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HOW PERSUASIVE IS NATURAL LAW THEORY?

Kent Greenawalt*

INTRODUCTION

This Article, in honor of John Finnis, evaluates the persuasiveness of one central element of natural law theory—its claim to an objective moral truth discoverable by reason. Although I stand outside the tradition, my interest in natural law theory goes back to my college days. John Finnis, especially in his work *Natural Law and Natural Rights*,¹ has much enriched my understanding of moral, political, and legal philosophy. Prior to that book, natural lawyers and analytic jurists had little to say to each other; by and large, the members of each group had scant respect for the scholarly endeavors of the other. Finnis made a major contribution to bridging the gap. He drew carefully from the work of his colleagues at Oxford: H.L.A. Hart, Ronald Dworkin, and Joseph Raz. His challenges to their positions appreciated what they were trying to say, rather than settling for the misleading and superficial sallies that too often mark the critical enterprise. But Finnis did not back off from developing a full-bodied, traditionally rooted, comprehensive natural law theory. In this respect, his endeavor differed sharply from some other modern challenges to legal positivism. Lon Fuller's claims about an internal morality of law, or procedural natural law,² and Ronald Dworkin's "naturalism"³ went only a slight distance toward the major tenets of natural law as conceived over the centuries. In his book, Finnis defended those tenets, drawing heavily from Aristotle and Aquinas, while relating their basic insights to modern understanding. From the publication in 1980 of *Natural Law and Natural Rights*, Finnis has been deservedly recognized as the leading proponent of natural law theory within the Anglo-American legal

* University Professor, Columbia University School of Law. I have received perceptive comments on a draft from Charles Beitz and very helpful assistance and criticism from James Beattie.

1 JOHN FINNIS, *NATURAL LAW AND NATURAL RIGHTS* (1980).

2 See LON L. FULLER, *THE MORALITY OF LAW* (rev. ed. 1969).

3 See RONALD DWORKIN, *LAW'S EMPIRE* (1986); Ronald A. Dworkin, *Natural Law Revisited*, 34 U. FLA. L. REV. 165 (1982).

academy. Many legal scholars continue to reject that approach out of hand; but insofar as natural law commands the attention of scholars who are not themselves natural lawyers, it is largely thanks to Finnis. That is a major contribution to jurisprudential and moral thought.

I offer my comments here with some humility. It seems presumptuous to make a sweeping assessment of fundamental claims of natural law theory if one has not made an extensive study of the writings of natural lawyers and their major critics. I may be an "expert" on some subjects with which natural law theory deals,⁴ but I am definitely not an expert on natural law writ large or, most importantly, on its claims about moral truth. Yet, I hope this account of what I find appealing and what I find troubling, built upon remarks made at a conference of natural lawyers,⁵ has value.

The questions on which I concentrate are those that bother me most. In large part, thanks to Finnis's own work, I believe the aspects of natural law theory that distinctively concern legal and political theory are less crucial, and less controversial, than its fundamental claims about moral truth and action.

I begin, in Part I, by outlining five questions about natural law that my discussion addresses. Their initial statement should help readers trace the threads of the analysis. Part II summarizes my understanding of a standard natural law theory, followed by a brief explanation about items on the list and omissions from it. Part III concerns relations between determinations of natural law and the responsibilities of officials and citizens. Part IV is the heart of the Article. It addresses the plausibility of claims about moral truth that natural lawyers commonly make. I am partly concerned with what might be called the challenges of historicism and moral relativism, the idea that what is proper morally varies according to social context and historical era. I am also concerned with the persuasiveness of natural law reasoning and conclusions within a society, ours, in which people reason differently about moral issues as well as reaching variant conclusions. These two concerns relate to each other, as I explain. I

4 See KENT GREENAWALT, *CONFLICTS OF LAW AND MORALITY* (1987) for a discussion of theories of obligation to obey the law including natural law theories.

5 See *NATURAL LAW AND CONTEMPORARY PUBLIC POLICY* (David F. Forte ed., 1998) [hereinafter *NATURAL LAW*]. Some of this Article is taken directly from that commentary. I also draw upon a book review, see Kent Greenawalt, *Natural Law and Natural Rights*, 10 *POL. THEORY* 130, 133-36 (1987) (book review), and a Pope John XXIII Lecture at Catholic University, see Kent Greenawalt, *Natural Law and Political Choice: The General Justification Defense, Criteria for Political Action, and the Duty to Obey the Law*, 36 *CATH. U. L. REV.* 1, 1 (1986) [hereinafter Greenawalt, *Natural Law and Political Choice*].

tackle three particular moral problems: the distinction between intending harm and knowing it will occur, homosexual acts, and assisted suicide. Without undertaking a full analysis of any of these, I can illustrate my misgivings about approaches of writers, like Finnis, who identify themselves with traditional natural law theory. I move from conclusions about these to the intercultural problem. Having developed the central difficulties, I consider what qualifications one might make to traditional natural law theory in order to meet them. I conclude that if core elements of natural law theory are to be maintained, we may need a more subtle and complex notion of moral truth and an acknowledgment that religious premises figure into one's belief in objective moral truth and into one's discernment of that truth.

What is the practical point of this Article? I am not so naive as to suppose that, upon reading it, committed natural lawyers will have the scales fall from their eyes. Nor do I suppose that those strongly opposed to natural law theory will rush to consider just how natural law theory might revise itself to meet what they regard as crushing objections. For these two groups, the Article might contribute modestly to mutual understanding, a recognition of difficulties and possibilities. Perhaps the Article will speak more forcefully to others, like myself, who find aspects of natural law theory to be very appealing but who are put off by the substance and style of many of its claims.

I. SOME BASIC QUESTIONS ABOUT NATURAL LAW THEORY

1. How far is a natural law approach a general inquiry about human fulfillment and common good, and how far is it a distinctive tradition with long-standing and settled ways of approaching moral and political problems?
2. Are forms of moral reasoning and, in particular, the categorical approaches of a traditional natural law view universally valid?
3. How culturally relative are specific moral conclusions?
4. How crucial are religious convictions for (1) belief in something like a natural law and (2) specific conclusions on moral and political issues?
5. What judgments about the place of human law and the roles of actors within legal systems need to be made, if one is to recommend adoption of moral conclusions for official action and for citizens?

I raise these questions about a full, robust, natural law position—a view that has roots in Aristotle and the Stoics and has found its most

influential formulation in the writings of Saint Thomas Aquinas. There are, of course, very important disagreements *among* natural lawyers, and I risk insensitivity to those. Perhaps the most general disagreement is whether one should (and Aquinas did) build a theory of good and of moral action from a teleological (purposive) understanding of human beings or whether one should (and Aquinas did) begin with self-evident human goods. Following Germain Grisez,⁶ Finnis has powerfully defended the second position.⁷ I remark briefly on this difference in connection with homosexual acts, but most of what I say has application to both positions.⁸

II. THE BASIC NATURAL LAW POSITION

According to my understanding, the standard natural law position rests on a number of premises.⁹

1. Human life is integrally related to all of existence.
2. Human nature is universal.
3. The defining characteristic of human beings is their reason or rationality.
4. Human beings have inherent purposes (the teleological approach) or self-evident goods (the approach Finnis defends).
5. These purposes, or goods, are discoverable by reason, reason being understood in a broad sense to include the light of experience.
6. Morality is objective, universal, and discoverable by reason.
7. People's moral obligations are consonant with their own true purposes, or their realization of self-evident goods, and with their true happiness.
8. At the deepest levels, no conflict arises between individual good and the common good.
9. Human laws appropriately reflect the natural law (though not every dictate of natural law should be subject to state coercion). Human laws appropriately determine details left

6 See FINNIS, *supra* note 1, at vii.

7 See *id.* at 30-36.

8 However, there may well be differences in the implications of the two positions that I fail to recognize.

9 See David F. Forte, *The Natural Law Moment*, in NATURAL LAW, *supra* note 5, at 3, 3-9.

open by natural law, such as the precise punishments for various crimes, and they settle matters of indifference.

10. Human laws that are not in accord with natural law are not "really" law in some sense. A failure to accord with natural law may occur if a human law requires behavior that natural law forbids, or if a law forbids behavior that natural law values, or if the burdens and benefits of a law are highly unjust.

