

*Drawing on the more fundamental ethical reservoir of standards*

## *The Unavoidability of Natural Law and Rights*

*Tibor R. Machan*

DURING THE LAST several decades something of a renewal in natural law and rights theorizing has emerged in political philosophy. Until around 1970 the dominant theme in contemporary moral and political philosophy was noncognitivism, notably variations of emotivism, the view that when we judge some act or institution morally right or wrong, what we are doing is giving expression to our feelings about it (or trying to induce a similar feeling in others toward it). This was a result of the empiricist/logical positivist movement in epistemology and meta-ethics in terms of which no proposition or judgment could be meaningful (*i.e.*, capable of expressing some truth) unless its terms could be specified as relating to sensory or perceptual (conscious) inputs.

Starting, roughly, with John Rawls's *A Theory of Justice* (1971), moral and political theory has experienced a rebirth. Even before Rawls published his major work, hints of a rejuvenation of cognitivist ethics could be detected. Outside academic philosophy, but not without some direct influence upon it, Ayn Rand, the novelist who wrote *The Fountainhead* (1946) and *Atlas Shrugged* (1957), began the formulation of her neo-Aristotelian philosophy of objectivism, which attempted to ground ethics and politics in objective standards, specifically on a conception of human nature that Rand backed up with a meta-

physics and an epistemology aimed at overcoming traditional difficulties with Aristotelian naturalism.<sup>1</sup>

From the efforts of Rand arose the more academically oriented works, specifically in natural rights theory, of such philosophers as Eric Mack, Fred Miller, Jr., Douglas Rasmussen, Douglas J. Den Uyl, myself, and others.<sup>2</sup> Not all followed the objectivist approach, and those who did often modified some of Rand's ideas as the need arose. By now, however, a rather comprehensive body of work, arguing for natural rights in the Lockean political tradition but with Aristotelian philosophical foundations, is on record, one that eschews the wrongheadedness we find in the left-wing revisionist discussions of "human" rights.<sup>3</sup>

In a recent paper entitled "Against Natural Rights," published in a journal that is customarily friendly toward the kind of free society that the Lockean natural rights theory is often seen as supporting, Professor Ernest van den Haag reverses this trend and attacks natural rights.<sup>4</sup> Van den Haag, who is well known for his championship of conservative legal theory—*e.g.*, the death penalty, community censorship of pornography, et cetera—attacks not so much the Lockean tradition, or especially the objectivist development of this tradition, but rather the welfare statist or socialist revisionist school of rights theo-

rists. To be more precise, although van den Haag often attacks theses that are connected with the Lockean position, he in fact focuses on non-Lockean usurpers rather than on genuine Lockean natural rights theorists as he advances his various critical points.

Here is the gist of van den Haag's argument: While various necessary conditions may be required for human existence and excellence, just as natural law-rights theorists suggest, it does not follow at all that from (knowing) these it is possible to infer norms or virtues or moral principles. (Here van den Haag restates the Humean "is-ought gap" thesis, namely, that no judgment of what one ought [not] to do is deducible, with strict logical necessity, from any [true] judgment of what is the case.<sup>5</sup>) Not only are we unable to establish that there are certain basic individual rights, believes van den Haag, but it is not really desirable to do this by invoking any firm idea of human nature or excellence—whatever school of philosophical politics advances this idea. Assuming, van den Haag proposes, the desirability of negative liberty—freedom from the forcible intrusions of others in one's life—there is, he claims, reason to believe that any natural law approach to politics would jeopardize such liberty. This point reiterates what Karl Popper maintained in his *Open Society and its Enemies* (1953). Most thinkers who have supposed that we can derive "ought" judgments from the "is" judgments about human nature have promulgated views that are hostile to negative liberty. Plato, Hegel, and Marx all fall into this camp with their holistic/totalist moral and political philosophies.<sup>6</sup> While van den Haag does not claim that this proves the invalidity of the natural law/natural rights approach, he wishes us to consider the suggestiveness of the intellectual historical record. He wishes to warn those of us fond of liberty how important it might be to resist the temptations of the naturalist schools.

