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NATURAL LAW, HUMAN RESPONSIBILITY AND RIGHTS

LLOYD L. WEINREB

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Teléfono: 3394949-3394999. Ext: 3068
http://derecho.uniandes.edu.co
E mail: mrengifo@uniandes.edu.co

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Coordinación editorial: Mauricio Rengifo Gardeazábal

Comité editorial:
Daniel Bonilla Maldonado
Alfredo Fuentes Hernández
Rodrigo Lozano Vila
Mauricio Rengifo Gardeazábal

Diseño de Cubierta: Jaime Flórez Moreno

Impresión
Econta S.A.
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Teléfono: 3 394949. Ext: 2195 - 2196
E mail: econatad@uniandes.edu.co

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NATURAL LAW, HUMAN RESPONSIBILITY, AND RIGHTS
BY
LLOYD L. WEINREB*

1. NATURAL LAW AND RESPONSIBILITY

The subject of my lectures today and tomorrow is ambitious. In truth, it is not one subject but several, which are among the most difficult and enduring topics in jurisprudence and political philosophy: natural law, justice, and rights. I want to show how these topics, each vast in itself, are related together and how emphasizing their relationship points the way to a resolution of intractable issues. I ask your indulgence for trying to cover a great deal of ground in so short a time. I have written about these subjects at much greater length in two books: Natural Law and Justice (1987) and Oedipus at Fenway Park: What Rights Are and Why There Are Any (1994). I shall be glad to respond to questions and comments after each lecture.

What I propose to do is the following: I shall begin today by tracing the long tradition of natural law, starting in classical Greece and coming up to the present in the natural law school of jurisprudence. I shall argue that somewhere along the way, natural law went off the rails and a profound debate about the human condition became an arid dispute about how to mediate between law and morality when the two do not coincide. I want to restore natural law and reestablish its original significance. In this way, I shall defend a secular theory of natural law.

I emphasize that it is a secular theory, because natural law is probably most familiar to you as it is expressed in the writings of Thomas Aquinas in the thirteenth century, which, from the fourteenth century, have been incorporated into the doctrines of the Catholic church. I shall ask you to set that version of natural law aside. Not because I want to question that doctrine or argue that it is
not properly called natural law. But it is also true that Thomistic philosophy did not arise in the thirteenth century out of thin air. If it was a new beginning, nevertheless it emerged as a distinct doctrine out of a long tradition, which developed over more than 1500 years and which continued to develop after the fourteenth century in other directions. If Thomism represents the high point, the greatest flourishing of natural law, still there is that larger tradition also to be considered.

I set the Church doctrine of natural law aside because it is integrally, inextricably bound up with the Catholic faith. Natural law did not lead Thomas to that faith. His commitment to Catholicism was unquestioned. Rather, his view of natural law proceeded from his faith and depended on it. It would be presumptuous of me, not sharing that faith, to speak about that version of natural law. My subject is not religious but intellectual. That is not to suggest that natural law, as a matter of faith, is not also a matter of reason. It was, after all, Thomas’s great achievement to show that faith and reason need not be altogether separate. But my subject is intellectual only, intellect unaided by faith.

With the full sweep of the natural law tradition before us, I want to ask whether there is any world view, any perspective, today that can persuasively be described as secular natural law and, if so, whether secular natural law has anything to say to us. The answer to both questions, I believe, is yes.

The question is hardly ever asked. A secular theory of natural law had a brief efflorescence after World War II as a school of jurisprudence, which, in the United States, was associated mainly with Lon Fuller. It is not irrelevant that the wellspring of that jurisprudence was an agonized reaction to the phenomenon of Nazi law. As the agony has faded, so has the jurisprudence that

* Dane Professor of Law, Harvard Law School
sprang from it. In any case, jurisprudence is not my main concern. A full-blown secular theory of natural law has had little staying power and, for the present, little influence. My intention is to return to the original natural law tradition, the tradition out of which the doctrines of Thomas emerged, and ask whether, those doctrines apart, anything can be found in it that speaks to present circumstances.