My first comment about this list concerns the idea that a human law that violates natural law is "really" not a law. Perhaps because the subject has seemed especially legal in some sense, theorists interested in law have expended a good deal of effort arguing over whether an unjust law is "really" a law and this has often appeared to be the major point of division between natural lawyers and positivists. Finnis rightly relegates this argument to a secondary position, carefully explaining the different senses in which a law might be said to have authority, acknowledging that in an important sense, an immoral law is law, but maintaining that such a law does not create the moral obligation to obey that is produced by other laws within a generally just system.¹⁰ Even then Finnis does not claim that as far as moral duty is concerned an unjust law is like no law at all, but instead he develops a frequently overlooked passage in Aquinas to suggest that one's obligation not to undermine a just system may require one to obey an unjust law if disobedience would have destructive consequences.¹¹

Since most political theorists who are not natural lawyers believe that moral reasons may justify disobedience of immoral laws, what distinguishes them from natural lawyers in this respect? Their conceptual apparatus and their exact approach to issues of obligation and obedience may differ subtly,¹² but these differences do not mark some major disagreement. The query whether an unjust law is "really" a law has less significance than may have appeared before Finnis wrote.¹³

My second comment ties closely to the first. Natural law theory is dominantly about human good and morality. Legal positivism, *by it-*

10 See FINNIS, *supra* note 1, at 245–342.

11 See *id.* at 365.

12 I discuss these differences in GREENAWALT, *supra* note 4.

13 There is an important conceptual divide between natural lawyers and many legal positivists. To oversimplify, the division is over whether it is appropriate, or even possible, to provide a value-free analysis of law. Many positivists say it is possible and a worthwhile enterprise. Natural lawyers believe a value approach to the nature of law is more worthwhile, and that a value-free approach may be impossible. I do not address this issue in this Article. Finnis has an illuminating discussion in FINNIS, *supra* note 1, at 3–22.

self, is a theory about what makes a human law a law; that legal theory can be joined with a wide range of theories about moral truth, about how judges should interpret, and about a citizen's obligation to obey the law. The true opponents of the most important claims of natural law are not legal positivists as such, but proponents of competing theories of morality (many of whom are also legal positivists).¹⁴ If we assess how useful various conclusions about natural law may be for the development of human law, we must ask how well natural law theory serves as an account of moral understanding, *and* how much that account ties moral conclusions to judgments about human law. For the latter inquiry, we need to inquire how moral determinations should affect actors in legal systems. We *might* conclude, for example, that legislators should take account of the truths of natural law, but that judges interpreting statutes should be guided by standards of original meaning.

My third and fourth comments are about omissions from my list. I have not included any connection between natural law and God. Although in modern times, belief in natural law is strongly correlated to belief in God, *and* opponents of natural law views often have mistakenly supposed these views are simply religious, natural law theorists have consistently asserted that individuals can discover the natural law, independent of their particular religious beliefs. Finnis strongly claims, further, that one can establish the validity of natural law theory without invoking religious premises. These assertions raise central issues about the plausibility of a robust natural law theory.

My last comment concerns natural rights theory of the sort developed by John Locke that has been highly influential in our history. Claims about natural rights may or may not be based on a state of nature analysis of the kind found in Locke. According to the dominant version of natural rights theory, what reason mainly teaches that is relevant for political society are the limits of justified interference with the freedom of individuals.¹⁵ These limits constrain other individuals and the government. Typically, natural rights theory connects

14 Jeremy Bentham, John Austin, and Hans Kelsen are striking examples. Bentham and Austin were both utilitarians about moral theory (though Austin's rule-utilitarianism differed from Bentham's act-utilitarianism); in many respects utilitarianism is sharply opposed to natural law claims. Kelsen was a relativist about morality.

15 Finnis accepts natural rights, understood in a certain way, but his foundations are at variance with common natural rights theory. He examines moral duties to determine what rights people have. He says, "[W]hen we come to explain the requirements of justice, . . . we find that there is reason for treating the concept of duty, obligation, or requirement as having a more strategic explanatory role than the concept of rights." FINNIS, *supra* note 1, at 210.

to a social contract explanation of the legitimacy of government. The government has authority because people have created it to protect them from wrongful interferences with liberty. If the government trespasses against protected liberty, it becomes illegitimate and may be overthrown. Much of what I say applies to typical natural rights theory as well as to traditional natural law theory.¹⁶ But I am mainly interested in the latter here and do not pause to work out implications for natural rights.

III. THE ROLE OF NATURAL LAW IN DEVELOPING HUMAN LAW

Let us assume for the moment that some natural law approach is the correct way to discern moral truth, that a government official recognizes this, and that the official has reached a confident conclusion about a moral truth that seems to bear on how a social problem should be resolved. The official is convinced, for example, that capital punishment is wrong, that an embryo has the value of a full human being from the moment of conception, or that every individual should have an opportunity to work. What obstacles might the official conceive to the appropriateness of converting one of these moral conclusions into positive human law?

The official recognizes, of course, that any decision about legal coercion involves judgment about the place of government and law as well as about moral truth. Many serious lies, for example, may violate natural law but not be subject to legal redress. The official recognizes, further, that decisions about enforcing natural law involve judgments about the proper responsibilities of particular officials in particular societies.

Constraints on implementing moral truths are most obvious for judges. When judges interpret legal materials, they usually do not (and should not) decide simply what they think are moral standards the state should enforce. They must consider their responsibilities vis-à-vis other political actors: the makers of constitutions, legislatures, administrators, higher courts, and earlier judges on their own court. Frequently, judges should do what statutes, executive orders, or precedents require rather than what they think would (otherwise) be morally best.¹⁷

16 The foundations of natural rights are a perplexing problem for claims of universal human rights.

17 I put the "otherwise" here because a determination to follow other authorities is itself a moral decision of a kind. And if what the authorities clearly demand is immoral enough, judges should refuse to comply. For one argument by a natural

Even if a decision comes down to moral evaluation, a strong argument exists, at least for common law cases, that judges should be guided substantially by community sentiments, rather than their own assessments under the best moral theory, if the two diverge. I do not mean direct moral evaluation has *no* proper place for judges. Indeed, I think it has considerably more place in constitutional adjudication than strict originalist approaches allow.¹⁸ But any judge needs to devote substantial thought to the role of courts in various cases before concluding that he or she should implement some principle of morality. Answers will depend not only on general considerations about judicial authority in liberal democracies, but also on various "local" aspects, such as whether traditions encourage flexible interpretation of statutes, and whether the Constitution is grounded on natural law premises.¹⁹

When executive officials administer clear statutory directions and when lower executive officials carry out the orders of higher-ups, the constraints they face are similar to those on judges. Their job is mainly to do what they are told, not to decide what approach to a problem is best morally.

The appropriateness of relying on natural law conclusions about morality may seem simpler for legislators and for executive officials who are exercising broad discretion, since their task is to adopt good laws and regulations.²⁰ Even here complexities face us. How far should government discourage actions that are immoral, but which most citizens do not regard as such? Former Governor Mario Cuomo has given us the most famous modern exploration of this problem by an official who believes in natural law. He defended support of a permissive law despite his conviction that abortion is deeply wrong from a moral point of view.²¹ He might conclude that if a proposed restrictive law flies in the face of the morality of most citizens, it would be ineffective or too harsh. A legislator might believe that he has a re-

lawyer that judicial reliance on natural law should be very limited, see Christopher Wolfe, *Judicial Review*, in *NATURAL LAW*, *supra* note 5, at 157.

18 This comment applies to both strict textualism and strict intentionalism.

19 A plausible claim about the United States Constitution is that it largely reflects a natural rights philosophy.

20 A subtle treatment of these matters might require distinctions between legislative responsibilities and administrative responsibilities, even when administrators have broad discretion; and it might require distinctions among kinds of administrative responsibilities. These distinctions would not affect my basic point here.

21 See Mario M. Cuomo, *Religious Belief and Public Morality: A Catholic Governor's Perspective*, 1 NOTRE DAME J.L. ETHICS & PUB. POL'Y 13 (1984); see also Terry Hall, *Legislation*, in *NATURAL LAW*, *supra* note 5, at 135.

sponsibility to represent public attitudes, as well as to conform the law to correct moral judgment.²²

Even when an official has a clear domain of private discretion, questions about implementing moral judgments arise. What should a governor do if he believes capital punishment violates natural law, but the state authorizes capital punishment and many murderers are sentenced to death? Should the governor commute *every* death sentence, and thus achieve a morally correct outcome for each case, or would a uniform exercise of executive clemency that so directly rejects legislative judgment be improper?²³

If natural law theory is sound and useful, natural law should figure significantly in the work of legislators and high executive officials, but concerns about role and about the functions of law preclude any easy assumption that what is called for is unblinking application of natural law to positive law.

IV. IS THERE A HELPFUL UNIVERSAL NATURAL LAW?

We now reach much more difficult terrain. Is a natural law approach the correct, or best, way to resolve moral questions? Put differently, is the fundamental core of a traditional natural law theory persuasive, or even plausible? I am interested here in what I shall call a distinctive natural law approach and its ability to yield convincing or defensible answers to genuine moral problems. Against the claim that a distinctive natural law approach can yield such answers are arrayed challenges that its methodology is seriously flawed and that, at most, any answers it gives lack universal validity. For me, these two challenges are closely related. I use examples that test the soundness of natural law theorizing for problems that face our culture to develop concerns about universal validity.

