Chapter I

Introduction

1.1 General introduction
The problem of natural right and natural law is as alive as ever; witness the
debate generated in the 20th century by such distinguished philosophers as
Leo Strauss, Eric Voegelin, Jacques Maritain, John Finnis, Germain Grisez,
Ronald Dworkin, and others. One impetus for this is the legal and moral positivism
which has come to play such an important role over the last two centuries.
To the extent that positivism, and its often attending relativism, can be
seen as an essential part of modernity, the revival of natural law can be regard-
ed (and has indeed been so by many) as a fight against modernity itself.

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An Exploration of the Relationship between Natural Law and Natural Rights, with Special Emphasis on the Teachings of Thomas Hobbes and John Locke

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1 I am thinking of, inter alia, such important works as Leo Strauss's Natural Right and History (Strass 1953), Jacques Maritain's The Rights of Man and the Natural Law (Maritain 1942 [1986]), Eric Voegelin's underrated but important essays 'What is Right by Nature' and 'What is Nature' (in Voegelin 1978), John Finnis's Natural Rights and Natural Law (Finnis 1980), Germain Grisez's interpretation of St. Thomas Aquinas in 'The First Principle of Practical Reason: A Commentary on the Summa Theologicae', 1-2, Question 94, Article 2' (Grisez 1965), and Ronald Dworkin's seminal article from a more liberal, rights-oriented perspective 'Natural Law Revisited' (Dworkin 1982). There are, of course, many others who have contributed to the debate as well (among them such scholars as Heinrich Rommen, Ernst Troeltsch, Lon Fuller, Yves Simon, Harold Berman, and Joseph Raz, to mention only a few), but this is not the place to give a full listing of all the contributions to the debate on natural law. For a good bibliography covering natural-law writings in the 20th century, see Schall 1995; one of the most recent and coherent defenses of natural law (focusing especially on Grisez and Finnis) can be found in George 1999; useful anthologies are Finnis 1991 and George 1992.

2 Two of the foremost exponents of legal positivism in the 20th century are Hans Kelsen and Axel Hägerström, both drawing on, among others, Jeremy Bentham and John Austin.
Natural law is, in short, a teaching which postulates certain natural or divine laws (or, to be less specific, a system of natural or divine “right”), while positivism postulates no such non-human, transcendent basis for law, politics, and/or morality. According to a thoroughgoing positivist, all laws and norms are made and derive their validity from no extra-legal source.

This book attempts to show some aspects of the problems and challenges of the natural-law tradition. The main focus will be on a timely topic in the world of the late 20th and early 21st century, preoccupied as it is with talk about human (or natural) rights; namely, the relationship between the concept of natural law (German: Naturrecht) and the concept of natural rights (German: natürliche Rechte). The idea of rights inhering naturally in each individual is found in various forms in the 17th-century philosophies of Grotius, Hobbes, Pufendorf, and Locke, and it can fairly be said to be the philosophical basis of the Enlightenment idea of “the rights of man,” defended so vigorously (albeit not always respected) by the revolutionary movements in America and France in the 18th century.

This idea of natural rights was originally constructed within the framework of the much older natural-law tradition. Indeed, it is common even today to see the idea of natural rights as a direct descendant of the classical and medieval teachings of natural law. Whether that is a proper way of viewing natural law and natural rights will hopefully become clearer in the course of my discussion. The question is: Is the teaching of natural rights a species of natural law, or is it a reaction against the main tenets of the natural-law tradition?

My main aim, then, is to investigate the relationship between on the one hand a teaching which stresses the unchangeability and transcendence of law, and on the other a teaching which to a larger degree emphasizes the idea of certain incontestable, individual rights.

I.2 Discussion of key terms

There are several possible definitions of natural law, as this book will bring out. A useful one, describing the core idea inherent in many (if not most) natural-law theories, can be found in an article by Adolf Süsserhenn:

By natural law is understood an ideal right valid for all peoples and all times, which owes its origin not to the lawgiving of the state or any other social authority, but which is rather a preexisting constraint for each individual as well as for the state and every other society.

A good example (and summary) of this kind of argument can be found in Schall 1987, p. 5 ff., who deals with the “revival” of political philosophy in the face of modern relativism and liberalism.

See, for instance, Margaret MacDonald, in Waldron 1984, p. 23 ff.

Adolf Süsserhenn, in Mählhofer 1972, p. 11. (My translation from the German, with adjustments by Thomas Pogge.)

7 Strauss 1953, pp. 165–251. Strauss, along with many other Germans, uses the English expression natural right where we would normally expect to find natural law. Natural right in this sense must not be confused with natural rights (in the plural) – natural right is meant to signify the same as the German Naturrecht, not that which in German would be called natürliche Rechte. One way of distinguishing between natural right (in the “objective” sense) and natural law – if we should wish to do so at all – would be to follow Leo Strauss in
“rationalistic” basis of the natural-law tradition and replaces this basis with a much more individualistic and voluntaristic view of legal and political philosophy. Hence, it does not really belong within natural-law theory proper.

