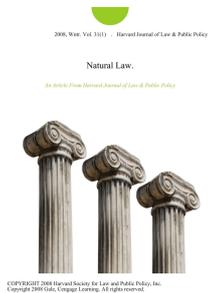


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NATURAL LAW EBOOKS 2019



Author: Harvard Journal of Law u0026amp; Public Policy

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Oliver Wendell Holmes, the legal philosopher and judge whom Richard Posner has, with admiration, dubbed "the American Nietzsche," (1) established in the minds of many people a certain image of what natural law theories are theories of, and a certain set of reasons for supposing that such theories are misguided and even ridiculous. While I have my own reasons for admiring some of Holmes's work--despite, rather than because of, the Nietzscheanism that endears him to Judge Posner--I think that everything Holmes thought and taught about natural law is wrong. I have elsewhere set forth a detailed critique of Holmes's thought, (2) which I will not repeat here. Rather, this Article offers a constructive account of what natural law theories are in fact theories of, explains why the idea of natural law and natural rights is far more plausible than people influenced by Holmes have supposed, and shows how natural law theories are similar to and different from leading competing accounts of practical reasoning and of moral judgments that provide the justificatory basis of positive law as well as standards for its critical evaluation. Theories of natural law are reflective critical accounts of the constitutive aspects of the well-being and fulfillment of human persons and the communities they form. The propositions that pick out fundamental aspects of human flourishing are directive (that is, prescriptive) in our thinking about what to do and refrain from doing (our practical reason)--they are, or provide, more than merely instrumental reasons for action and self-restraint. When these foundational principles of practical reflection are taken together (that is, integrally), they entail norms that may exclude certain options and require other options in situations of morally significant choosing. Natural law theories, then, propose to identify principles of right action--moral principles--specifying the first and most general principle of morality, namely, that one should choose and act in ways that are compatible with a will towards integral human fulfillment. (3) Among these principles is a respect for rights people possess simply by virtue of their humanity--rights which, as a matter of justice, others are bound to respect and governments are bound not only to respect but, to the extent possible, also to protect.

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