A. *An Approach That Is Helpful and Distinctive?*

From the time I first studied natural law in college, I was skeptical about the value of a genuine natural law approach to assist in the resolution of moral problems and the development of human laws. The nub of my difficulty was that some highly general moral premises seemed persuasive but not very useful, and that many principles and conclusions that would be useful, if persuasive, did not seem persua-

22 Of course, if someone thinks abortion is tantamount morally to murder of a full human being, he may reasonably think this is not a subject about which legislators should acquiesce in a permissive morality among the populace.

23 It might matter how recently the death penalty has been endorsed by the legislature and its degree of public support.

sive. Thus, for example, the idea that life is generally preferable to death is persuasive but not very helpful in resolving genuine moral problems; the idea that a distinction between intentional and knowing killing is *the* crucial principle for deciding whether to cause death in order to save life is unpersuasive, as is the notion that use of artificial contraception is morally wrong. (I do not mean to imply that all natural lawyers agree on all issues; many reject the conclusion about artificial contraception.²⁴) Simply put, I have believed that the plausibility of natural law views has depended substantially on their level of generality and that, as plausibility has increased, usefulness for actual choice has decreased.

My view has shifted somewhat in the last few years, primarily through exposure to arguments that have started with relatively uncontroversial premises about human good and have worked through to significant ideas about public policy. George Wright, for example, has urged that if people have a right to realize their capacities, they must be able to exercise their reason, and this requires educational opportunities greater than those our society now provides to many of its children.²⁵ James Murphy has argued that if work is a crucial element of human fulfillment, we must do more to see that everyone has an opportunity to work.²⁶

About such arguments, my concern is the distinctiveness of natural law theory. In an after-dinner talk, Judge John Noonan made a stirring defense of a commitment to natural law.²⁷ Building partly on an illustration of simple, voluntary cooperation between strangers to achieve the desired end of crossing a bridge with enough passengers to drive in the fast, no toll lane, he suggested that everyone does natural law as everyone speaks prose.²⁸ But, if this is so, we are left to ask what the distinctive natural law tradition offers for the resolution of social problems. Much of the arguments of Wright and Murphy could be cast in terms of widely accepted values, values that a utilitarian or a liberal perfectionist²⁹ would also endorse. Are the *distinctive*

24 See, e.g., *THE CATHOLIC CASE FOR CONTRACEPTION* (Daniel Callahan ed., 1969).

25 See R. George Wright, *Welfare*, in *NATURAL LAW*, *supra* note 5, at 280.

26 See JAMES BERNARD MURPHY, *THE MORAL ECONOMY OF LABOR: ARISTOTELIAN THEMES IN ECONOMIC THEORY* 4 (1993); James Bernard Murphy, *A Natural Law of Human Labor*, 39 *AM. J. JURIS.* 71 (1994).

27 See John T. Noonan, Jr., *The Natural Law Banner*, in *NATURAL LAW*, *supra* note 5, at 380.

28 See *id.* at 380-81.

29 By a liberal perfectionist, I mean broadly a liberal whose moral philosophy is built on some idea of human fulfillment, not on ideas of "right" that are detached from specific conclusions about good. See JOHN STUART MILL, *ON LIBERTY* (Alburey

components of natural law theory crucial? I am not sure, but I believe it is important to distinguish between (1) reasoning broadly about public problems from the standpoint of human fulfillment and common good, and (2) using the vocabulary, concepts, and modes of analysis characteristic of the particular natural law tradition. My doubts about the potential usefulness of most general natural law precepts has partially transmuted into doubts whether practical conclusions based on some of these precepts *need* the precepts or could be equally well grounded in other approaches.

As the last paragraphs indicate, on one general moral issue natural lawyers line up with utilitarians and those who think society should promote human autonomy above all. Adherents of all these positions think that moral conclusions relevant for political and legal choice should start with ideas of human fulfillment and common good. They are opposed to the view that the morality relevant for government and law rests primarily on ideas of moral rights.³⁰ I do not address whether those who begin with human fulfillment and common good have the better of the argument against those who start with moral rights, if one can put the issue so crudely.³¹ I am interested in whether the more distinctive approaches of the natural law tradition are persuasive.

On some issues, the distinctive natural law tradition adopts approaches and conclusions that are not generally shared. In contemporary public life, abortion, assisted suicide, and homosexual relations are sharply contested subjects. Natural lawyers often write as if the general tenor of modern permissiveness in law is a baleful commentary on the state of contemporary society, and that we are quickly moving toward a culture of narcissism and death that substitutes selfish satisfaction of preference for human good. It is with the reasoning and conclusions about such issues in mind that I want to examine the claims of universality that natural lawyers typically make.

Castell ed., Harlan Davidson, Inc. 1947) (1859); JOSEPH RAZ, *THE MORALITY OF FREEDOM* (1986).

30 I am lumping together in this category both those who think that morality overall is about respecting rights and those who think that much about individual morality starts from human fulfillment but that government and law should limit themselves to protecting rights. I am also lumping together those who emphasize rights against interference, *see, e.g.*, ROBERT NOZICK, *ANARCHY, STATE AND UTOPIA* (1974), and those who think substantial government involvement is necessary to assure rights to welfare, or to a fair share of the goods of society, *see, e.g.*, JOHN RAWLS, *A THEORY OF JUSTICE* (rev. ed. 1999).

31 Finnis challenges Rawls's reliance on a "thin theory of the good" to build political rights. FINNIS, *supra* note 1, at 105–06, 108–09.

B. The Challenge of Historicism and Cultural Relativism

Three of the vital premises of natural law theory—that human nature is universal, that human purposes or goods are discoverable by reason, and that moral principles are objective and discoverable by reason—are sharply challenged by varieties of historicism and cultural relativism. We are the people we are, so the challenge goes, because we are members of a particular culture. Our concepts of understanding, and what we take as good reasons, as well as our more specific moral beliefs, are the products of that culture. There is no universal human nature, no transcultural reason, no objective moral perspective. The notion of a fundamental human reason that can discern moral principles is a delusion, one of the culturally bound premises of traditional Western society.

In its most radical form, the challenge asserts that many moral questions do not have correct answers. A less radical version does not attack the idea of correct answers but doubts both that these answers will reach across cultures and that they can be discovered by cross-cultural reason. I am primarily interested in the less radical version. That is, I do not mean to dispute the idea that moral questions do have correct answers.

Even in the less radical version, the challenge to universality attacks some of the basic premises of traditional natural law theory. I believe that the real issue about universality is not either/or, but more or less.

Is there a universal human nature? Anthropologists tell us how different mainstream modern Americans are from people who have lived in various parts of the globe across the ages of history; but all people want food, a sense of well being, and companionship. Some human characteristics are universal, but much is culture-dependent. The same is true about human reason; to a substantial degree our sense of what is reasonable depends on our culture *and* our particular place within it.

If some human goods are universal, the understandings of those goods and their orderings in context are different. Natural lawyers, of course, acknowledge that individuals order goods in various ways in developing the best life for themselves and that different cultures also have different orderings.³² If these variations concerned *only* the lives individuals choose for themselves, they might pose little problem for natural law theory; but the variations also concern what people regard as appropriate interferences with others and as appropriate laws. To

32 See FINNIS, *supra* note 1, at 117; see also JOHN FINNIS, *FUNDAMENTALS OF ETHICS* 91 (1983).

some extent, the moral principles in which people believe are relative to culture.

C. Are Cultural Variations in Social Morality Consonant with Universal, Objective Moral Answers?

Where does this leave us? Cultural variations certainly do not rule out the possibility of objectively determinable, universally valid, moral judgments,³³ but they do raise a problem. To see just what the problem is, we need to distinguish between what I shall call fundamentals and non-fundamentals.

Natural lawyers can comfortably concede that, on some non-fundamentals, both social institutions and moral opinion may appropriately differ across cultures. Most obviously, matters that might require legal enforcement in some societies may be handled well enough by conscience and social morality in others.³⁴ Exactly when to use the coercive apparatus of positive law is a question of prudence. More importantly, as James Stoner has pointed out, the genuine achievement of basic human goods can be accomplished by variant structures of rights and duties, and the best structures may depend partly on stages of economic growth.³⁵ For example, we should expect the rights and duties connected with the ownership of private property to vary at different stages of economic development.³⁶ Thus, a natural law approach is hardly rigid and static in its implications for legal orders. Since many people's moral sense about these matters will be influenced by legal provisions³⁷ and by other aspects of the social environment, that moral sense will also vary among cultures. We should not expect members of a small tribe of Native Americans in 1650 to have had the same idea about *moral rights* to property as modern Americans. The theorist who stands back and reviews the rich variety

33 Finnis has said, "A genuine requirement of practical reasonableness is not the less a part of natural law (to use the classical phrase) just because it is not universally recognized or is actively disputed." FINNIS, *supra* note 1, at 31.