In order to take this discussion further, it is necessary to make an important point as regards terminology. Often (see note 7) natural law and natural right (in the singular, that is) are used interchangeably. Indeed, the two terms are often not easy to tell apart. This has to do with the purely linguistic fact that the *ius naturale* (“natural right” or “right of nature” — or, in German, *Naturrecht*) of Roman law can be translated into English both as “natural law” and “natural right.”

What lies at the heart of this apparent confusion is the distinction between *ius* (right) in the *subjective* sense and *ius* in the *objective* sense — in other words, the distinction between what is “a right” and what is “right” or “right.”

This needs to be explained more thoroughly. First, a remark about the terms “subjective” and “objective,” known from German jurisprudence. When it is commonly said that rights are “subjective” while law is “objective,” it is not meant that rights are such as each individual being considers them to be. They are subjective in the sense of pertaining to each subject, but they are certainly, at least when it comes to natural rights, objective in the sense of applying to everyone objectively. Thus, this distinction between subjective and objective is not the one we know from epistemology and the philosophy of science. Subjective rights are those rights which the subject him–herself *has* (i.e., a right to do (or not do) something; for example: “It is my right to express this belief”), while objective right (or law) has to do with an order that exists and is valid independently of each subject, and which prescribes what may or may not be done (i.e., a right (or law) *by which* we do something; for example: “It is right of me to express this belief”).

It is, however, not uncommon to claim that the subjective rendering of right is subjective in a more radical sense than the one indicated, since subjective right unequivocally centers around the power and freedom of the individual, and thus disentangles “rights” from “that which is right.” This is a theme we will return to often, directly and indirectly, in the coming chapters. For now, I recommend a very illuminating study on the subject by Luc Ferry and Alain Renaut, which brings out the different nuances of the concept of right in a way that nicely complements mine here.8

The *ius naturale* of the Roman jurists and most medieval philosophers was basically an objective system of right, not really distinguishable from *lex naturalis* (natural law) except in being a slightly less concrete term, or, alternatively, a term used to denote that which pertains directly to the virtue of justice. Building on this, we can say that it was only from the “objective” right that any “subjective” iura (rights) could be inferred, according to medieval thought. A. P. d’Entrèves brings our attention to this:

The different meanings of the word *ius* had of course long been familiar to the lawyers who had been brought up in the study of the Roman law. They had carefully distinguished between “objective” and “subjective right,” between the *norma agendi* (the rule of action) and the *facultas agendi* (the right to act) which can both be indicated by the name of *ius* . . . .

I question whether this had been distinguished as carefully as d’Entrèves claims before the late Middle Ages. As my discussion will show, it is exactly the question of disentangling the concept of the “right to act” from the “rightness (right rule) of action” which is not at all unproblematic. However that may be, it seems fair to say as a general statement that in the medieval context only the *norma agendi* was seen as fully natural in the sense of foundational, while the *facultas agendi* was seen as derived from a prior rule or law; in the last instance, from natural and divine law. Indeed, it seems that when the word *ius* was used, it almost always indicated a sense of “being in agreement with or falling within the just *norma agendi*”; even when *ius* from the time of the canon lawyers in the 12th century — came to be used more and more in the sense of the *facultas agendi* as well.

The two different senses of “right” cannot be also explained in the following way: The “subjective” use implies using *right* as a noun, thus meaning something one “has” or “owns” and by which one can claim something. The

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8 See Ferry & Renaut [1985] 1992, pp. 29–47. Ferry and Renaut discuss Michel Villey (esp. Villey 1968 and 1978) and Leo Strauss (Strauss 1953) as two of the most important thinkers to criticize the totalitarian horrors of modernity through a return to the ancient notion of right, instead of by way of a liberal defense of human rights. Ferry and Renaut insist that Villey’s and Strauss’s criticisms cannot be taken lightly, and that a renewed and vigorous defense of the modern notion of rights is needed to answer them fully.

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among the canon lawyers, in Ockham’s nominalism, or in Grotius, Hobbes, Pufendorf, Locke, and the other “modern natural law” thinkers? (Or, as detective Ellery Queen would have said, “was it someone else?”) I hope to be able to shed some light on this through my treatment of various texts. However, my aim in this work is not primarily historical; rather I wish to discuss various positions on natural law which, when compared, may show us what constitutes the break – if there is a break – between classical and modern natural law, and how this break can be understood. My point is not primarily “who said what,” but more “how things can be (and indeed have been) said and understood.”

It must be admitted that both the classical (“natural-law”) and modern (“natural-rights”) teachings are profiled against relativism and skepticism of various types, and they can thus be said to be merely variations on a theme. This is the view of, for instance, Jacques Maritain and John Finnis. It is, in their view, possible to unite natural-law and natural-rights teaching, thus constraining a basic continuity, albeit with several crucial inventions (for good and for bad) along the way, leading from Aristotle through Thomas Aquinas, Richard Hooker, and John Locke up to the Universal Declaration of Human Rights of 1948. The teachings of natural-law theorists such as St. Thomas Aquinas thus find their modern expression in a teaching of natural rights. There is, according to this view, no radical break, but rather progression.

