for this we choose always for itself and never for the sake of something else, but honour, pleasure, reason, and every virtue we choose indeed for themselves (for if nothing resulted from them we would still choose each of them), but we choose them also for the sake of happiness, judging by that means of them we shall be happy. Happiness, on the other hand, no one chooses for the sake of these, nor, in general, for anything other than itself.<sup>51</sup>

For his part, Aquinas appeared to dispense with the need for an explanation by saying that his goods were self-evidently desirable and understood as such *per se*. But then he also said that we all aim at something like happiness. “The first principle in practical matters, which are the object of the practical reason, is the last end: and the last end of human life is happiness or bliss (*felicitas vel beatitudo*).”<sup>52</sup>

At this point, natural lawyers have a choice. Either there is a single desirable end, such as happiness, or there isn’t. If there isn’t, they need to explain how they came up with their list of goods. We need more than their say so. If there is a final end, and it’s happiness, they would not seem to have evaded the NOFI problem, at least if happiness is a factual question.

Now, it might not at first glance seem like a factual matter. It isn’t quite the same thing as “I have a temperature,” said by the person who has a cold. We can whip out a thermometer and see if that is true. But while there’s no thermometer to measure happiness, we can still judge whether someone is in fact happy. In an action for fraud, Bowen L.J. said that “the state of a man’s mind is as much a fact as the state of his digestion;” and then went on to hold that the defendants had intended to deceive the plaintiffs.<sup>53</sup> Courts daily rule on the intentions of the parties before them, whether they be truthful, mean-spirited or prejudiced. These are rulings on matters of fact, and the statement “I am happy” is a factual one. People can lie about it and be found out to be lying.

Not merely is happiness an empirical “is” question, but there’s a good deal of evidence about what makes people happy. Social scientists measure happiness through surveys of people’s sense of subjective well-being

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51. ARISTOTLE, *Nicomachean Ethics*, 1097a-b, at 941-42, in *THE BASIC WORKS OF ARISTOTLE* (Richard McKeon ed., W.D. Ross trans. 1941).

52. AQUINAS, *supra* note 8, at I.II, q.90 a.2.

53. *Edgington v. Fitzmaurice*, 29 Ch. 459 (1885).

(SWB).<sup>54</sup> For example, the U.S. General Social Survey asks people “Taken all together, how would you say things are these days—would you say you are happy, pretty happy, or not too happy?” And while self-reported happiness levels are necessarily subjective, they correlate with objective measures such as physiological signs of stress. As far as empirical evidence goes, it doesn’t get much better than SWB surveys. But as this is an empirical literature about what makes people happy, it’s not to be confused with the normative question of what ought to make people happy.

No wonder that NNL tries to have it both ways and suggest that, without committing the is-ought fallacy, it offers the promise of a happier life. That’s why, when its theorists get into specifics, they sound like self-help gurus. They tell us that health, play and friendship are intrinsic goods, as if we needed some help to understand this. We’re naturally curious and so we want to learn things, but we’ve known that since the Garden of Eden. We’re therefore permitted to ask whether *eudaimonia* and flourishing are magic words which conceal how they identify the desired with the desirable and fail to skirt the NOFI problem.

#### 4. THE LIMITS OF RATIONAL SELF-INTEREST

NNL’s greatest difficulty is its failure to provide a satisfactory account of the duties we owe other people. NNL is a positive theory of *rational egoism* under which we make our choices based on rational calculations about how to achieve the greatest personal benefits and satisfactions. NNL is also a normative theory of *ethical egoism*: Rational people will wish to experience the most deeply satisfying pleasures, and it is good that they feel that way. “All these things to which man has a natural inclination, are naturally apprehended by reason as being good,” said Aquinas, “and consequently as objects of pursuit.”<sup>55</sup> People who chose badly are both morally at fault and foolish, for they have not understood their proper ends. As Grisez puts it, “one must do something good if he is to act intelligently at all.”<sup>56</sup>

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54. See generally BRUNO S. FREY ET AL., *HAPPINESS: A REVOLUTION IN ECONOMICS* (MIT Press 2008); Ed Diener, *The Collected Works of Ed Diener*, in *THE SCIENCE OF WELL-BEING* (Ed Diener ed., Springer Sci. & Bus. Media 2009).