34 As I have noted earlier, it is also true that what measures should be embodied in law will depend on the moral views of the broad population, as well as on informed opinion about what is morally right.

35 See James R. Stoner, Jr., *Property, the Common Law, and John Locke*, in NATURAL LAW, *supra* note 5, at 193, 193–218.

36 Finnis says cautiously, "The good of personal autonomy in community . . . suggests that the opportunity of exercising some form of private ownership, including of means of production, is in most times and places a requirement of justice." FINNIS, *supra* note 1, at 169.

37 I mean not only that they will think that citizens are morally entitled to receive what the law gives them a right to, but also that they will see the law as reflecting antecedent moral rights and duties.

of cultures may be able to see that no single moral attitude toward private property is universally correct, but few ordinary members of a culture will achieve that detached perspective. With an adequate degree of complexity, a natural law theorist may handle variations in moral attitude about non-fundamentals.

More serious difficulties arise with moral conclusions that natural lawyers assert are universally valid. For natural lawyers, these include a great many highly specific moral judgments, including, for example, the wrongness of abortion and suicide, even in extreme circumstances. Cultural variations, as we observe them, show that even on many significant and fundamental moral questions, people of ordinary goodwill in different cultures do not take the same view. No doubt, people everywhere believe that murder of other full members of the community is wrong, but that hardly helps settle difficult moral questions. On reflection, we can see that universal human reactions cannot directly settle difficult moral questions; because when reactions are uniform, questions are not regarded as difficult.

Modern natural lawyers are well aware that controversial issues divide people. Their arguments for their own views do not depend on these attracting anything like unanimous acceptance. In a passage responding to misconceptions of natural law theory, Finnis says that, although Aquinas thought any sane person could recognize basic goods of human existence, even the most elementary moral implications of first principles could be distorted for individuals and whole cultures by "prejudice, oversight, convention, [and] the sway of desire," and that "many moral questions . . . can only be rightly answered by someone who is wise, and who considers them searchingly."³⁸

What difficulties, if any, do cultural variations pose for natural law theory? As *more* about social morality is seen as culturally dependent, a higher percentage of moral questions will be seen as troublesome, at least if one tries to think in cross-cultural terms. For example, someone confident that monogamy is best for human beings in general might hesitate upon learning about apparently healthy cultures with polygamy.³⁹ The presence of many troublesome moral problems is *a* difficulty, but by no means the greatest.

Cultural variations may cast doubt on the very processes by which natural lawyers move from premises to conclusions. Very roughly, we can think of arguments by natural law theorists as beginning from ini-

38 FINNIS, *supra* note 1, at 30 (footnote omitted).

39 Of course, if one became persuaded that monogamy was "non-fundamental," one might accommodate it in the manner that one might accommodate various views about the range of property rights.

tial premises that have a very strong claim to acceptance, such as that life and friendship are inherent human goods. These premises are usually supported by broad, cross-cultural acceptance (though perhaps not in the conceptual formulation given them by natural law theory). From the premises, a careful process of reasoning yields conclusions that are much more controversial. This process of reasoning carefully from powerful premises may be defended as the basis for a belief in answers to moral questions that are universal, objective, and discoverable by reason. Thus, even when slavery remained widely accepted, one might have begun from a compelling and broadly shared view about human beings to show that it was morally wrong.⁴⁰ How could people make the moral mistake of accepting slavery? They might somehow not recognize that certain groups of people are full human beings, a factual mistake about the fundamental characteristics of the people made slaves. Or they might mistakenly suppose that moral respect extends only to an "in group," whereas reason can somehow establish that we owe respect to all people. Or they might reach a conclusion about what victory in war entails that reason can show to be faulty. In any event, refined reason might build on basic judgments to reach conclusions that are not universally shared. A more modern example of a controversial judgment is a rejection of all forms of suicide and assisted suicide, built on premises that life is of great value, and that one should not act intentionally against such values.

Despite the rejection in some cultures of specific conclusions reached by natural lawyers, these conclusions, supported by reason from indisputable premises, could have universal force. But a serious problem remains with the claims of reason itself. May not the reasoning employed by natural lawyers rest on categories and methods of thought that themselves are culture-dependent? I put this question to the side for the moment, but I shall return to it after addressing three specific moral conclusions of natural law theorists.

D. Is the Reasoning of Traditional Natural Law Too Abstract and Categorical?

In this Part, I shift from focus on cultural variations to a more direct critique of the process of reasoning in which natural lawyers

40 I am aware that at various stages of history, some natural lawyers defended slavery as natural. Our judgment now that natural law approaches, like all other approaches, have led to serious moral errors may be some ground for skepticism not only about particular modern conclusions but also about the process of reasoning used to reach them.

commonly engage. This critique is more suggestive than systematic. It is not meant to resolve the three moral problems I address, much less make conclusive arguments in favor of some different way of proceeding across a broad range of moral issues. For two of the problems, I draw from personal experience, partly to exemplify a different way of reasoning about moral issues than one is likely to find in discussions by natural lawyers. Once my truncated critique from within a single society is complete, I connect my general conclusions to the broader theme of cultural variation.

1. The Rule Against Intentionally Taking Innocent Life

According to virtually all of those who have adopted a traditional natural law position, one should not intentionally take innocent human life.⁴¹ As a basic moral principle, this has wide appeal, but what I want to examine is the absoluteness with which it is held. Suppose a unit of an invading army approaches a town that has surrendered and is offering no armed resistance. The captain, bearing a personal grudge against the mayor, plans to destroy the town's 5000 inhabitants, including the mayor. A lieutenant, Lief, is horrified and warns the captain he will be committing a terrible war crime if he goes ahead. The captain tells Lief, of whom he is fond, that if Lief kills the mayor and brings her body to him, he will spare the other residents. Lief, having seen the captain do similar things, has no doubt the captain will obliterate the town if he fails to act. The unit is cut off from radio contact with all higher military personnel. Lief is not in a position to kill the captain. What should he do?

The position of Finnis and most other natural lawyers is clear; Lief should not kill the mayor. It helps to place this position within Finnis's broader claims in *Natural Law and Natural Rights*. Forgoing reliance on speculative principles, facts, or a teleological conception of nature, Finnis asserts that the intrinsic goodness of certain things will be perceived as self-evident by humans with social experience.⁴² He names knowledge, life, play, aesthetic experience, sociability (friendship), practical reasonableness, and "religion" (taken in a broad sense).⁴³ Among the standards of practical reasonableness, the standards by which participation in the other values is intelligently fulfilled, are a stricture against arbitrary preferences amongst persons,

41 I consider the positions of a number of Roman Catholic scholars in Greenawalt, *Natural Law and Political Choice*, *supra* note 5, at 6-12.

42 See FINNIS, *supra* note 1, at 85.

43 See *id.* at 86-90.

requirements of respect for basic values, and promotion of the common good.⁴⁴

Beginning with the premise that his seven basic values are not reducible to each other, Finnis moves to the proposition that they are not commensurable.⁴⁵ The incommensurability of basic values shows the indefensibility, indeed the senselessness, of consequentialism. The implausibility of consequentialism helps us to see the self-evidence of the position that one should never act directly against a basic value. One formulation of this requirement of practical reasonableness is that "one should not choose to do any act which *of itself does nothing* but damage or impede a realization or participation of any one or more of the basic forms of human good."⁴⁶

I confess to difficulties with the notion that attempting to engage in computations when basic values are in conflict is not only impossible but senseless.⁴⁷ Not only do individuals make such choices between values, something Finnis readily acknowledges, on some occasions a particular choice is morally required. If someone must choose between having a few people suffer a modest deprivation of aesthetic experience or having an innocent person lose his life, she should choose the deprivation of aesthetic experience. On a day a small museum is closed, ten foreign visitors who will fly back to Asia that evening are admitted.⁴⁸ A man who has just been denied admission suffers museum deprivation rage, produces a gun, and says he will shoot the museum guard immediately unless the ten visitors are put out. The manager should deprive the visitors of aesthetic experience in order to save the guard's life.⁴⁹

We need not pause over problems including *different values*, because Lief's dilemma does not raise those problems. The only value at stake for him is life. He can save 4999 lives by taking one, and that

44 See *id.* at 106–07.

45 See *id.* at 112.

46 *Id.* at 118.