Leo Strauss has taken the exact opposite view, and many have followed his lead. For Strauss, the modern teaching of individual rights destroyed the ancient teaching of natural law. The modern teaching indeed employed much

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10 Leviathan, XIV (Hobbes [1651] 1991, p. 91). To a certain extent this view is also present in William of Ockham and subsequent nominalist writers, who express the idea of rights as “powers” belonging to the individual (see McGregor 1980, pp. 150–51). But Ockham’s rights are not natural in Hobbes’s sense. I will attempt to shed more light on this in chapter II.

11 Cf. Gr. telos = goal/aim/end. A teleological moral teaching is one which stresses the goals or ends which human beings should seek to attain. Teleological teachings are thus often called “perfectionist.”
of the ancient and medieval terminology, but that was done merely to conceal the revolutionary content of what John Locke calls a “very strange doctrine.”

Where the ancients believed in a *sumnum bonum* – a highest good – for all of mankind, modernity has abandoned all such concepts in favor of lowering one’s sights and being content with the good of each (i.e., the rights of each) instead of the highest good of all. However, even Strauss stresses that there is a certain continuity between natural-law and natural-rights doctrines:

> [I] take the modern natural right as untenable, and narrow, or crude. But one must allow for the fact that it is about natural right, otherwise one could not understand the connection with Rousseau, Kant, and Hegel.

In other words, and in spite of the contrast between medieval natural law and modern natural rights, both teachings do claim to be about a “natural right” of sorts. This should not be obscured, even according to Strauss.

Before going on to a brief overview of how the discussion between natural-law protagonists and natural-rights thinkers can run, it will be necessary to say a few words about what “a right” actually is. The word forms the centerpiece of so much of modern philosophy; yet, it is seldom clearly explained or defined, nor used in a consistent way. As Rex Martin puts it:

Surprisingly, the great classics of Western political thought, such as Hobbes and Locke, while identifying certain things as natural rights, failed to make clear just what a right is. And some of the most prestigious contemporary thinkers, such as John Rawls and Robert Nozick, though using the language of rights, have not penetrated to the question of the nature of rights or the character of their justification.

Maybe Martin overstates his point here, but it is true that we are dealing with an elusive concept.

The most widely held, though clearly not the only, opinion as to what a right most basically represents, is that it constitutes a legitimate claim. Saying that it is a “claim” means that it is something a person or a group – the right-holder(s) – can expect others to honor, either actively or passively. The “legitimacy” may refer to a positive, legal system, or to some philosophical or theological doctrine as to what a man is or what a human life should consist in. Saying that A has a right to p thus means that A can legitimately claim of B (as well as C or D, etc.) that she (A) may do or enjoy p unhindered. The other person, B (or C or D), may, however, be in different positions as to A’s claim. We may be dealing with someone against whom A has a legitimate claim, and who thus may be under an obligation to perform an act; for instance, of paying money to A. But it may also be that the other person really has nothing in particular to do with A and p, and thus merely has what we may call a “passive duty” not to interfere with A’s legitimate claim. (I do not distinguish between “duty” and “obligation” here, as it seems not to be necessary in the present context.)

So far everything seems more or less clear-cut. But there are difficulties. One is related to the so-called correlativity of rights and duties. Indeed, the suggested definition of a right seems to make rights and duties exactly complementary (or “correlative”) to each other: When A has a right, some person B has a duty. Rights and duties are simply two sides of the same coin, and any theory of morality or politics which emphasizes the one, must by definition imply the other. Three remarks must be made about this.

First, it seems to matter quite decisively to a political theory whether it accentuates rights or duties. What is distinctive about John Locke’s political theory, for instance, is that it seems to emphasize people’s rights over and above their duties. Locke’s aim was to show how citizens can claim certain

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14 Leo Strauss (see Strauss 1953, p. 222) makes a point of Locke’s using this expression about his own theory. It can be found in Locke’s *Second Treatise*, pars. 9 and 13 (Locke [1690] 1967, pp. 272, 275).

15 This point has often and forcibly been made by Allan Bloom, one of Strauss’s most famous students. In an essay on the Enlightenment, he writes: This scheme [of the moderns] represented a radical break with the old ways of looking at the political problem. In the past it was thought that man is a dual being, one part of him concerned with the common good, the other with private interests. ... Locke and his immediate predecessors taught that no part of man is naturally directed to the common good and that the old way was both excessively harsh and ineffective, that it went against the grain. ... From the point of view of God or heroes [this modern teaching of rights and reasonableness] is not very inspiring. ... As Leo Strauss put it, the moderns “built on low but solid ground.” (Bloom 1987, pp. 166–67).