Finally, van den Haag also discusses the difficulties concerning the sort of ethical/political doctrine we may expect from a

consequentialist or utilitarian approach, which he favors and considers the prominent alternative to the natural law/rights tradition, especially in connection with the justification of the classical liberal political order. Van den Haag does not deny the problems with his favorite view. What he does, rather, is to claim that we must bite the bullet—admit that consequentialism is not clean, that one might be able to justify some *prima facie* abhorrent practices with it, and that despite this there is nowhere else to turn for a sensible moral and political framework since the natural law-rights approach does even worse with such hard cases. These difficulties with consequentialism-utilitarianism may have moved John Rawls, Robert Nozick, and Ronald Dworkin to look for different answers, but van den Haag is not himself moved.<sup>7</sup> He denies that the horrid results are really implicit in the consequentialist-utilitarian school, at least when we consider things in detail. The pursuit of the greatest happiness of the greatest number, even without some clear idea of happiness, will not lead to policies favoring trampling over the lives of the minority, at least no more so than any other live option. It is not necessary, for example, to favor random killing of some so as to ensure the environmentally safe survival of the majority nor the giving of healthy body organs from the less important to the more important who suffer from disease.<sup>8</sup>

Van den Haag's criticism of the natural law/rights school falls prey to the charge of repeating the error of the epistemological positivists. The force of the Humean argument lay in its having been aimed at epistemological idealists who believed that we can know moral truths the way we supposedly know basic principles of logic or metaphysics. Hume showed that if this is what knowledge requires, we cannot have some very precious kind of knowledge, indeed, including moral and scientific knowledge. But Hume seems to have been making this point as a *reductio ad absurdum* of the idealist view of what knowledge must be. Once this view is rejected, there is no reason to claim, even in Hume's

own terms, that moral knowledge is impossible.

True enough, "ought" cannot be derived from "is," if one means by "derived" that it cannot be "deduced" as a necessary conclusion from given true premises. But this does not imply that we cannot rationally establish the truth of certain judgments concerning what is best for human beings to do, how they ought to carry on in life and in politics, et cetera.

The "is-ought gap" was an offshoot of a strict empiricist doctrine about human knowledge or, more precisely, of the model of knowledge that governed the empiricists. To know something, within that model, meant to have as firm a grasp of what one knows as one would have if one were the thing oneself—"knowing it" means "becoming it" and, barring this, one ends having to doubt that one knows at all. Of course this ideal is impossible, utopian.

Empiricism, furthermore, begs the question of what there can be—to wit, it holds that only whatever is capable of being sensed could be known to exist. Yet that rules out *a priori* any type of existence that does not consist in the manifestation of exclusively sensible properties. Moral judgments aim to identify principles of conduct, relationships between some consciously acting agent and various aspects of reality vis-à-vis that agent. They cannot be reduced to statements of fact as understood in empiricism, nor can they be derived from such statements of fact without remainder. Moral facts—*e.g.*, that lying is evil or that everyone possesses the natural right to life, liberty, and property—are embodied in a broader conception of what facts of reality must be.

But the empiricist stance is highly dubious—certainly it does not accurately characterize the epistemology of the natural sciences any longer. Why we should use it as a basis for evaluating the possibility of moral knowledge is a mystery.<sup>9</sup> To the extent that the "is-ought gap" rests on such a philosophical background, we need not accept it. It is arguable, certainly, that a different tradition would warrant a new

look—the neo-Aristotelian teleological conception of human nature, which seems to be perfectly compatible with modern science, would appear to deserve more attention from those who wish to assert flatly the dichotomy in our time.<sup>10</sup>