47 See FINNIS, *supra* note 32, at 87–92.

48 I include this fact, so that one cannot say the visitors' enjoyment of this aesthetic experience is only postponed.

49 Finnis does say that in one instantiation slight damage to a particular value is better than great damage to the same value. See FINNIS, *supra* note 1, at 111. One might build on that comment to suggest that slight damage to one value can be justified in order to prevent great damage to another value. Finnis also suggests that a convenient test of respect for good is whether the person doing the harm would think the act reasonable had he been the one harmed. See *id.* at 123. If almost everyone thinks it would be reasonable to be put out of a museum to save a life, even when the saving occurs because of a threat, that might affect how one would characterize the act.

life, along with the 4999, will be lost if he does not act. Those who adopt the absolute position that taking an innocent life can never be morally justified do not doubt that a person saving lives in a rescue operation should save 4999 rather than one, if a choice is required. So the wrongness of taking innocent life is not commonly thought to rest on any radical skepticism about the relevance of numbers.⁵⁰ Rather, intentionally killing a person is barred by the principle that one can never act against a basic value. It is permitted to perform acts that will have the certain consequence of killing innocent people,⁵¹ but one cannot act for that purpose, even if the accomplishment of the purpose is to serve a greater good. (In Lief's case he would aim to kill the mayor, in order to save other lives.)

Someone might defend the absolute principle that requires Lief to stay his hand in various ways. One might talk about the harmful long-term consequences of admitting any exceptions, or defend a religious conception under which we should comply with God's injunction against the intentional taking of innocent life, and rely on God's providence when we contemplate the awful consequences to follow. But Finnis does not make a consequentialist argument, and he asserts that natural law principles can be defended without reference to God. This leaves, as possible supports for the absolute position, the incommensurability of basic values and the idea that one should not choose against a basic good.⁵² Whatever the incommensurability of values may plausibly entail, it does not provide support for the absolute position here.

50 See, e.g., Germain Grisez, *Against Consequentialism*, 23 AM. J. JURIS. 21, 51 (1978).

51 According to the so-called principle of "double effect," an act that predictably causes the loss of innocent life may be warranted if the actor's intention is good, and there are proportionately grave reasons for allowing the evil to occur. Thus, an engineer may divert a flood to save a town although she knows that the inhabitants of a farm will be killed. Similarly, fliers may bomb military targets, if their aim is to attack those targets, though it is certain some civilians will die. (For these purposes, enemy soldiers do not count as innocents.)

52 For some situations, there is an argument that one should not yield to extortion. See Greenawalt, *Natural Law and Political Choice*, *supra* note 5, at 21-22. That argument may bear on the museum hypothetical because the enraged gunman is extorting behavior from the manager, but it hardly bears on Lief's dilemma since the captain is quite content to destroy the entire town, and is only hesitating in order to do Lief a favor. Another argument is that, if one participates in wrong, one compromises one's identity and dirties one's hands, but this hardly seems decisive if many lives are at stake.

The notion that one should not choose against a basic good is related to the idea that people should not be used as mere means.⁵³ Killing the mayor would be to use her as a means to the good end of saving others. Our museum example tests the proposition that people should *never* be used as mere means; is not the exclusion of the foreign visitors from the museum a mere means to save the life of the guard?⁵⁴ Shifting to the idea that people should not be used as means from the idea that no one should choose against a basic value does not make the absolute principle more compelling.

The absoluteness of the principle seems particularly vulnerable when we focus on the borderlines of its coverage—borderlines of intentions, action, and innocence.⁵⁵ The principle relies on a critical distinction between intended and merely foreseen results. Could we say that Lief does not “intend” the mayor’s death if Lief would be delighted if somehow the mayor survived being shot through the heart and appearing dead to the captain?⁵⁶ If the principle condemns action, not a failure to act,⁵⁷ can it matter whether someone’s choice is to flick a switch that will kill or refrain from flicking a switch that will save? As far as innocence is concerned, may someone kill (in self-defense) a small child unwittingly advancing with a bomb, when killing the child is the only way to prevent the bomb from killing oneself?

53 See GERMAIN GRISEZ, *ABORTION: THE MYTH, THE REALITIES, AND THE ARGUMENTS* 319 (1970). Finnis refers to the saying that “the end does not justify the means” and to Kant’s principle to treat humanity “always as an end and never as a means only.” FINNIS, *supra* note 1, at 122 (quoting IMMANUEL KANT, *FOUNDATIONS OF THE METAPHYSICS OF MORALS* (Lewis W. Beck trans., 1963)).

54 One might resist this conclusion in various ways, and Finnis acknowledges the complexities in how one decides what counts as a single act and how to describe the act. See FINNIS, *supra* note 1, at 122–23; John Finnis, *Intention and Side-Effects*, in *LIABILITY AND RESPONSIBILITY* 32, 56–61 (R.G. Frey & Christopher W. Morris eds., 1991). I suspect the methods of avoidance that might work for the museum manager would also cover Lief’s situation.

55 I explore these in somewhat more detail in Greenawalt, *Natural Law and Political Choice*, *supra* note 5, at 18–19.

56 See Finnis, *supra* note 54, at 54–61, for a discussion that bears on whether that claim about intent would be reasonable.

57 Even if one cannot act to hasten the death of someone suffering a painful terminal illness, some people believe one can refuse extraordinary measures of care for a similar motive. Finnis rejects this position. See John Finnis, *A Philosophical Case Against Euthanasia*, in *EUTHANASIA EXAMINED: ETHICAL, CLINICAL AND LEGAL PERSPECTIVES* 23, 28 (J. Kaewn ed., 1995). The widely discussed variations on “the trolley problem” raise issues about action and inaction. See 2 FRANCES M. KAMM, *MORALITY, MORTALITY: RIGHTS, DUTIES, AND STATUS* 144–267 (1996); see also Judith Jarvis Thompson, *The Trolley Problem*, 94 *YALE L.J.* 1395 (1985).

Let me be clear that I believe both that these concepts of intention, action, and non-innocence matter for moral appraisal of acts, and that we need to worry about how to define their borders. But the delicateness and contestability of these borders give us reason to doubt whether these distinctions can support absolute moral norms that condemn every instance of conduct that falls on the "wrong side" of the borders.⁵⁸

In summary, the absolutist approach of Finnis and most other natural law theorists seems unfaithful to the complexities of moral choice, and to be more abstract and categorical than the circumstances of life justify.

2. The Wrongness of Homosexual Acts

Finnis, and most other theorists in the natural law tradition, have claimed that sexual acts between persons of the same sex are morally defective. In discussing this problem, I am interested in that basic moral judgment, rather than whatever conclusions one might draw about criminal penalties or benefits for same-sex couples or same-sex marriage. In respect to the moral judgment, my special concern is the manner in which one reasons to the judgment, rather than the judgment itself. Others have discussed the subject extensively, and I do not undertake a thorough exploration of all the relevant arguments.

In his reasoning about sexual acts, Finnis does not follow most older writers in the natural law tradition.⁵⁹ They claimed that homosexual acts, as well as artificial contraception, frustrated the natural purposes, or teleology, of sexual acts and sexual organs.⁶⁰ According to Finnis,

The union of the reproductive organs of husband and wife really unites them biologically (and their biological reality is part of, not merely an instrument of, their *personal* reality); reproduction is one function and so, in respect of that function, the spouses are indeed one reality, and their sexual union therefore can *actualize* and allow

58 Finnis expresses some caution about the "doctrine" of double effect developed by causists, which is not itself a principle of practical reasonableness. See FINNIS, *supra* note 1, at 123. He is sensitive to the difficulties of characterizing acts. See *id.* at 122-23. But he gives no hint he would approve killing to save lives.

59 See Paul J. Weithman, *A Propos of Professor Perry: A Plea for Philosophy in Sexual Ethics*, 9 NOTRE DAME J.L. ETHICS & PUB. POL'Y 75, 78-79 (1995).

60 Finnis says that he does not mean to "seek to infer normative conclusions or theses from non-normative (natural-fact) premises." John M. Finnis, *Law, Morality, and "Sexual Orientation,"* 69 NOTRE DAME L. REV. 1049, 1068 (1990).

them to *experience* their *real common good*—*their marriage* with the two goods, parenthood and friendship.⁶¹

Friends who are incapable of marriage (this includes all couples of the same gender) cannot become a “biological unit” through their sexual acts, so these acts “cannot do what they may hope and imagine.”⁶² Because they cannot experience “the *marital* good” through their sexual acts, these acts “can do no more than provide each partner with an individual gratification.”⁶³ They are treating their bodies as instruments for their own experience; “their choice to engage in such conduct thus dis-integrates each of them precisely as acting persons.”⁶⁴ “The attempt to express affection by orgasmic non-marital sex [is] the pursuit of an illusion.”⁶⁵

Finnis’s basic line is not between all heterosexual acts and all homosexual acts; it is not between all genital intercourse between men and women and all other sexual acts arousing orgasm; and it is not between sexual acts capable of reproduction and all sexual acts not capable of reproduction. On the “good” side of the line are standard sexual acts between committed married partners, even though they know that reproduction is impossible (because of various physical factors) or extremely unlikely. On the “bad” side of the line are orgasmic acts by married couples achieved by other than genital intercourse, genital intercourse with artificial contraceptives,⁶⁶ and, apparently, all heterosexual intercourse outside of marriage, even by couples who are engaged and will shortly be married.