16 From a letter by Strauss to Eric Voegelin, April 29, 1953 (reprinted in Emberly & Cooper 1993, p. 97).


18 These are only sketchy remarks and do not do justice to the thorny question of the relationship between rights and duties (or obligations). An attempt at a fuller treatment of this problem can be found in the appendix to this chapter: “The Relationship Between Rights and Obligations.”
freedoms within a political system, instead of all the time being told by some authority that they have obligations and duties which override their wish for freedom and rights. Other political theories, on the other hand, such as Edmund Burke’s, seem to take an opposite view. While Burke’s thinking no doubt has its liberal elements, on the whole it emphasizes men’s obligations to tradition and to society. That a theory can fairly be described as a “rights theory” and not a “duty theory” – and vice versa – seems quite obvious if we take a glance at a number of actual political theories.

Second, it is one of the most salient features of rights that they often have to do with conflicting claims. Andrew Hacker brings this out nicely when he juxtaposes the right to spread one’s opinions through a loudspeaker and the right to “auditory comfort,” e.g., the right to enjoy a quiet afternoon in one’s garden. In a society where free speech is highly valued, I have a duty to respect the political agitator’s right to spread his message. But the political agitator also has a duty — namely, to respect my right to a certain privacy and comfort. And, therefore, it may be that the latter right actually trumps the former. We must remember, as Hacker puts it, that “[o]ne man’s right can be not only a nuisance but downright oppressive to another.” Thus, a man (or woman) may have a legitimate right, but it may be that it is not, or cannot be, enforced in practice. (I admit that, as Thomas Pogge has pointed out to me, I am conflating two different issues here: that of balancing rights, and that of enforcing rights. However, they are closely intertwined and can usefully be treated together for our current purposes.) The question, then, will be: To what extent is such a “right” actually a right at all — that is, if no one has the duty of enforcing it? This will turn out to be part of the difficulty with Thomas Hobbes’s natural rights.

Finally, it must be noted that there are certain claims normally considered to be rights which in reality can be termed no more than “imperfect” rights; in other words, we are confronted with holders of rights who can point to no corresponding holders of duty. This is connected with my previous point about conflicting rights and the non-existence of duty enforcement. I am thinking of, for instance, the right to be clothed and fed. Normally, this corresponds to a duty belonging to one’s parents when one is a child, and to oneself or one’s family when one has grown up. But in the case of the utterly poor — of which there are so many in this world — we do say that the rich somehow have a duty to help the poor, and that the poor indeed have a “right” of sorts to receive such help. However, there does not seem to be any particular per-

20 A recent, thorough discussion of poverty, rights, and solutions to the problems of world poverty can be found in Pogge 2002. Pogge, furthermore, relates the discussion about poverty to the development of natural-law and natural-rights ideas, see ibid., p. 54 ff.

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son to whom this obligation or duty belongs. In other words, there may be both a right and a duty involved here, but it is not the case that poor person P can direct this right specifically against rich person R, since R may, for instance, have chosen to help someone else. This holds even if there is a legal duty involved — for instance, if R has a duty, by law, to give at least 10 percent of her income to charity. In that case, if P is not helped properly, it seems to be the case that it is hard for P to direct her grudge against any one specific duty-holder R, since R is (most probably) not under an obligation to give the money to any specific poor person. Where rights are not rights against any specific duty-holder, we can call them “imperfect rights” (echoing the Kantian concept of “imperfect duties”). This shows once more the vagueness and ambiguity we are confronted with when we speak of rights and corresponding duties.

The lack of clarity and conciseness in our use of the term “right” is further commented on by the legal philosopher Wesley Hohfeld in his book Fundamental Legal Conceptions. Claiming that “rights” are to be properly understood as claim rights, he adds that — regrettably, in his view — the word is often used in quite different ways from that, causing some considerable confusion. He goes on to distinguish between four different kinds of juridical relationships which all go under the banner of “rights and duties” in everyday legal language, but which really comprise different relations. These are: (a) (claim) rights and duties, (b) liberties (or privileges) and “no-rights,” (c) powers and liabilities, and (d) immunities and disabilities.

We do not have to go through all of Hohfeld’s categories here. But it may be useful to take a look at the distinction between “rights” (category a) and “liberties” (category b), useful summaries and explanations of which can be found in writings by, among others, Joel Feinberg, Jeremy Waldron, and Charles Reid.

A good example of a liberty (or a privilege, as Hohfeld prefers to call it) is the liberty I have of picking up the stray $10 bill I find on the street (that is, when I have no chance of finding out who the real owner is). If others get ahead of me, they may pick up the bill — in other words, I have no claim, or “claim right,” to the money against other persons. However, another person may not elbow me out of the way in his or her quest for it. I do thus have a claim right to walk unhindered. In this example — as in many others — we thus see a complex of both a liberty and a claim right.