55. AQUINAS, *supra* note 8, at I-II, q.94 a.2. “Since the rational soul is the proper form of man, there is in every man a natural inclination to act according to reason: and this is to act according to virtue.” AQUINAS, *supra* note 8, at I-II, q.94 a.3. “For Aquinas, the way to discover what is morally right (virtue) or wrong (vice) is to ask, not what is in accordance with human nature, but what is reasonable.” FINNIS, *supra* note 23, at 36. See also FINNIS, *supra* note 50, at 102; ROBERT P. GEORGE, *IN DEFENSE OF NATURAL LAW 37* (Oxford Univ. Press 1999).

56. GRISEZ, *CONTRACEPTION AND THE NATURAL LAW*, *supra* note 41, at 62. That’s also what Socrates thought. In the *Protagoras*, he argues that, while there is evil in the world, one never consciously chooses to do wrong. When we see someone doing something wrong, he’s really trying to do good, and simply doesn’t know that what he’s doing is bad for him.

In that case, however, it's difficult to see how NNL can provide a satisfactory account of duties to others. Apart from its is-ought problem, NNL has an *ego-alii* difficulty. How could it be otherwise, since rational egoism tells us not to sacrifice for others unless there is something in it for us. What NNL cannot explain are duties to promote the common good where this requires self-sacrifice, and as such doesn't even count as a moral theory.

NNL theorists might have recognized this had they paid attention to two parallel literatures on rational egoism. The first is the contractarianism of scholars such as David Gauthier under which moral requirements are the product of a hypothetical agreement made by self-interested bargainers.<sup>57</sup> The second is the objectivism of Ayn Rand—and as she made a virtue of selfishness that should have been a tip-off.<sup>58</sup> Logically, one would have expected the three to end up in the same place. But while contractarians and Randists recognize that rational egoism cannot account for a general duty to promote the common good, NNL scholars have failed to do so.

Contractarians and Randists understand that rational self-interest counsels honest dealing. We would not want to lie, cheat or steal if word would get out and this would ruin our reputation, and that supplies what David Gauthier calls *Morals by Agreement*. “To choose rationally,” he said, “one must choose morally.”<sup>59</sup> Suppose, however, that reputations were hidden. Would we still be moral? That is the point of the story of the Ring of Gyges in Plato's *Republic*. Gyges was a shepherd in the kingdom of Lydia, who one day discovered a cave in a mountainside. Entering it, he found the tomb of a man who wore a magical ring. Gyges took the ring and discovered that, by rotating it, he could make himself invisible. He then had himself sent as a messenger to the king, where he used his new power to hide himself and seduce the queen. Together with her, he killed her husband and became king himself. And that's the sort of thing we'd all do, Glaucon tells Socrates, if we didn't have to worry about being found out. “If anyone who had got such a license within his grasp should refuse to do any wrong or lay his hands on another's possessions, he would be regarded as most pitiful and a great fool.”<sup>60</sup> With Gyges' ring, there would be no reputational sanctions if we could make ourselves invisible. And while no one possesses a magic ring,

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PLATO, THE COLLECTED DIALOGUES 348-49, at 357c-358d. (Edith Hamilton & Huntington Cairns eds., Paul Shorey trans., 1961). Socrates makes the same argument in the *Meno*, *id.* at 360-61, 77b-78b.

57. DAVID GAUTHIER, *MORALS BY AGREEMENT* 4 (Clarendon Press 1986). See Richmond Campbell, *Gauthier's Theory of Morals by Agreement*, 38 PHIL. Q. 343 (1988); RUSSELL HARDIN, *MORALITY WITHIN THE LIMITS OF REASON* (1988).

58. See TARA SMITH, *AYN RAND'S NORMATIVE ETHICS: THE VIRTUOUS EGOIST* (Cambridge Univ. Press 2006).

59. *Id.* at 4.