As I said, my answer is yes. But since the full explanation takes us far afield, the answer must wait until tomorrow. Today, I shall turn from the natural law tradition to a consideration of deep puzzles about the nature of justice. I shall suggest that the puzzles that confront us now are not different from the puzzles out of which the tradition of natural law arose 2500 years ago and that although, perforce, we find a way of dealing with the puzzles, we are no closer to a true resolution now than people were then. With that, I shall conclude for today.

Briefly to anticipate, tomorrow I shall pursue the inquiry about justice by examining the nature of rights. Prominently as rights of all kinds figure in political philosophy and debate, they are tenaciously resistant to analysis. In some ill-defined way, rights are just there, as a matter of fact. Yet they have moral significance. I shall argue that the facticity of rights along with their moral significance is the key to understanding what they are and why there are any. Rights, I shall assert, define the boundaries of individual human responsibility and, so doing, enable us to overcome the antinomy between freedom and cause that is at the root of the problem of justice.

I shall continue tomorrow with some discussion of what rights there are, and, as I have said, conclude by returning to the beginning, and showing how all of this relates to the natural law tradition.
A distinct philosophy of what may be called natural law emerges clearly in classical Greece in fifth century Athens. Before then, the notion that human affairs are within and subject to an external ordering force is clear. There is no doubt that that meant something more than mere causal order, whether it referred to moira (fate), or the will of Zeus, or simply the interference of meddlesome gods. But it was hardly sorted out into a coherent view; and so far as the sources indicate, the dispute was not whether there is such an external normative ordering but just what it was.

The situation changed in the fifth century. Whereas the pre-Socratic philosophers had been interested in the regularities of nature, in the fifth century not only the poets but also philosophers turned their attention insistently to human affairs. The overriding question that subsumed all the others was whether human affairs are governed by any order other than that imposed by human beings themselves, whether human existence has any meaning or significance beyond bare events, the never-ending chain of circumstance and consequence. Is it finally the case, as Jocasta says to Oedipus just before he is revealed as the murderer of his father and husband of his mother, when it still appears that the oracle that forecast Oedipus’s situation was mistaken, that “chance is all in all”? Or is there some larger stage on which human lives are played out?

The philosophic issue took shape as a debate between those who believed that the natural order was normative and gave meaning to human existence and those, notably the sophists, who believed that the normative dimension of our experience was imposed entirely by human contrivance. The idea of natural order expressed by the term physis (to which was opposed nomos)

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was an order that, however deeply rooted, was not found in nature but only in a given human community. The order at stake was a normative order, not a bare causal order, for which the term was not *physis* but *tyche*, blind chance or necessity. The issue runs through the writing of the period, not only philosophy but also history and the tragedies, most visibly the tragedies of Sophocles. I single out Sophocles among the three great tragedians because he stands between Aeschylus, whose view of the cosmos seems more religious than philosophical (although the Greeks would not have made that separation as we do), and Euripides, who repeats the formulas of divinely ordained natural order without much conviction, as, at best, part of the question. For Sophocles, the affirmation of moral order was a resolution, not a challenge or complaint. It meant that Oedipus’s suffering, or Creon’s or Philoctetes’, all different in their circumstances, was not merely the play of blind forces; however bitter, it was, when all was revealed, as it ought to be and, therefore, is.

There is a direct line from these ruminations, by way of the Greek and Roman Stoics and later the Roman lawyers and Church fathers and Christian theologians, to Thomas Aquinas. Cicero, not himself an original thinker, provided the phrase “natural law.” Referring to the normative aspect of natural order as law made sense, because a central element of Stoic philosophy was to bring the human faculty of reason into conformity with the *Logos*, which, in our terms, meant variously Reason (with a capital R) or Nature or God. Ethics was thus inextricably bound up with ontology, much as, earlier, what is and what ought to be were united. Brought into contact with the Christian belief in a personal, all-embracing God, the normative natural order of the Greeks became Divine Providence, in which human beings, able in some measure to provide for themselves, have a share. Thomas Aquinas brought that to fruition in his doctrine of natural law. “The rational creature is
subject to Divine providence in the most excellent way, in so far as it partakes of a share of providence, by being provident both for itself and for others. Wherefore, it has a share of the Eternal Reason, whereby it has a natural inclination to its proper act and end: and this participation of the eternal law in the rational creature is called the natural law."