21 Onora O’Neill has commented on just this kind of problem in O’Neill 1989, p. 224 ff. There are, it should be noted, also other ways of using the terms “imperfect” rights and duties, but we need not touch on them here.
23 I am indebted to Thomas Pogge for the construction of this example.
Another frequently quoted example of a liberty, found in Hohfeld's own work, is the liberty I have of eating shrimp salad (even if it is not good for me!) as long as I have not contracted with anyone that I will not do so. I am under no duty to do otherwise (for instance, not to eat the shrimp salad), and the person(s) against whom I have this liberty has (or have) no claim against me that I not eat the salad. Now, if I have paid for my meal and it has become my property, I could say that I have a claim against others in the salad, and we would thus be faced with a right proper. But in the case of a mere liberty or privilege, we are dealing with a different kind of relation, simply involving a privilege to use or do something. Thus, the relationship to the shrimp salad may include both these sorts of "rights": the claim right that others not eat the salad, and the privilege or liberty to eat (or not eat) the salad in the manner I wish.

The example with the $10 bill helps make the distinction between "claim right" and "liberty" clearer; for in this case, the other person has just as much of a liberty to pick up the bill as I have. Thus, I have no real claim — in other words, I have a "no-right," according to Hohfeld — against the other person if she comes first and grabs it right in front of my nose. This, interestingly, seems to be the case with Hobbes's so-called "natural rights." They are not actual (claim) rights, but rather mere liberties. Nonetheless, they serve a definite function, as if they were full-fledged moral rights, in Hobbes's argument. We will return to this in Chapter V.

Hohfeld's point was to show how the term "right" can be used in several different ways — including so-called powers and immunities, which I have chosen not to deal with here (see, however, note 24). Yet, according to Hohfeld, it is the term "claim right," implying a corresponding "duty," which best captures the essence of a right. To this must be added the concept of "legitimacy," since the person — or institution — claiming the right most likely believes that the right is in some sense legitimate, meaning that some system of law or morals makes it legitimate to pursue the claim in question. If we, against this background, restrict the use of the term "right" to a legitimate claim-right, we can follow Alan Gewirth in defining a right by the following formula: "A has a right to X against B by virtue of Y," where A is the right-holder, X the "object" of the right (that to which one has a right), B the person who has the corresponding duty, and Y the justificatory basis, ground, or rule of the right. The "nature" of a right is, according to this model, determined by our understanding of Y. A "legal right" will be a right which (ideally) will be upheld in a court of law, and Y is thus equivalent to the existing system of positive law. A "moral right" will be a right supported by an ethical rule or system of belief; this rule or system will then be Y. What — in the light of Gewirth's definition — will be distinctive about a natural right is that it is considered to be upheld and supported by nature, probably (albeit not necessarily) meaning that it is regarded as being common to all human beings qua human beings; thus, it is not dependent on a specific system of law or a specific system of beliefs in order to be a right. Y is, in other words, equivalent to nature.

And thus we are led back to the question of how to define nature in this context. Hobbes and Locke — and many following them — have given a vague answer to this by their use of the fiction of a "state of nature": that theory of human nature and individuality which has later been referred to (sometimes derogatorily) as "atomism." But such an understanding of human nature is, of course, only one among many, and the understanding underlying St. Thomas's natural law is clearly different from that of, for instance, Thomas Hobbes.

What is, then, a natural right, apart from the fact that it is a right mandated by "nature" in some sense of that word? We get the sense, not least from Hohfeld, that the concept of "right" is highly ambiguous. And as I have already indicated, the addition of the adjective "natural" does nothing to reduce that ambiguity. One rather common definition of natural rights is given by Margaret MacDonald, who defines them as rights people have "as human beings, independently of the laws and governments of any existing society." This is surely a useful definition, yet it is hard to square with an Aristotelian or Thomistic emphasis on man as a "political" or "social" animal, since it seems to indicate that human beings may have rights in splendid isolation from the rest of mankind. Maybe that is one reason why there seems to

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24 As for Hohfeld's "powers" and "immunities" they can also be explained as kinds of liberties and claim rights respectively. It is, however, both sensible and useful — not least in a legal context — to make the kind of distinction Hohfeld makes, thus delineating more clearly (1) "powers" to divest oneself of one's liberties and claim rights (and the corresponding "liabilities" of others) and (2) "immunities" against being deprived of one's liberties and claims (and the corresponding "disabilities" of others). For a critique of the power/immunity concepts, see Stoljar 1984, p. 58 ff. I am indebted to Thomas Pogge, with whom I co-taught a seminar on rights in June 2001 in Oslo, for clarifying further for me — and our students — many aspects of Hohfeld's distinctions.


26 As my colleague Lene Bomann-Larsen has pointed out, Y (the justificatory basis) may also simply be a claim or principle, such as "All human beings have a right to life."


28 Arthur O. Lovejoy has listed at least eighteen different uses of the term "nature" in art, literature, and philosophy in his essay "Nature as an Aesthetic Norm" (in Lovejoy 1948, pp. 69–77).

29 Margaret MacDonald, in Waldron 1984, p. 23.
be a conflict between Aristotelian thought on the one hand and natural-rights theories on the other. Yet, Margaret MacDonald says that natural-rights theory actually builds on a teaching of natural law, and surely the idea of natural law has its roots in Greek, and not least Aristotelian, metaphysics. So what is, then, the relationship between natural law and natural rights? I trust that my discussion in this book will help find at least some inroads to answering that question.