Popper's idea that naturalist views pose a threat to classical liberalism because they encourage holism, totalism, or authoritarianism, misses its target. It should be directed at the frequent error committed by naturalists, namely, that anything human beings ought or ought not to do may be forced upon them. Aristotle already understood the connection between volition and the moral virtues: to wit, "the virtues are modes of choice or involve choice," and "it is in our power to be virtuous or vicious."<sup>11</sup> Furthermore, the moral (as distinct, *e.g.*, from intellectual) virtues are, in Aristotle's view, a matter of volition or free choice. If, then, the natural law/rights tradition embraces some ethical doctrine based on an understanding of human nature, and this understanding recognizes that to be morally good a person must choose to act right, this is a wholly adequate basis on which to defend negative freedom as a necessary condition in society for the very existence of the possibility of morality. The natural law/rights school attempts to develop this idea in full. The reason the idea was mistakenly omitted from some naturalist moral philosophies is that the propounders focused exclusively on the good state of affairs that actions and institutions ought to aim at, failing to consider fully that the goodness of attaining those goals in the case of human nature depends on the choices of individual persons.<sup>12</sup>

As to the trouble with hard cases, van den Haag discusses them not in light of the works of defenders of the Lockean tradition but vis-à-vis the work of such welfare state "human" rights advocates as John Rawls, Ronald Dworkin, Alan Gewirth, *et al.* Thus he never comes to terms with the extensive literature on just this topic, produced by Rand, Mack, myself, and others. The reason this is significant is that the former group basically collapses ethics and

politics—their moral philosophy really is a political philosophy, or vice versa. For example, in Rawls we do not see any discussion of personal ethics, of the virtues that a good human being would live by, and so forth. Similarly, in Dworkin and Gewirth all the apparatus of their philosophizing is focused on forging public policy.

Yet the hard cases are just the kind that depart from the arena in which politics is possible and reigns. Hard cases are exceptions to the political situation and not the norm, even though of course this may not be clearly evident all the time. But the laws of a good human community are not supposed to be geared primarily to handling emergencies. They are, so to speak, the social navigational principles for ordinary human beings who have the opportunity, in the main, to aspire to excellence in each other's company if these principles are respected and protected.

Yet the reality of hard cases cannot be ignored. The answer as to how to cope with them, however, must come from a more basic system of action-guiding principles than law, namely, ethics. And the neo-Aristotelians, such as Mack, Miller, and Lee, have prepared themselves to deal with them. Thus Mack has argued that when we are in an emergency situation, where no mutually beneficial resolution of a problem is possible—the standard lifeboat, desert island kinds of cases—matter must be handled independently of political principles.<sup>13</sup> No such resolution is possible for the politicized “moral” philosophers van den Haag chose to attack as defenders of natural rights. For them any solution to the theoretical problem posed by hard cases must come from within their political framework. The natural rights theorists who have developed the neo-Aristotelian ethical foundations (natural laws) for their Lockean political principles (*i.e.*, natural rights) can approach hard cases by leaving politics and law and drawing on the more fundamental ethical reservoir of standards.

Thus it is possible to see how one might handle difficulties about emergencies for which the political legal system is not prepared by consulting ethics in, say, the

lifeboat situation. Here persons occupy a boat that will sink unless some leave it, but who is to leave the boat? By referring merely to a doctrine of human rights, there seems to be no answer to this question. Utilitarianism seems inadequate to the problem since there is no objective criterion, even in principle, as to what the greatest happiness of the greatest number is—clear cases can be thought of whereby it will not suffice simply to save the majority and let the minority (drawn by means of random selection) perish, yet in terms of utilitarianism it does not seem we can make sense of these cases. Utilitarianism offers no principled resolution. But some other ethics might—*e.g.*, by reference to the idea that individual human happiness must be supported and by invoking a conception of human nature in terms of which such promotion can be clearly understood and a criterion of selection arrived at. Thus perhaps the very old should offer to die, given that theirs will be a full and dignified life by doing so, whereas the immature would have to cut short a possibly flourishing life. Or those with greater creative talents would be preferred to those who are living rather dull lives. Exactly what the standard of choice would be is perhaps difficult to think of when one is so remote from the situation, but we all know of good novels in which just these kinds of choices are made for better or worse and some famous cases in the law where actual persons have come to grips with them. The point here is that, with a sound ethical system at one's disposal, it is not inherently impossible to conceive of dealing with hard cases.