In this way, natural law as elaborated by Thomas preserved elements of the Greek *physis*. It was real, and it was normative. In one crucial respect, however, there was a difference. The affirmation of normative order in fifth century Athens did not mean that one could know that order and state and understand what it prescribed, but only that there was such an order. That gave relief from what we should now call existential despair, as Sophocles’ affirmation of moral order at the end of his tragedies attests. But it did not mean that one could with any confidence guide his steps in conformity with that order, as again the fate of Sophocles’ protagonists — Oedipus, Creon — attests.

With wonderful compression, Sophocles makes both points in the lines of the Chorus that close the *Antigone*:

> Our happiness depends 
> on wisdom all the way.  
> The gods must have their due.  
> Great words by men of pride 
> bring greater blows upon them.  
> So wisdom comes to the old. 

Thomas, by emphasizing humankind’s “share of the Eternal Reason” and participation in Divine providence, indicated that with the aid of faith, natural law could be known and its moral dictates followed. That was, in truth, contrary to the Greek notion or, at any rate, added a new dimension to

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2 *Summa Theologica*, 1–2, qu.91, art.2.
it, and it created new difficulties. For the very heart of the problem from the Greek perspective was that one could not have any assurance that his conduct conformed to the normative order, as Oedipus’s own failed efforts to avoid the oracle’s prophesies demonstrated. Not long after Thomas, the problem erupted in the controversy whether the natural law was a product of God’s will or God’s reason. Even to state the problem that way suggested how fragile Thomas’s solution was. For if the natural law were a product of God’s reason, in which humankind participated, might one not, by the application of reason and by closely studying the nature of things dispense with God altogether? If, on the other hand, natural law was a product of God’s unconstrained will and not accessible to reason, were we not in some sense back where we started, in a cosmos the meaning and significance of which was, if not in doubt, altogether unknowable.

Looking back at the nomos–physis debate in fifth century Athens with the Thomistic synthesis of faith and reason before us, it is evident that in the intervening 1500 years a great change has occurred within the tradition that binds them together. The question of meaning that so occupied the Greeks has in the thirteenth century been answered definitively, not by philosophic speculation and reflection, but by religion. The meaning and purpose of human existence is guaranteed by God, whose own existence is a matter of faith and not to be questioned. What was left for natural law was not an ontological question as it had been, but a normative one: How ought one behave? The very rubric “natural law” indicated that. Whereas Cicero, adapting Stoic philosophy to his purpose, could use it ambiguously to refer both to Reason immanent in an ordered universe and to prescriptive guides for human behavior, once the former aspect is fully brought within distinctly Christian doctrine, only the latter remained. The reference to nature preserved an ambiguity, but it ceased to
signify that the natural order itself is normative and meant only that its prescriptions are evident and certain. The significance of that change should not be underestimated.

When the universal dominion of Christianity gave way to national states, puzzlement about humankind’s place in the natural order gave way to the more immediate problem of establishing the individual human being as a member of civil society. Questions about the normative force of nature became questions about the normative status of positive law. Was it—ought it be—anything more than a reflection of the will of whoever is powerful enough to enforce it? If reason entered the picture at all, whose reason, and to what effect? That is to say, suppose will and reason diverged? Or, more simply, suppose the law were unjust?