Before I leave this topic of heuristically clarifying what a right is, I will turn to a recent book by Attracta Ingram on rights. She formulates a definition which fits in with the ones we have already tried out, but which also nicely brings out the difference between her (modern) "autonomy"-based view of rights and a more "natural-law"-oriented view. What I am quoting is Ingram's definition of an "individual right" as it relates to what she calls "political morality" (i.e., claims individuals have toward institutions):

To say that a person P has a right to be treated in manner M (to be unhampered in the free expression of her opinions, for example) is to say that: (1) people are subject to a certain constraint on their actions (the duty to treat P in manner M) which consists in their liability to be (rightly) forced to treat P in manner M; and (2) the duty owed to P is grounded in P's right; and (3) the duty holds even if not treating P in manner M would be better for society as a whole...30

It is condition 3 which is of special importance here, since it points to a crucial difference between classical and medieval natural-law teaching on the one hand and modern rights doctrines on the other. The most straightforward way of putting my point would be to say that condition 3 does not hold for a pre-modern natural-law theorist (nor, incidentally, for most utilitarians51); thus, the modern rights theory divorces rights from "the good," whereas pre-modern thinking about rights always connects the two. As we will see in Chapter IV, however, there are several ways in which a thinker such as Thomas Aquinas could actually accept legal rights to things not tending to the common good. And it is certainly possible for a modern thinker, such as Ingram, to accept that societal demands can sometimes, rightly, trump individual rights. Nonetheless, there are differences. If rights were to be fitted neatly into a pre-modern natural-law context, such as Thomas Aquinas's, they would have to be grounded, somehow, in a conception of the good for human beings; for instance, by seeing it as a "lesser evil" to accept the right in question, or by referring to the overall good of human freedom, or the common good. So we

30 Ingram 1994, p. 11; Ingram is influenced in her view of rights by Hart (see Hart 1955).
31 At least "act utilitarians"; Ingram's formula can be defended on rule-utilitarian grounds.

1.3 Central elements in contemporary debate on natural law

The attacks on natural law in modern ethics and political philosophy have been manifold, and, hence, so has the defense. I will in the following section highlight some of the main views presented in the debate, as I believe this will create a useful backdrop to the ensuing discussion.

Classical and medieval teachings of natural law have been seen by many modern thinkers, especially by moral and legal positivists, (1) as too much tied to an unscientific — teleological — view of the universe; (2) as unsuited to the pluralism of modern society in being too "perfectionist," i.e., too dependent on a summum bonum, a highest good, which is a concept not endorsed (at least not in the political sphere) by modern, main-stream liberalism which, after all, respects freedom of conscience and the possibility of a multitude of opinions on the "highest good"; (3) as ahistorical, meaning that they do not take seriously the necessarily historical preconditions, and thus the changeability of moral and political ideas; and, last but not least, natural-law teachings have been seen (4) to commit the "naturalistic fallacy" by drawing normative conclusions from facts about human nature, the order of the Creation, or God.

These four concerns: (1) the teleological, "un-scientific" bent of natural-law teachings, (2) the fact of pluralism in modern society and the attending criticism of "perfectionism," i.e., of the concept of a summum bonum, (3) the charge that natural law is ahistorical, and (4) the fact-value distinction, are to a certain degree related concerns, and they are often confounded in the discussion about natural law.33

Further, it should be noted that there are really two distinct kinds of criticism of natural law, although they are often confused. Firstly, natural law can be attacked for not being viable in the political sphere, and, secondly, it can be seen to be a demonstrably (or presumably) false philosophical teaching. The first line of attack is political and social; the second is philosophical and metaphysical. Of the four concerns above, all can be (and have indeed been) asso-

33 See Finnis 1991, pp. xi–xxiii for a good introduction to the "pros" and "cons" of natural law as presented in the 20th-century debate.
associated with both lines of attack, although they are used in different ways depending on whether the concern is political or philosophical/metaphysical.

Leo Strauss has made somewhat shorter lists than mine of the main arguments within modernity against natural law. He groups the arguments under two headings: the argument on behalf of history, and the argument based on the fact-value distinction. The first argument leads to historicism: the radical dependence of all values on history. The second leads to relativism: values are dependent on context and acts of the will, and they are not susceptible to rational argumentation. The latter has also led to, in Alasdair MacIntyre's view, the ubiquitous popularity of emotivism, the teaching that morality has to do merely with feelings and preferences and not with truth.

It should be mentioned here that while Strauss does not see the fact-value distinction as a decisive criticism of natural law, since, in his view, nature can have normative significance — thus, one can infer from "ought" (something which is by nature normative) to "ought" (morality) even if one cannot infer from "is" to "ought" — others, such as John Finnis, have taken the charge very seriously and have tried to show that natural-law theory does not, or at least not necessarily, commit the fallacy of deriving its premises from factual statements about nature. This aspect of the discussion about natural law should indeed be mentioned, but overall it is not necessary here to go into this problem in any more detail (even though it will be implicit in much of the material that will be discussed).