More generally the natural rights position, properly so named, links up with a more substantive ethical tradition than those van den Haag picks for attack.<sup>14</sup> Even John Locke directs us to how hard cases must be approached when he states that we must distinguish between situations “where peace is possible” and those where it is not. Once rights have been widely violated or where their observance is not even possible, some other approach needs to be taken. And at times it may even be

morally proper to flip a coin so as to reach a solution—but even this has to be understood as arising from the implementation of standards, not as a matter of arbitrary decision.

The basic thrust of the natural law/rights approach in handling hard cases may be summarized as follows: The purpose of ethics or a moral system is to provide for the guidance of human living, with political ethics and law, as a branch-off, to provide for the guidance of human life in the company of other (unrelated) persons. To the extent that an ethical and/or political system helps achieve the purpose it naturally has—*i.e.*, the purpose assumed in asking the question that gives rise to it as one of the many competing answers—it is a sound system: it is naturally justified. But even a sound system of ethics and/or politics can face difficulties, so the question is whether one or another faces them more successfully—more comprehensively, with greater integrity, et cetera. What about the relationship between the ethical system and the political—the principles of which would form a constitution or set of common laws on which positive law would most appropriately be made to rest in human communities aimed at justice? It is best seen in light of the fact that each person, as an adult, faces questions of living concerning oneself before he or she faces questions of living with others. This is a matter of the ontology of the situation; that is, because one is one's own behavioral motivator in need of guidance in one's conduct, one needs to have the answer to what one should do *per se* before adding the more specialized question of what one should do *vis-à-vis* others, *i.e.*, the political question. (Although there are many who claim that Aristotle saw this the other way around—*i.e.*, regarded politics prior to ethics—there is also some scholarship that argues that he too understood ethics to be prior to politics.<sup>15</sup>) The ethical dimension of one's life has priority and the political is subsidiary to it: one must guide oneself first and foremost, not others. When a conflict arises, the ethical framework is decisive—one's moral

obligations dominate. And however statisticians might like to deny it, a person must answer to morality before he answers to law.

For official representatives of the political dimension, this may not be advisable to stress publicly, of course; and as far as their own conduct is concerned, given their personal commitments or oaths, the issue of priority may not even arise. Indeed, in a free society, where men and women are governed by virtue of having given their consent, it may be assumed that, with a decent citizenry, the bulk of what politics requires of citizens is also what morality demands of them. (The difficulties with the highly mixed situations we face is well illustrated by such fiction as Melville's *Billy Budd*. Politics alone will not serve us here.)

Since the natural law is prior, the natural rights each person has *vis-à-vis* others (whose actions alone serve to express either a chosen respect for or a violation of their personhood) may on occasion be disregarded (not violated) in the face of one's ethical responsibilities.

Of course, this sketch immediately suggests some congruence with certain elements of van den Haag's consequentialist position. But this is due to van den Haag's badly chosen representatives of naturalism: Had he focused on the neo-Aristotelian defense of natural law and rights, a defense much more hospitable to liberty than the so-called human rights theories that he discusses, he would have seen that the teleological approach incorporates many elements of consequentialism—*e.g.*, a concern with the facts bearing on how the future will turn out for us.

Yet, whereas van den Haag is entirely uncommitted to some definitive (though not concrete) conception of the human good or *summum bonum*, the neo-Aristotelians are committed—they claim that human happiness is indeed the proper goal of the moral life and that although this happiness may manifest itself in various ways, depending on what we are talking about, the fact that we are talking about human happiness circumscribes how it can be manifest.