Although it is scarcely noticed, the great political philosophers of the seventeenth and eighteenth centuries inherited much of the natural law tradition. They relied on notions of a state of nature and law of nature to give their conclusions a mantle of certitude that they would have lacked merely as expressions of political preferences, which they were. Hobbes’s skepticism and rigorous logic led him to reject every claim to authority founded on reason and, therefore, to substitute for natural law the positive law of the state, resting on nothing more than the ruler’s will and power to enforce it. The puzzle about how humankind could be part of a natural (causal) order and yet be free and responsible became the puzzle about individual freedom qualified by the unlimited coercive authority of the state. However weak a subject might be, Hobbes argued, he was better off than if he were in a state of nature, where there are no obligations of any kind and where he would be exposed to the unconstrained power of others. That was not, in truth, responsive to the ontological issue. But Hobbes’s reductive psychology made that insignificant anyway.
Locke’s view of the state of nature and natural law is more benign. The human condition in the state of nature is not so bad, and hence there is not so desperate a need to get out of it and into civil society. What Locke unskeptically found in the state of nature that Hobbes did not was reason, which can discern what is laid down as law by God and is therefore objectively valid. The whole duty of humans, as God’s creatures, is to fulfill their Creator’s purpose for them, prescribed in natural law. Thus barely stated, Locke sounds remarkably like Thomas Aquinas. But the world had changed during the intervening 400 years. Whereas Thomas was concerned principally with the human relationship to God, of which the authority of the earthly ruler was a part — important enough but distinctly a small part — for Locke, the latter was everything. God’s role was little more than to set everything in motion, on such terms and conditions — the natural law — as would support the political arrangements that Locke’s Whiggish sentiments approved. When men’s reason failed or their will was too strong, the only recourse was an “appeal to heaven,” a usefully ambiguous phrase that recalled the divine credentials of the whole operation but concretely meant civil war or simply that the more powerful party wins.

Rousseau’s first draft of The Social Contract contains a withering attack on natural law, the terms of which, he said, “are always unknown or impracticable, and necessarily either one does not know them or one violated them.”4 But since Rousseau argues that the human animal becomes fully a human being only after he leaves the state of nature and enters civil society, and since in civil society the General Will is the source of all law and all virtue (as well as the repository of all authority and power), the General Will effectively occupies the place that natural law had occupied.

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earlier and does the same work. The puzzles of human freedom within the determinate natural order are “solved” by making them coincide. The state, surrogate for nature, itself directs the exercise of freedom and eliminates any contradictions. Individual will is folded into the General Will, freedom into causal order. Humankind, as it were, will be “forced to be free.” A Stoic aphorism had said much the same thing: “Just as a dog tied to a cart follows while being pulled, if it is willing to follow, making its own self-determination comply with necessity, yet it will be in all respects subject to compulsion if it is unwilling to follow. So it is too with men.”\textsuperscript{5} If the Stoic formulation, which does not evoke the totalitarian horrors of the twentieth century, is less chilling, nevertheless it indicates the reach and ontological underpinning of the problem that Rousseau’s General Will addressed.

The so-called “natural rights” theories that have flourished from the eighteenth century add little to the structure or content of these arguments, beyond providing a preferred list of rights asserted to be in the nature of things and certain. Just how malleable nature was in this respect is indicated by the United States Declaration of Independence: “We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain inalienable Rights, that among these are Life, Liberty, and the pursuit of Happiness.” This could be said in a society in which slavery was part of the established order. Today, we speak more of human rights than natural rights, but the import of the phrases is about the same. The Universal Declaration of Human Rights, for example, includes just about any right that has ever been thought to have general application. Substitution of the “human” for the “natural” has not changed the rights on the list; at most, it

reflects doubt whether nature or however one refers to what is the case can intelligibly be the ground of normative principles. Leaving the ground unstated, the reference to “human” rights accomplishes the same thing by stressing their unlimited human application.

So we come finally to jurisprudential theories of natural law. It is difficult to find there any trace of the ontological ruminations of the Greeks. Indeed, it is difficult to understand why the phrase “natural law” is used at all. Nature, the natural order, has nothing to do with it. Theories of natural law are about the nature of law, of course, but so also are theories of legal positivism, to which natural law is opposed. The only perceptible connection with older views about natural order is that the normative aspect of the latter has, by a curious displacement, been transferred from nature to law. Whereas it was formerly asserted that the natural order is normative, now it is asserted that law is normative, not merely in the sense that it is prescriptive but in the sense that it necessarily incorporates substantive normative principles. Whether those principles are definite and invariable or are to some extent limited to a particular community is unclear. That ambiguity itself indicates how unmoored in theory the asserted normativity of law is.