The revival of natural law must be seen against the background of the four "charges" I listed above and their effect on the relationship between, on the one hand, the teaching of what is good for man, and, on the other, the teaching of what is politically and legally right. What seems to dominate so much of modern ethical and political thought is partly the division between the "good" and the "right," and partly the claim that there is no objective good at all, or at least that it is not knowable or "showable" to all. These claims, and especially the latter, constitute what natural-law theorists seek to combat.

There are, as already mentioned, both political/practical and more philosophical problems connected with the concept of natural law. Politically, one thing is for certain: Modern society seems to create a difficult backdrop for a meaningful use of natural-law teaching and terminology. Pluralism being a fact of life in modern society, something which John Rawls and other liberal political theorists have made a basic premise of their theories of justice, appeals to metaphysical and philosophical concepts of nature surely seem too uncertain, or at least too contested, a basis for ethical and political consensus.

Now, while pluralism in itself constitutes no argument against the existence of natural right or natural law, as Leo Strauss and many others have pointed out, it nevertheless does weaken the effect of natural-law arguments considerably. The argument that "homosexuality is unnatural," to pick just one of many arguments sometimes using natural law as a starting point, surely bears little political clout if a large number of grown, rational human beings indeed believe that homosexuality is not unnatural in any prohibitive sense of that word. Thus, it seems to be a natural (!) solution to this predicament to say that natural law, if at all meaningful, is a teaching which belongs exclusively within the sphere of personal morality. It can be a lodestar to those who believe in natural purposes, tendencies, or duties, but it can never be part of a binding, inter-personal political regime. Thus, the teaching of human rights, for instance, should not be dependent on a teaching of natural law, although there will be individuals and groups who base their own defense of human rights on a natural-law teaching.

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34 See Strauss 1953, p. 9 ff.
35 See MacIntyre 1985, chs. 2 and 3.
37 This distinction between "right" and "good" was alluded to above, in my discussion of Ingram's definition of rights.
38 See Strauss 1953, pp. 23–24. Strauss's point is that the diversity of opinions about a subject does not entail that there can be no true opinion about it. And the fact that there can be less certainty and exactness about practical matters than in the case of the natural sciences, does not imply that there can be no truth at all in practical philosophy. Strauss sees the demise of teleology as the main reason why the search for truth in practical matters has been given up. Much of the same view is held by Henry Veatch (see Veatch 1985, pp. 213–49).
39 This is the argument of Tore Lindholm in The Cross-Cultural Legitimacy of Human Rights (Lindholm 1990). Lindholm insists that human rights can be grounded in a teaching of natural law or natural rights, but this should not be made the sole possible grounding of a human-rights theory. Here, Lindholm draws on John Rawls's concept of an "overlapping consensus" (Rawls 1987, 1993) — the idea that a political notion can be grounded in several different (even competing) metaphysical or philosophical beliefs and systems. Rawls claims that there is an area where different views (albeit only those views Rawls calls "reasonable") will agree or "overlap." For instance, several different religious and philosophical groups can agree that individual human beings should not be persecuted, or that stealing what legitimately belongs to others is wrong. They may justify this in different ways — the will of God, the authority of tradition, the edicts of reason, the reasonable agreement of consenting individuals, etc. — but they can nonetheless come to agree on the basic policy: in this case, a policy of certain individual rights. Thus, a teaching of natural law or natural rights becomes only one of several possible bases of a teaching of human rights.
1.3 Central elements in contemporary debate on natural law

scaled-down political philosophy with pluralism as the ideal, compromise as the means, and peace as the end. Liberalism claims to be value-neutral, according to this view, but it ends up being value-hostile. Much of the revival of natural law in the 20th century was based on arguments along exactly these lines.

Let us now turn to natural-law theory itself, judged on its own merits. The renewed interest in and enthusiasm for natural-law theory obscures the fact that the question of what natural law is – or what its scope is – seems to be as unsettled as ever. Appeals to that which transcends human, positive law can be found in all the authors listed at the outset (Strauss, Finnis, Voegelin, etc.), as well as in the Nürnberg War-Crime Trials, in the rhetoric of Martin Luther King, Jr. and the American civil-rights movement, among human-rights activists of all political colors, even in the Marxist philosophy of Ernst Bloch, and – of course – within the Catholic Church, the “home” of natural law.

The war-crime trials probably bring out the force of natural-law arguments the best. We are faced with the trial of individuals who have acted under a certain legal order, following legally binding orders from superiors to the last, minute detail. If all law is merely positive, and if there is no higher order on the basis of which we can legitimately judge a political and legal system – in other words, if legal positivism is right – how can we ever condemn a concentration-camp commandant? This is the kind of question that lies at the heart of the revival of natural-law theories.