60. PLATO, *supra* note 56, at 608, 360d.

there are going to be times when we can misbehave and not be detected. In such cases, defection is individually rational.

What might help is a sense of guilt. Reputational policing works in what anthropologist Ruth Benedict called shame cultures,<sup>61</sup> where we feel anguish when others see that we're at fault. By contrast, in guilt cultures the sense of shame is internalized, and defectors feel pain whether or not their transgression is observed. Better still if we reveal our sense of guilt through our facial expressions or through other tells. In David Mamet's *House of Games* (1987), for example, a gambler is able to win at poker by learning the nervous tics that reveal when an opponent is bluffing.

Other unconscious tells, such as blushes when lying, will serve the same purpose. Economist Robert Frank pointed this out with a tongue-in-cheek question: if *homo economicus* had a choice, would he want a conscience?<sup>62</sup> Only if he sincerely wanted to be wealthy, answered Frank, for he would be able to make credible commitments to perform his promises if his dishonesty were written on his face. But this is not going to eliminate every kind of fraud or self-dealing, or permit us to think that our self-interest will always lead us to the good.

On top of facial signals, institutional rules will help correct out misincentives. The rational egoist will recognize that he will be wealthier in a society that penalizes contract breach, and he would therefore want to adopt a legal regime that imposes damages for breach of contract. Mark Murphy calls this an aggregative common good,<sup>63</sup> but fails to understand just how limited this is. Contract law does not police the kinds of advantage-taking where people profit from their initial endowments, whether of bargaining skills or inherited wealth. Gauthier concedes the point by noting that "only beings whose physical and mental capacities are either roughly equal or mutually complementary can expect to find co-operation beneficial to all."<sup>64</sup> If the parties are unequal, taking advantage of another's bargaining weakness is consistent with rational self-interest, and inconsistent with altruism and a duty to advance the common good.

Contract law's institutional rules also fail to explain the duties to promote the common good through, for example, a decent welfare system.

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61. RUTH BENEDICT, *THE CHRYSANTHEMUM AND THE SWORD: PATTERNS OF JAPANESE CULTURE* (Mariner Books 1989). See RICHARD WOLLHEIM, *ON THE EMOTIONS* 148-66 (Yale Univ. Press 1999).

62. Robert H. Frank, *If Homo Economicus Could Choose His Own Utility Function, Would He Want One with a Conscience?*, 77 AM. ECON. REV. 593 (1987). See Jack Hirshleifer, *The Emotions as Guarantors of Threats and Promises*, in *THE LATEST ON THE BEST* 307 (John Dupré ed., 1987).

63. MARK C. MURPHY, *NATURAL LAW IN JURISPRUDENCE AND POLITICS* 77 (Cambridge Univ. Press 2006).

64. GAUTHIER, *supra* note 57, at 17.

Unlike John Rawls,<sup>65</sup> neither NNL, the Randists nor Gauthier would impose a “veil of ignorance” constraint in which the parties arrive at a bargain without knowing who they are and where they find themselves. If they did, their aversion to risk might make them want to redress inequalities. NNL also rejects the utilitarian imperative to promote the common good, under which a bargainer might be asked to sacrifice the gains he would derive from his wealth endowments or bargaining skills. For the rational egoist, that would be giving the game away.

This does not mean that rational egoists will be “non-tuists,”<sup>66</sup> and indifferent to the welfare of other people. As to their friends they might be altruists, for there is nothing irrational about promoting their welfare. We are social creatures and made happier through our friendships with others, and with friendship comes a sense of empathy for the other person. Aristotle said that friends are like another self (*heteron auton*), whose happiness one desires as much as one’s own.<sup>67</sup> So we will move beyond selfish self-love and seek the friend’s happiness as well as our own.<sup>68</sup>

Rational egoism might thus incorporate an element of altruism by invoking the good of friendship.<sup>69</sup> But that is a constrained form of altruism, since it extends to friends and not to strangers, and cannot support a more general duty to advance the common good. The virtuous man will prize friendship, said Aristotle, but he added that “it is nobler to do well by friends than by strangers.”<sup>70</sup> As such, friendship does not add a great deal to our understanding of justice. It is the morality of K-Street lobbyists, pay-for-play campaign donors and congressional back-scratchers, and does not ask one to care for strangers.