For all the intensity of the debate between legal positivism and natural law in the immediate aftermath of World War II, natural law is not very prominent today. The phenomenon of Nazism proclaiming itself the law of Germany made consideration of the morality of law inescapable. But generally people have found it convenient to address separately the question of what law prescribes and the question whether what it prescribes is sufficiently conformable to the requirements of morality to have the force of obligation. One may choose to withhold the designation of law from a prescription that fails the latter test, which may be thought to further the moral claim. But the
difficulties that attend treating the issue of compliance in that manner have seemed to most people to outweigh any incidental benefit gained. Not least of the difficulties is figuring out just how immoral law has to be to lose the entitlement to be called law, for everyone agrees that there are bad laws, even very bad laws, which nevertheless are properly so called.

Looking back from the end of this long development to the beginning, one can trace the lines of thought that led from the Greek inquiry into the human condition to a theory about the normative dimension of law. But the two are far apart. The jurisprudential issue may not seem of first importance, but it is, at least on the surface, intelligible. The original conception of natural law, the idea of physis, normative natural order, however, is likely to seem to the modern mind simply a fundamental mistake. The separation of “is” and “ought,” description and prescription, is not a theory or a position; rather, it is a given, where we start. (That separation drives the fundamental positivist objection to the jurisprudence of natural law. And, from the positivist viewpoint, it troubles the intelligibility of natural law jurisprudence.) And so the reference to normative natural order, the normative order of nature, or any of the other rubrics of natural law that build the normative claim into the description of some aspect of our experience is rejected out of hand.

I believe that that is a mistake. It can be demonstrated that our own world view, our own understanding of our experience, without tricks or gimmicks or subterfuge, incorporates the same conjunction of the natural and the normative that the Greeks represented as normative natural order. I have traced the development of theories of natural law in its various guises because defense of the secular version of natural law leads me to reconsider the original Greek conception. The issue before us, that is to say, is ontological, not moral, political, or jurisprudential.
The argument requires that we consider other difficult subjects: responsibility and justice.

Human responsibility is a structural fact of our experience. By "structural fact" I mean a proposition that cannot be contradicted without altering the nature of our experience, not just in some concrete details, however important, but fundamentally, making it a different experience entirely. One cannot translate a description of events that refers to responsible human conduct into a description that omits such a reference, because responsibility has no equivalent. In that sense it is fundamental because no translation in those terms would be equivalent.

As a structural fact, human responsibility marks the difference between persons and things. Persons are responsible, in a manner that implies desert; things are not. Furthermore, broadly speaking, leaving aside the troubling cases at the edges — infants, the very aged, the comatose — all human beings are persons and, again leaving aside some possibly troubling cases, all persons are human beings. That equivalence would be tested if a creature from another planet altogether unlike us physically exhibited a sense of individual responsibility. Would we regard the creature as a person? (To suggest the profound implications of the question, notice how an affirmative answer would affect the story of Genesis. Or notice how the story of Genesis indicates the answer.)

There are many puzzles about responsibility. Hardest of all are not cases of human beings who for one reason or another are not responsible or nonhuman beings whose behavior has some of the indicia of responsibility. We resolve such cases generally by regarding birth to a human mother as establishing a conclusive presumption of personhood, even if responsibility is temporarily or permanently lacking in fact, a presumption that we accept the more easily, because persons who are indubitably responsible pass regularly through periods when they are not, such as when they sleep.
The hardest puzzle is the ordinary ascription of responsibility in the standard case of an adult, competent person. We take it for granted that one is responsible in a moral sense, a sense that implies desert, only for conduct that is self-determined. Just as a hurricane is not responsible in that sense for the devastation that it causes, a puppy is not responsible for the mess it leaves on the floor, a person is not responsible in that sense for bumping into someone if she is shoved from behind, or for crying out if she is stuck with a pin or for any of the conduct about which we say, "She couldn’t help it." Usually, determining whether a person is responsible is an empirical question, with plenty of ambiguity, plenty of close cases, plenty of disagreement. But generally the pattern is understood and accepted by us all.