Yet, the problem is that the various modern exponents of natural-law philosophy often go in different directions, or at least they emphasize different aspects of natural law. Not all of the philosophers often grouped among natural-law theorists can even be said to espouse natural-law theory in the traditional sense. There are certainly many branches of practical philosophy that appeal to “higher standards” without thereby being natural-law theories.

The main topic of this book – the relationship between natural law and natural rights – is one of those issues that have divided natural-law theorists. Actually, the weight put on either natural law or natural rights probably accounts for much of the disagreement over natural law within the modern

40 Liberalism and positivism are, of course, not the same! Many liberal theorists see themselves as spearheading an attack on positivism. However, many critics of liberalism see liberal as being based on a legal – and, for that matter, moral – positivism of sorts (see, for instance, MacIntyre 1985, George 1993).
discussion. While followers of Leo Strauss have been intent on restoring natural law as, in many ways, a counterweight to the overwhelming presence of “rights” talk in modern discourse, adherents of, for instance, Germain Grisez and John Finnis have sought to base and secure rights by a return to natural law; their emphasis has thus been on rights just as much as it has been on law, and they see the natural-law tradition as a superior alternative to more liberal groundings of rights.

But this plurality of natural-law teachings is surely not only an invention of the 20th century. A quick look at the historical background of natural-law teaching brings out the problems of any unified approach to this field of study. As Stephen Buckle has pointed out:

The idea of natural law in ethics has had a long and varied history — so much so, in fact, that it is difficult to pick out the essential ingredients in a natural law ethic. For the same reason, some attempts at exposition are very misleading, typically because they oversimplify: it is tempting to pick out one version of natural law and generalize from its particular features, in the hope that it is representative. The hope will probably be vain, however, partly because the idea of a natural law ethics has itself changed over time.\(^{44}\)

Against this background, it does indeed seem necessary to make an analysis of various approaches to natural law a central part of the present work, although this does not mean that I will myself play the role of the historicist by simply listing various views and stressing the divergences and similarities.

This may, by the way, seem ironic: that there are various approaches to a field essentially preoccupied with avoiding unnecessary pluralism and combating relativism. The reason why I stress this “pluralism” within natural-law theory is that my further goals can hardly be reached if I do not make somewhat clearer what is meant by natural law and natural right(s), and in order to do so I will have to examine various philosophical, legal, and theological traditions and justifications of natural law.

I have thus outlined some of the problems we face in this complex but interesting debate. Let me, as a conclusion to this section, try to re-formulate a few of the central questions which a natural-law teaching faces when confronted with modernity.\(^{45}\)

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\(^{44}\) Stephen Buckle, in Singer 1991, p. 161. (Exactly the same can, of course, be said of liberalism, positivism, or any other approach to moral, legal, and political philosophy.)

\(^{45}\) These are all very important issues; however, they cannot all be discussed in depth in this book. Here I am merely trying to give a summary of some important topics in the debate over natural law. I will shortly return to a more detailed treatment of my own main topics.

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I.3 Central elements in contemporary debate on natural law

Does a teaching of rights represent a break with the classical tradition of natural law?

Does the “fact of pluralism” demand of us that we, in the political sphere, put aside all talk about natural law in favor of some kind of ad-hoc consensus? Should thus, for instance, a teaching of human rights be based on something other than, or at least not only on, a theory about human nature and natural law?

Is the modern natural-rights teaching in itself an attempt at accommodation to pluralism in the sense that it does not presuppose a comprehensive theory about God or the good?

Do the arguments advanced against natural law within modernity decisively disqualify all sorts of natural-law theory?

There is, however, one more facet of the debate on natural law, which cannot be left out, and which will turn out to have a crucial significance for my discussion in this book, viz., the relationship between natural law and religion. It is a fact that the classical and especially medieval natural-law traditions to a large extent were rooted in religious faith and experiences. Natural-law teaching often has been, and still is, expressed in a deeply religious language, by philosophers, jurists, and theologians alike. Does this somehow limit the validity of natural law? If it is based on a religious doctrine, does it belong in the sphere of philosophy and politics? Rev. James V. Schall, s.t., puts it thus:

Now, it is the standard contention of those contemporary political philosophers who would meet the dangers of institutionalized relativism by a return to Greek classical theory, that the natural law tradition, coming out of precisely the medieval philosophic reflection, cannot be used. This is because it is somehow “tainted” from the standpoint of reason on account of its relation to revelation. . . . The objection is not so much that the conclusions said to belong to natural law are not universal, but that they are only open to the restricted group who believe.\(^{46}\)

This certainly brings out another facet of the problem of pluralism: Can any claim to universality on a religious basis have philosophical or political validity, especially in a world where people do not agree in religious matters?

This is more than just the problem of pluralism; this concerns the relationship between reason on the one hand and religion and revelation on the other. If natural law is dependent on revelation, can it be part of a rational and potentially universal political philosophy? In other words, if natural law is really divine law, can it then be said to be natural in any meaningful sense of that word?

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\(^{46}\) Schall 1984, p. 230.