A theory of rational self-interest cannot explain why a person should be affected by the suffering of a stranger, if he is not. A person can be faulted if he is friendless, because friendship is a basic good. But one cannot be faulted if one’s sense of friendship does not extend to strangers. Friendship takes one only so far.

Suppose that people were divided into friends and strangers, two easily recognized groups that do not interact with each other. One group is rich and

65. JOHN RAWLS, *A THEORY OF JUSTICE* (Harv. Univ. Press 1971).

66. SIMON BLACKBURN, *RULING PASSIONS* 137-44 (1998). The envious or spiteful are altruists, not non-tuists. They do care about the welfare of others—just not in a good way. Envious people are saddened when another does well, and the spiteful feel happier when the other person is made unhappy.

67. ARISTOTLE, *supra* note 51, 1169b7 at 1088. See LORRAINE SMITH PANGLE, *ARISTOTLE AND THE PHILOSOPHY OF FRIENDSHIP* 152-54 (Cambridge Univ. Press 2003).

68. FINNIS, *supra* note 23, at 142-44; FINNIS, *supra* note 50, at 113-16.

69. The Randist will not want to miss out on friendship, since it is one of life’s greatest pleasures. SMITH, *supra* note 58, at 17. “If one person cares about another who is in distress—as a lover, friend, or fellow human being—it can be in his interest to offer help.” *Id.* at 253.

70. ARISTOTLE, *supra* note 51, 1169b13-14 at 1088.

powerful, the other not. They might live in different continents or belong to different races, and there will no mutually profitable bargains for them to exploit. In such a case, said Hume, we could not speak of justice between the two groups, on theories of rational self-interest.

Were there a species of creatures intermingled with men, which, though rational, were possessed of such inferior strength, both of body and of mind, that they were incapable of all resistance, and could never, upon the highest provocation, make us feel the effects of their resentment; the necessary consequence ... is that we ... should not, properly, lie under any restraint of justice with regard to them.<sup>71</sup>

So the rational egoists might conclude. But if this is right, do they owe any duties to the disabled or chronically ill? If rational egoism seems unsatisfactory, it is because we think that moral requirements are strongest when we are asked to ignore self-interest and do the right thing.

That does not exclude the possibility that members of the dominant group might have a sense of empathy for an inferior group, even if they are not friends. Dominant people might be pained at the thought that inferior people are suffering. If so, the dominant person will be happier if the latter are made better off, either through charitable donations or a government welfare system. For the NNL's rational egoists, however, what matters is *their* pain, and not that of the people dying in the street. One may or may not feel empathy, but if you don't, you have no duty to feel it unless one can invoke the utilitarian's moral requirement of altruism. That's evidently where NNL's John Finnis would like to get, but he can't do so without abandoning his rational egoism.

A moral theory that excluded Good Samaritan requirements would not seem to be compelling, and Finnis therefore seeks to connect his rational egoism to a general duty to advance the common good. But his project is unsuccessful as he never abandons his methodological individualism. His moral requirements are rooted in personal self-interest, and the idea that the common good is desirable only insofar as it advances individual well-being. "The common good is fundamentally the good of individuals."<sup>72</sup> To the extent that a common good exists, "it is a set of conditions which enables the members of a community to attain for themselves reasonable objectives, or to realize reasonably for themselves the value(s), for the sake of which they have

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71. DAVID HUME, ENQUIRIES CONCERNING HUMAN UNDERSTANDING 190-91 (Selby-Bigge ed., 2d ed. 1962).

72. FINNIS, *supra* note 23, at 168.

reason to collaborate with each other ... in a community.”<sup>73</sup> Finnis’ common good is thus an instrumental good, not desired for its own sake but rather because it permits each person to exploit the gains of cooperation with others and thereby make himself individually better off.<sup>74</sup> But that excludes duties to people we will never meet, and Hume’s country of strangers.