I have compressed an argument of Finnis’s that is already compressed.⁶⁷ In trying to reconstruct the argument, Paul Weithman breaks it down into forty-six separate explicit or implicit claims.⁶⁸ But it is fair to say that the argument can be taken as one about the inherent nature of acts or about the experience of those who participate in the acts, or both. Suppose a man says he can fly, and further claims that he has been flying when observers have seen him firmly rested on the ground. If he says he has had the experience *of flying*, we can

61 *Id.* at 1066.

62 *Id.*

63 *Id.*

64 *Id.* at 1067.

65 *Id.* at 1065.

66 Given the degree of reliability of many contraceptives, couples relying on them will often perceive the chances of procreation as being higher than couples who are aware that some physical impairment will prevent pregnancy.

67 See Finnis, *supra* note 60, at 1067 n.47 (referring readers to Germain Grisez, *Living a Christian Life*, in 2 WAY OF THE LORD JESUS 634–39, 648–54, 662–64 (1993)).

68 See Weithman, *supra* note 59, at 89–92.

conclude that he has not actually experienced flying, however close his experiences may be to those of beings actually capable of flight. Suppose, instead, in some distant time when we can communicate minimally with dolphins, a superior human swimmer says his experiences are like those of a dolphin. This claim is about the quality of lived experience, and one could evaluate the truth of the claim only by comparing the quality of the person's subjective experiences with those of dolphins.

If Finnis's argument is essentially about the inherent quality of various acts and does not depend on the qualities of lived experience,⁶⁹ it is immune to evidence from that experience. In that event, the argument does not seem so different from more standard teleological arguments. Persons of the same gender, incapable of reproductive acts, cannot participate in a marital common good; they can participate in the good of friendship but that alone does not include sexual acts. So put, the argument seems highly abstract and categorical, and many will wonder why intercourse with artificial contraception is radically different from intercourse when one is certain that physical impairment renders procreation impossible.⁷⁰

Suppose we take Finnis as making a claim about lived experience that, at least in theory, can be confirmed or rebutted by reference to that experience. If his fundamental distinction was between heterosexual and homosexual acts, most people would have a fundamental difficulty in evaluating the claim; they would have to evaluate their own experience against the described experience of others with different sexual inclinations.⁷¹ A heterosexual who experienced the union possible in genital intercourse might doubt that those involved in homosexual acts could have quite that experience, even if they said that they did. But Finnis seems to make things easier for the high proportion of his readership who have been married and have at one time or another engaged in intercourse in marriage with a substantial possibil-

69 Of course, if one were confident that an argument about the inherent differences between acts were correct, one might also be confident that qualities of lived experience would differ.

70 A defender of this general approach might answer that we need not be locked into just the categorization Finnis has provided; perhaps use of artificial contraception under the right conditions falls on the "good" side of the line.

71 I am aware that many people with dominantly homosexual inclinations have married and engaged in heterosexual intercourse, and that many people with dominantly heterosexual inclinations have at some time or other engaged in homosexual acts. But if one is looking for an account of what experiences are possible, one might suspect descriptions by people who have acted against their dominant inclinations. People who are fully bi-sexual in their inclinations may make comparisons that are more highly relevant.

ity of procreation, intercourse with artificial contraceptives, and intercourse in which physical factors will prevent procreation.⁷²

My own experience, which has to be *my* starting point, is that intercourse within marriage does have an extra element when one is aware that it may produce a (wanted) child, but that the lived experience of intercourse when procreation is precluded by physical impossibility does not vary (significantly) from that when contraceptives are used. The mix of selfish satisfaction and loving care is incredibly complex in almost all sexual experiences, but the supposition that a distinctive good is possible for marital intercourse without contraceptives and impossible altogether for all other forms of sexual intercourse, including marital intercourse with contraceptives, is belied by my experience. The notion that all else is relegated to pursuit of one's own satisfaction is strikingly implausible.

Developing a much fuller analysis along these lines, Michael Perry concludes that "[t]he reality apprehended by many married couples who practice contraception, and by many homosexual couples, is directly contrary to the reality postulated by John Finnis."⁷³ Responding to Finnis's claim that many people may suffer illusions about the quality of their sexual experiences, Perry wonders why Finnis himself is under the illusions that he is under.⁷⁴

I am especially interested in a response by Paul Weithman to Perry's rebuttal of Finnis. Professor Weithman is a Roman Catholic, natural law philosopher who disagrees with Finnis's basic thesis, but who also suggests that Perry's challenge is not compelling.⁷⁵ Contending that Perry does not provide a sound argument that the experiences on which he relies are veridical, Weithman says that Finnis has a sophisticated sense of the ways in which fantasy and illusion can affect human sexuality.⁷⁶ Finnis, Weithman proposes, can accept what Perry claims descriptively and still maintain his fundamental thesis, though Weithman himself does not believe that deliberate contraceptive sex should be assimilated to homosexual activity.⁷⁷

72 This last category includes not only physical impairments of various sorts, but also intercourse at certain points in the menstrual cycle and at times when the woman is already pregnant.

73 Michael J. Perry, *The Morality of Homosexual Conduct: A Response to John Finnis*, 9 NOTRE DAME J.L. ETHICS & PUB. POL'Y 41, 59 (1995).

74 See *id.* at 59–61.

75 See Weithman, *supra* note 59, at 75. Weithman considers Finnis's arguments more fully in his contribution to *Sex, Preference, and Family*. See Paul J. Weithman, *Natural Law, Morality and Sexual Complementarity*, in *SEX, PREFERENCE AND FAMILY* 227 (David M. Estlund & M. Nussbaum eds., 1997).

76 See Weithman, *supra* note 59, at 80–82.

77 See *id.* at 88.

To some degree, Weithman's quarrel with Perry seems to be over the extent to which we can rely on experience to reach moral conclusions. No doubt, the vast majority of the population could be under an illusion, and a plausible theory of why that might be so should make us more likely to think that most people suffer in this way than if no such theory were available. But it is also true that coherent theories that have seemed convincing at one time appear to be shot with error, even ridiculous, at a later time. As moral agents, we must choose between the weight to give to theory and the weight to give to experience when the two seem to conflict. Finnis does emphasize that ethical judgment depends on experience,⁷⁸ but Finnis, and Weithman, in accord with traditional natural law approaches, give a high place to theory.⁷⁹ Perry, in this instance reflecting a more Protestant approach to moral judgment, emphasizes lived experience.⁸⁰ In this division, I side with Perry.

Another point about experience is important here. Finnis, in calling homosexual acts "unacceptable,"⁸¹ strongly implies that persons of dominant homosexual inclinations should remain celibate rather than engage in homosexual intercourse. Robert George, whose views about these acts substantially accord with those of Finnis, is more explicit.⁸²

George talks of "the basic good of marriage itself as a two-in-one flesh communion of persons"⁸³ that is consummated and actualized by acts of the reproductive type. Only such sexual acts can be "truly unitive."⁸⁴ Other sexual acts fail to accomplish this basic good and are immoral. Acknowledging that two to five percent of the population may be strongly inclined from birth to desire homosexual unions,⁸⁵ George says that the moral course of action for them, as for non-married heterosexuals, is to remain celibate.⁸⁶

In my own life, love in marriage has had a transforming power; it, and the children of marital union, have been the two greatest blessings of my life. My experience tells me that to consign to permanent

⁷⁸ See FINNIS, *supra* note 1, at 101.

⁷⁹ See *id.* One may doubt whether any coherent theory that does not rely on religious premises can draw the lines just as Finnis does, but I here assume that such a theory may be available.

⁸⁰ See Perry, *supra* note 73, at 51-52.

⁸¹ Finnis, *supra* note 60, at 1064.

⁸² See Robert P. George, *Nature, Morality, and Homosexuality*, in NATURAL LAW, *supra* note 5, at 29, 38.

⁸³ *Id.* at 36.

⁸⁴ *Id.*

⁸⁵ See *id.* at 29.

⁸⁶ See *id.* at 38.

celibacy many persons who are not called to such a life by devotion or inclination is to insist that they should deprive themselves of one of the richest sources of human affection and understanding. This substantive position, though not the intentions of those who defend it, strikes me as harsh, even cruel. Even if one could plausibly defend the proposition that, all in all, heterosexual relations with genital union can be more enriching than homosexual relations, it certainly would not follow that the latter are morally defective, to be avoided by responsible people with strong homosexual inclinations.