With van den Haag's human good left essentially subjective—which is the central flaw of all utilitarian “ethics” and “politics”—the questions of moral right and political rights are also undecidable. While he does claim that some kind of escape is possible—“stipulated along the lines of Ulpian's maxims, or along Roman or Common law lines”<sup>16</sup>—he just cannot make clear sense in his own theoretical terms of the assertion, *e.g.*, that there is “a right or even a moral duty to be unjust to individuals in certain circumstances.”<sup>17</sup> Utilitarianism is not able to provide guidance in the area of personal morality where such circumstances arise.

There is one other difficulty in giving a subjectivist account of values, including the value of liberty. This has to do with the self-defeatist character of valuing such liberty while one also maintains that whether one values it is rationally indefensible. Many have made this charge, including some more conservative friends of liberty.<sup>18</sup> Any theory that needs to be action-guiding, that rests on principles or ingredients in terms of which one may be indifferent as to whether one should respect that theory or not, is theoretically flawed. If one cannot apply one's principles to giving one's actions a rational justification, such that this justification defeats some other possible justifications, the system involved is not superior to alternatives. (Perhaps this is the thrust of Solzhenitsyn's point that the West lacks the will to defend itself!)

The point is not to deny that difficulties can arise in attempts to reconcile principles of morality or natural laws with principles of politics and law. But there is reason to doubt that any moral system would handle these equally badly. There may be, for example, no good reason to abandon the idea of the inalienability or absoluteness of natural rights—*e.g.*, by characterizing them as “*prima facie*”<sup>19</sup>—even when some instances can be found when such rights need to be disregarded.<sup>20</sup> But wherever it is suspected that such difficulties face us, the course that would seem to recommend itself is to attend very

carefully to the intricacies of the situation. The positive law is itself indicative of this point when we consider how it handles alleged wrongdoings in exceptional circumstances, such as those involving, *e.g.*, shipwrecks, famine, and earthquakes. Such cases tend to beg for the fullest possible knowledge of details since only then can we learn if the persons involved made full use of their moral faculties. Sketching such cases will not suffice, however tempting this is for argumentative and illustrative purposes.

The naturalist framework is not fully satisfying for those who prefer mechanical solutions to complex moral and political problems. No doubt, also, many efforts to develop such a framework have been failures. But the main reasons for their theoretical shortcomings have not been substantial but foundational—the philosophical theories underlying these views have had many problems. Yet these are not incapable of remedy.<sup>21</sup> If we heed Gilbert Harman's idea that “we must take care not to adopt a very skeptical attitude nor become too lenient about what is to count as knowledge,”<sup>22</sup> especially in how we conceive of moral and political knowledge and what tests we expect claims to such knowledge to meet, the task of developing the naturalist position would seem to be more promising than many would suppose. Hopeless idealism must not be the model of what we should strive for. Nature, which is not purely geometrical but still quite coherent, needs to be our guide as to how we should cope with human lives. The subjectivism involved in the consequentialism-utilitarianism that is often posed as our more viable alternative in political theorizing does not seem to be able to overcome some of the problems that any promising theory must tackle.<sup>23</sup>

<sup>1</sup>Ayn Rand herself presented us with only philosophical essays, excepting her *Introduction to Objectivist Epistemology* (New York, 1979). The most formidable work following her philosophical theory may be found in David Kelley, *Evidence of the Senses* (Baton Rouge, 1985). See also Douglas J. Den Uyl and Douglas Rasmussen, eds, *The Philosophical Theory of Ayn Rand* (Champaign, Ill., 1984). For a brief