Finnis disagrees, however. A person will seek to live in a “complete community,” which he defines as an unbounded “all-round association in which would be coordinated the initiatives and activities of individuals, of families, and of the vast network of intermediate associations.”<sup>75</sup> Remarkably, Finnis thinks that his imagined community includes the entire world, which would entirely erase the boundary between friends and strangers.<sup>76</sup>

That is a plea for life in a civilized community that adheres to the rule of law, which indeed is consistent with rational self-interest. What this does not include, however, is Finnis’ duty to support a welfare regime in which the state supplies basic goods such as health care. “What is unjust about large disparities in wealth in a community is not the inequality as such but the fact that (as the inequality suggests) the rich have failed to redistribute that portion of their wealth which could be better used by others for the realization of basic values in their own lives.”<sup>77</sup> But where did that come from, and how is it consistent with Finnis’ methodological individualism? As Gauthier noted, mutual self-interest won’t help the “animals, the unborn, the congenitally handicapped and defective [who] fall beyond the pale of a morality tied to mutuality.”<sup>78</sup> Rational egoists have no greater sense of generosity to strangers than an Ayn Rand objectivist. Whatever they are, they will not be Good Samaritans.<sup>79</sup>

The failure of rational egoism to account for duties to others is a fatal flaw. Derek Parfit thought that it could not even be called a moral theory. “Rational egoism is best regarded, not as a moral view, but as an external rival to all moral views.”<sup>80</sup> Should one wish to support a welfare system and duties of charity to the poor, one must therefore simply abandon NNL in its entirety and in its place second-guess an individual’s choices in favor of goods that are desirable for broader reasons, such as a duty to advance the

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73. *Id.* at 155.

74. *Id.* at 169.

75. *Id.* at 147.

76. *Id.* at 150.

77. FINNIS, *supra* note 23, at 174.

78. GAUTHIER, *supra* note 57, at 268.

79. Finnis invokes a norm of impartiality, which he regards as “a pungent critique of selfishness, special pleading, double standards, hypocrisy [and] indifference to the good of others whom one could easily help.” FINNIS, *supra* note 23, at 107. Those are evils, to be sure, but it takes something more than rational egoism to see them as such. A duty to support the common good does exist, but you’ll more easily find it in utilitarianism than in a theory rooted in private self-interest. Under rational egoism, free riding is a positive good.

80. 3 PARFIT, *supra* note 27, at 345.

common good. This has been suggested by NNL's Joseph Boyle, who argues that we should be required to sacrifice our initial endowments if they would result in an unfair distribution of wealth and unjust welfare rights.<sup>81</sup> That turns NNL inside out, however. It would advance the common good, but at the cost of accepting utilitarianism and rejecting the rational egoism which was its signature move in departing from classical natural law.

#### D. CONCLUSION

The natural lawyer's policy conclusions may or may not commend themselves, but they are not strengthened by the appeal to human nature or rational self-interest. Instead, they stand alone and are to be evaluated, like every policy, according to their consequences and the rights of the parties. Bad philosophizing should not be permitted to give them an extra weight. Words such as nature and natural have a powerful hold on us, said Mill, but they are so apt to mislead that they have become "one of the most copious sources of false taste, false philosophy, false morality, and even bad law."<sup>82</sup>

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81. JOSEPH BOYLE, FAIRNESS IN HOLDINGS: A NATURAL LAW ACCOUNT OF PROPERTY AND WELFARE RIGHTS, IN NATURAL LAW AND MODERN MORAL PHILOSOPHY 206 (Ellen Frankel Paul, Fred D. Miller & Jeffrey Paul eds., 2001). Michael Murphy calls this a "distinctive good conception" of the common good, which he notes is inconsistent with egoism. MURPHY 72-80.

82. JOHN STUART MILL, THREE ESSAYS ON RELIGION 3 (Henry Holt 1884).