3. Suicide and Assisted Suicide

My third example is the problem of suicide and assisted suicide. I should perhaps start here by saying that I thought *Roe v. Wade*⁸⁷ was wrongly decided; that I have not expected a constitutional right to commit suicide, much less to be assisted in the effort, in my lifetime; that I do not favor a general legal right to commit suicide and would be troubled if I were a legislator considering a limited right of the terminally ill to have assistance in dying. Further, I am uncertain whether suicide and assistance toward that end are ever morally justified.⁸⁸

What I want to highlight is a certain form of categorical argument about this problem.⁸⁹ In a paper on the subject, David Novak hardly acknowledges the nearly unbearable pain that some persons suffer as they slowly die.⁹⁰ He remarks,

Of course, now such a suicidal course of action is only advocated for those who are "terminal." But if death is our inevitable lot in the world into which we have been cast, then who is terminal and who is not can only be a matter of inherently imprecise degree, not one of essential kind.⁹¹

Novak, no doubt, has a valid philosophical point about "degree," but the sentence in which the point is made asks me to deny what life has taught me. The two months between the discovery that my late

87 410 U.S. 113 (1973).

88 Part of what is troubling is what exactly counts as suicide and assistance, as contrasted with refusing life support, letting die, and assuaging pain.

89 Finnis makes a categorical argument against suicide and assisted suicide, but that argument does not include the particular formulation on which I focus. See Finnis, *supra* note 57.

90 See David Novak, *Privacy*, in *NATURAL LAW*, *supra* note 5, at 13, 24. I agree with Professor Novak that fear of lack of control has much to do with the wish of many people to "die with dignity." *Id.* at 24. Indeed, I think that graceful acceptance of dependence is a lesson that many who are dying teach us all.

91 *Id.* at 24.

wife Sanja had incurable cancer and her death was a time of far greater stress and intensity than I had ever experienced. Although sadness about her approaching death was never absent from my feelings, our already strong love was deepened yet more as she embraced my support, and I was moved by her incredible spirit and courage. For Sanja, suicide was never an option; she expressed her powerful will to live until she lost consciousness for the last time. This period was unlike any other in my life, and I know that was true for Sanja. Novak's implication that terminal illness is just a matter of degree seems insensitive, if not actually insulting, and remote from the lives of people who themselves are terminally ill or who have loved ones in that condition. The suggestion that, since all is a matter of degree, no exceptions from moral constraints on suicide are warranted seems not to respect the special plight of those who suffer painful terminal illness.⁹²

4. Lessons from the Three Moral Problems: Possible Limits of Reason

In each example I have chosen, the recommended natural law approach relies on abstract, categorical modes of thought in preference to greater emphasis on qualities of lived experience and contextual distinctions drawn from that experience.⁹³ I have always had a distinct distrust for highly abstract ideas, whether they come from the political left or the political right. Reflection on lived experience seems to me a better guide to moral choice than abstract categorization. Of course, one makes sense of experience by abstracting and categorizing, but there is a difference between top-down and bottom-up thinking, and experience can be given more or less weight if it seems to conflict with abstract arguments. When Finnis writes, "[r]eality is known in judgment, not in emotion,"⁹⁴ he implicitly assigns emotional response a less significant place than I would give it.

92 Perhaps a legal right to help in dying will create pressures, internal and external, for people to die to save money; perhaps a limited right of the terminally ill might evolve into a broader right of people to receive help in dying. These are valid worries about creating *any* legal right to assistance, but they do not resolve the underlying moral question.

93 In relation to the widely cited and widely attacked thesis that women, in general, and men, in general, adopt different approaches to moral problems, *see generally* CAROL GILLIGAN, *IN A DIFFERENT VOICE: PSYCHOLOGICAL THEORY AND WOMEN'S DEVELOPMENT* (1982), we can easily place traditional natural law theorizing far on the male side of the spectrum.

94 Finnis, *supra* note 60, at 1067.

What has this particular challenge to common forms of natural law reasoning to do with the problem of cultural variations? Most straightforwardly, I am objecting to a certain approach to moral reasoning and proposing a preferable alternative. This critique assumes that we have sounder and less sound ways to reason about moral matters, and that an approach in which experience receives greater weight is sounder than highly abstract, categorical analysis. Since I am located within the same broad culture as the natural lawyers with whom I disagree, my claims about the three moral issues I discuss are not directly about cultural variations.

Here are the crucial connections. Whether people are attracted more to abstract principles or to contextual evaluation of experience itself depends significantly on habits of mind and personal psychology. Perhaps it is my Protestant upbringing or some deep-seated intellectual skepticism that influences my resistance to abstract theory. In one sense, all each of us can do is to pay attention to a wide range of positions, to reason as best we can, and to adopt and defend the positions that seem to us most persuasive, with the humility that we may be mistaken. But we should be aware of the possibility that the reasoning of actual human beings, limited as we are, may not resolve which among certain plausible approaches to moral reasoning is the most sound.⁹⁵ If such differences exist within single cultural traditions, we can expect yet greater differences if our reference point shifts to a broad range of human cultures. If the abstract, categorical approaches of traditional natural lawyers seem closely connected to *one particular strand* of the wide culture of Western Europe, they will seem even less universal from a transcultural perspective.

I am not claiming that the positions taken by members of one culture are unintelligible to members of another culture who try to understand them. Some level of mutual intelligibility exists among those who disagree about what is morally right. My claim is that we may have no transcultural method of evaluation of the strength of competing assessments

In sum, my theoretical point is this—we do not have an evidently correct, universal form of moral reason that can build an imposing edifice of moral norms on the basis of simple, compelling, widely-shared judgments about human goods and moral obligations. Our processes of moral reasoning no more escape cultural dependence

95 I am putting this very simplistically. It is not as if one approach generally disregards altogether the aspects emphasized by its competitors. What differentiates serious approaches is typically more subtle nuances and matters of degree.

than do particular moral judgments that are outside some shared universal core.

How may natural lawyers respond to this pervasive concern about whether the answers to moral questions are objective, universal, and discoverable by reason?

E. Natural Law Theory as the Best System Yet Developed?

Natural lawyers may acknowledge that, over some range, different cultures make different moral judgments and employ different forms of moral reason; but they may further claim that the system of reason and judgments represented by the natural law tradition is indeed the best, or the best yet developed by human understanding.⁹⁶ A theorist might combine such a view with belief in a certain kind of moral progress—namely, that thoughtful people of goodwill can make more accurate moral appraisals as human civilization develops.⁹⁷ The forms of reason employed by most natural lawyers may be both culture dependent to a degree *and* the best available.

Such an account can save the crucial claims of universality and objectivity, but it carries a certain cost. Natural lawyers could not reasonably suppose that all their moral norms should seem valid to thoughtful, reasonable people in all cultures. Suppose a moral conclusion rests significantly on a kind of moral reasoning that is not characteristic in another culture. Members of that culture will think the norm is valid only if they can be persuaded to exchange their dominant forms of moral reasoning for the approach of natural lawyers. Since we are here supposing that a particular type of Western reasoning about morality—natural law reasoning—is actually superior to other forms of moral reasoning, perhaps that persuasion could be effective. However, people of another culture may have deeply ingrained forms of reasoning that will not be easy to displace, and many people of other cultural backgrounds may simply be unable to see the superiority of natural law reasoning.⁹⁸ In any event, many people of goodwill in other cultures will remain unpersuaded by natural law rea-

96 Given the changes in moral judgment over time, even among those falling squarely within the natural law tradition, it would be naive not to suppose that many particular moral judgments that are now dominant will seem to be erroneous in the future.

97 This particular version of the idea of moral progress may be able to explain the increasing rejection of slavery without being refuted by horrors like the Holocaust.

98 Scientific reasoning may be different from moral and social evaluation in this respect. Scientific successes may give some approaches a very strong appeal across cultures.

soning that leads to specific moral norms at variance with those of their culture.

Another difficulty, one I have already mentioned, is still more fundamental. If forms of moral reasoning differ in crucial ways, how can natural lawyers be confident their forms are best? They may believe their approaches are self-evidently right,⁹⁹ but if others on reflection do not find them to be so, there is an impasse. Natural lawyers might rely on critical standards of evaluation that transcend cultures. They might claim, for example, that natural law reasoning and conclusions, if followed, yield lives that are recognized by all as more fulfilling than the lives lived according to the conclusions of other approaches. Unfortunately, it seems much more likely that forms of reasoning within cultures fit fairly well the ideas of human fulfillment within those cultures. Observance of moral norms asserted by natural lawyers will lead to lives that proponents of natural law find fulfilling; observance of the norms yielded by other approaches will lead to lives that are fulfilling judged by the standards of those cultures. Lack of agreement on what lives are fulfilling does not rule out the possibility that some ways of life are *really* the most fulfilling *and* that some disputed moral norms are *really* best; but establishing this by reason will be difficult, to the extent that reason itself is culture bound.