outline of Rand's philosophical positions, see Tibor R. Machan, "Ayn Rand: A Contemporary Heretic," *The Occasional Review*, no. 4 (1976), pp. 133-49.<sup>2</sup>See the works of some of these in Machan, ed., *The Libertarian Reader* (Totowa, N. J., 1982).<sup>3</sup>For some of this see Machan, "Some Recent Work in Human Rights Theory," in K. Lucey and Machan, eds., *Recent Work in Philosophy* (Totowa, N. J., 1983), and "Wronging Rights," *Policy Review*, no. 17 (Summer 1981), pp. 37-58. <sup>4</sup>Ernest van den Haag, "Against Natural Rights," *Policy Review*, no. 23 (Winter 1983), pp. 143-75. <sup>5</sup>David Hume, *A Treatise of Human Nature* (Garden City, N.Y., 1961), p. 423. The emotivist inferences from accepting Hume's argument at face value may be found in C. L. Stevenson, "The Emotive Meaning of Ethical Terms," in A. J. Ayer, ed., *Logical Positivism* (New York, 1959), pp. 264-81. <sup>6</sup>For a good criticism of this line of criticisms, see Renford Bambrough, *Moral Skepticism and Moral Knowledge* (Atlantic Highlands, N. J., 1979). Clearly, from "I know that doing D is right for A," it does not follow that "someone ought to (or is authorized to) make A do D." <sup>7</sup>See John Rawls, *A Theory of Justice* (Cambridge, Mass., 1971); Robert Nozick, *Anarchy, State, and Utopia* (New York, 1974); Ronald Dworkin, *Taking Rights Seriously* (Cambridge, 1977). <sup>8</sup>I will discuss these kinds of cases shortly. <sup>9</sup>See, for more on this, my "Epistemology and Moral Knowledge," *The Review of Metaphysics*, 36 (September 1982), 23-49, and "Another Look at Naturalist Ethics and Politics," *Cogito*, 3 (December 1985), 75-114. <sup>10</sup>See, e.g., Rom Harre, *The Philosophies of Science* (New York, 1972). See also Machan, *The Pseudo-Science of B. F. Skinner* (New Rochelle, N.Y., 1974). <sup>11</sup>Aristotle, *Nicomachean Ethics*, bk. 2, chap. 5 1106a2, 1113b13. <sup>12</sup>See also Douglas J. Den Uyl, "Freedom and Virtue," in Machan, *The Libertarian Reader*, pp. 211-25. <sup>13</sup>Even in John Locke,

although we find mixed signals, we also find reference to the Law of Nature, which is Reason, that governs the state of nature and that will guide one if one will but consult it. This suggests the doctrine from Aristotle that the fundamental moral law is right reason. See, for more, Machan, "An Aristotelian Foundation for Natural Rights?" *This World*, no. 10 (Summer 1985), pp. 83-86. (Many of the points in this work have been developed in some unpublished but more thorough work by Fred D. Miller, Jr.) <sup>14</sup>See Eric Mack, "Individualism, Rights, and the Open Society," in Machan, *The Libertarian Reader*, pp. 3-15. See, also, E. Mack, "Egoism and Rights," *The Personalist*, 53 (Winter 1973), 5-33. I discuss some of these problems in my *Human Rights and Human Liberties* (Chicago, 1975). <sup>15</sup>W. F. R. Hardie, "The Final Good in Aristotle's *Ethics*," *Philosophy*, 40 (1965) 277-95. <sup>16</sup>Van den Haag, p. 49. <sup>17</sup>*Ibid.*, p. 48. <sup>18</sup>E.g., Leo Strauss, Walter Berns, George Will, et al. <sup>19</sup>See, e.g., Gregory Vlastos, "Justice and Equality," in R. Brandt, ed., *Social Justice* (Englewood Cliffs, N. J., 1962), pp. 31-72. <sup>20</sup>See Machan, "Prima Facie versus Natural (Human) Rights," *The Journal of Value Inquiry*, 10 (Summer 1976), 119-31. Van den Haag gives us a good clue here when he tells us that "the legal never exhausts the moral" (van den Haag, p. 50). What we could learn from this is that the law has a narrower scope than ethics and might very well be aimed, as I suggested above, at less stressful circumstances, in principle, than morality. <sup>21</sup>See Machan, "Metaphysics, Epistemology and Natural Law Theory," *American Journal of Jurisprudence* (forthcoming). <sup>22</sup>Gilbert Harman, *Thought* (Princeton, 1973), p. 145. <sup>23</sup>I developed some of these points in the course of preparing for the Liberty Fund conference on natural law and rights in the spring of 1982, Santa Barbara, California.