F. *Use for Intracultural Evaluation*

A natural lawyer might make a significant retreat, believing in a kind of natural law for a particular culture, and claiming that if one begins with the premises of one's own culture, a single answer to any moral question will be correct. What counts as a single culture could be troublesome. For some issues of international commercial practice and human rights, the relevant culture might be the modern international community; for other issues "a culture" might be conceived much more narrowly. If natural lawyers lowered their sights to this degree, they would still have to face the worry that internal conflicts or contradictions in values within a culture might preclude uniquely correct moral answers. But the main problem with this idea of intracultural natural law is that it surrenders a central aspect of natural law theories, as well as natural rights theories: their claim to universality. One aspect of this surrender would be the loss of a basis to claim that the dominant values of a culture are misconceived.

99 I mean "self-evident" in the sense that Finnis uses about intrinsic good. See FINNIS, *supra* note 1, at 70. A truth is self-evident if it does not derive from some other proposition; it can be self-evident without being obvious or undisputed.

G. *Religious Premises*

Natural lawyers may invoke religious premises to support their claim to universality and to deflect the argument that practical reason is culture dependent. Even if practical reason seems to depend on culture, perhaps a Higher Spirit exists who loves us and to whom moral standards and ways of reasoning are connected.¹⁰⁰ Finnis has maintained that his claims about natural law are persuasive independent of claims about God,¹⁰¹ but some natural lawyers think that religious conviction plays a more central role than it does in Finnis's exposition. One's attachment to valid religious belief may be thought to establish that objective moral standards do exist and to underlie one's confidence about specific standards.¹⁰² A natural lawyer who relies significantly on religious premises can retain the claim to universal objective moral standards, but he cannot expect all reasonable people of goodwill to accept those standards, unless his religious beliefs include the idea that God gives everyone the reasoning power to ascertain the validity of true moral norms.

An approach that relies on religious conviction faces another obstacle. Why should we suppose that religious perceptions are any less culture dependent than moral understandings? Someone who began without any religious commitment would conclude that religious perspectives are at least as culture dependent as moral perspectives, to which they are intimately tied. Nevertheless, the believer may suppose, based on faith or on overwhelming evidence of some kind, that the core of his convictions is reliably true. Once this is granted, he may think that moral understandings tied to the convictions in various ways are either true to a high degree of certainty or at least are more likely to be true than moral understandings developed in some other way.

A Christian believer in natural law may think that detailed moral norms that have been developed in the Christian natural law tradition (especially the Roman Catholic tradition) are reliable partly because they, and the forms of reasoning that lead to them, have the authority of the tradition. Religious persons who are skeptical about the unique validity of their own tradition may conclude that religious truth helps

100 I put the point in this way to avoid the question of what exactly is the relation between God and moral standards. Two possibilities are that God establishes moral standards and that moral standards exist independent of God, but God perfectly perceives those standards and encourages human beings to live by them.

101 See FINNIS, *supra* note 1, at 48–49.

102 See Novak, *supra* note 90, at 21–22 (arguing forcefully that ideas of natural law are much more deeply rooted in religion than has commonly been recognized).

bolster belief in universal moral truths, but they will have less confidence about the soundness of their particular religious understandings and about whatever moral insights flow from those understandings.

H. *Norms That Vary by Culture*

I want now to develop a bit more extensively a possibility I suggested earlier in the Article, exploring a rather different set of assumptions about basic premises and detailed conclusions than one commonly sees in natural law writing. One might think that certain, minimum, basic moral premises can be established, but that their proper application may vary widely among cultures. One might conclude, for example, that human beings should count equally and should care for each other's welfare. In some cultural settings, these basic premises might properly yield a "rights" focused morality; in other cultural settings, informal mutual care might predominate. One could then believe in a universal, objective standard for morality, but one whose best application varies significantly.¹⁰³ That is, even the best set of specific *moral norms* might vary significantly. One could acknowledge that many detailed moral conclusions might be valid only for some times and some places. To return to one of our examples, assisted suicide might be appropriate for some cultures, but not all.

As with the more detailed norms of traditional natural law theories, such a "flexible" system might be grounded on various underlying premises. One might base such a system on (1) compelling, widely-shared moral judgments about human good plus reasoned development, (2) the best reasoned understanding among culturally variant forms of reason, (3) religious convictions, or (4) some combinations of these.

A system in which desirable moral norms vary is more modest in its universal claims than the traditional natural law approach, which assigns universal validity to many specific moral norms. Belief in such a "flexible" system may seem easier to sustain. The problem of supporting basic premises remains, but the more limited these premises are, the more reasonably one can assert their transcultural validity. For example, the premise that people should care for each other is at the core of the moral understanding of many religions, and that premise is more *indisputably* enjoined by Christianity than are most highly specific norms—such as the principle of double effect or the inappro-

103 Analogously, one might compare within a single culture the differences between family morality and the morality that governs relations among strangers.

priateness of homosexual acts. A Christian may be able to move more confidently from a belief in religious truth to a belief in the validity of this basic premise than he can move to disputable, specific norms.

With what confidence could one move from some fundamental premise to more specific norms for particular cultures? We are generally better able to assess our own culture than other cultures. We are more familiar with the social conditions of our own culture, and its dominant forms of reasoning are more likely to reflect how broad principles can best be worked out in that culture than in other cultures.

This does not mean we are foreclosed from all assessments of other cultures or that we need accept all the basic premises of our own. We may see plainly that another culture does not treat people equally or even that some of its members are regarded as mere objects. We should not adopt without examination the dominant forms of reasoning in our own culture. Feminists and critical race theorists, for example, have argued that forms of reason in our culture tend to thwart genuine equality. Any assessment of how well fundamental moral premises are achieved in context needs to approach our own cultural reasoning, as well as our specific cultural norms, with a critical eye.

CONCLUSION

My own views lie along the lines of belief in certain fundamental moral perspectives that are universally valid, with appropriately different manifestations in different cultures; and my belief in the truth of these views rests on a mix of ordinary reason and religious conviction.¹⁰⁴

I have focused on difficulties in the relation between natural law approaches and different approaches in other cultures. I claim that these difficulties are exhibited to a degree in disagreements between natural lawyers and proponents of competing approaches within our own culture. Offering a challenge from the inside to approaches that are too abstract and categorical and detached from human experience, I have turned to the problem of other cultures. The claim that disagreements can ultimately be resolved (at least in theory) on the basis of a common reason seems most vulnerable as to them.

104 Insofar as religious conviction plays a direct role in our moral evaluations, further questions arise about its appropriate place in the political decisions of liberal democracies. I have developed my views on these complex questions in other works. See KENT GREENAWALT, *PRIVATE CONSCIENCE AND PUBLIC REASONS* (1995); KENT GREENAWALT, *RELIGIOUS CONVICTIONS AND POLITICAL CHOICE* (1988).

I should emphasize that natural law reasoning and conclusions, not the least those of Finnis, have an important place in our society, even if skepticism is warranted about assertions of universality, reason, and unique correctness. We must all make moral judgments, and natural law approaches are one fruitful source of evaluation, with a rich tradition in our culture. The value of these approaches extends to legislators and judges as well as ordinary citizens. But natural lawyers want to claim much more than this; it is these more ambitious claims to which I have responded.

It remains to supply answers to the questions I posed in the Introduction. Complex judgments about the place of human law and the roles of particular officials need to be made before one proposes adoption of moral conclusions for official legal action (question five). Natural law approaches connote both a general inquiry about human fulfillment and common good and also a particular tradition with distinctive concepts about moral and political problems; conflation of these two senses is bound to yield confusion (question one). Some specific moral conclusions are culturally relative, valid for some cultures but not others. The number of "relative" moral conclusions is greater than most writers in the natural law tradition have recognized (question three). Forms of moral reasoning themselves, including categorical approaches of traditional natural law, are relative to a degree that natural lawyers have not acknowledged (question two). Reason can establish a kind of minimum natural law, including such precepts as people should refrain from willful killing of members of their own communities; but religious convictions are a crucial condition for justified belief in a robust natural law that asserts universal values and objectively correct moral answers (answers that may vary somewhat by culture). Religious convictions also bear on specific conclusions about moral and political issues (question four).

These answers represent my beliefs about problems of immense difficulty. My own perspectives have been enriched greatly by exposure to the writings of scholars in the natural law tradition, and most particularly to the comprehensive account that Finnis has provided. I hope this Article will contribute to fruitful dialogue between scholars within and without that tradition, a dialogue in which Finnis has been such a central figure.