The pattern is illustrated by the practice of excuses. Self-determination is not a quality of action that we observe, like speed or agility. We speak of someone acting with determination, but not of acting with self-determination. But in a general way, even if conduct is of a kind for which we ordinarily regard persons as responsible, we regard as not self-determined conduct that has a recognized, identifiable causal explanation that places the person outside the endless variety of the ordinary. Not regarded as an excuse are the ordinary qualities of one’s birth — intelligence, good looks, physical strength, or their lack — or any of the ordinary qualities of nurture — loving, supportive, economically successful parents, or their lack. Some rise above their individual circumstances, and some fall below theirs. But attributes like industriousness, determination (not self-determination) are also, we suppose, the product of nurture and, more and more it turns out, nature — the chemical composition of the body, the shape and mass of the brain — and are both beyond our control.
In fact, a determinist argues, everything that we are now is traceable to who, what, we were in the past, in an unbroken chain of cause and effect, circumstance and consequence. For whatever else we may be, we are part of the natural order. Furthermore, a determinist might argue, the notion of individual responsibility does not otherwise make any sense. For if an action that a person takes now is not, however indirectly, a determinate consequence of the person’s individual attributes, which are themselves fully determined in the same way, how are his actions anything more than happenstance, not his normatively in a way that makes him responsible but only an event that happened to him, a circumstance in which he happened to be embroiled? Is he not, to use the obvious example, in the situation of Oedipus, unwillingly and unwittingly caught in the destiny of the Theban royal house and, despite himself, doomed to fulfill the oracle’s pronouncement that he would kill his father and commit incest with his mother.

So we confront this dilemma. The notion of human responsibility requires that an act be free, that is, self-determined, and not determinate. But at the same time, unless the act is fully determined by the person as he is and not by anything else, it is not his in the necessary sense. Autonomy, on which responsibility and desert depend, requires that an act be fully undetermined and fully determined. It is a true antinomy, not soluble by halves, some of one and some of other. The notion of responsibility, the fundamental distinction between persons and things, turns out to have a deep contradiction at its very center.

The scope of the difficulty is indicated by the extraordinary, not to say desperate, solutions that are available. For the Greeks, the solution was that Oedipus was responsible for the circumstances of his being: to be Oedipus, the person he was, was to do as he did. Responsibility
attaches to his self, because the natural order is itself normative. We, of course, reject that out of hand. One is not responsible for what he cannot help. Some years ago, a government official in Washington, evidently a student of classical Greece, asserted publicly that a person should be held responsible for physical handicaps due to birth defects, which she said reflected a person’s inner worth.\textsuperscript{6} She was excoriated in the press and finally resigned from her government position. The Kantian solution was to remove the autonomous self to an ineffable, noumenal plain, from which all traces of the phenomenal, causally determinate self are absent. But we are interested in the actions of the responsible self within the phenomenal universe. The person whom we reward and punish is the phenomenal self with all those actual attributes. The Kantian argument, as he acknowledged, is not a solution but a thorough, rigorous statement of the problem. The currently favored approach of Strawson and others is simply that there are two perspectives: the scientific and the moral. There is no unified perspective, nor need there be. One just needs to specify the point of view. But it is not so, because again the person to whom we respond one way or the other is one and the same person, acting freely or not, with all the characteristics of himself, his self. When we ask whether a person is responsible for some occurrence, we want an answer, “He is” or “He is not,” that refers unconditionally to that person. We do not want another question: “Why do you want to know?”

Abstracted from the reference to an individual person, the puzzle of human responsibility pervades every aspect of our lives. If Oedipus’s fate is, as we think, unjust, why is it just that Carlos Valderrama, el Pibe, gets to play football for Selección Colombia rather than some young man who desperately wants to play professional football and tries very hard, or tries to try very hard, but is

rather slow, doesn’t kick the ball very well, and makes a lot of errors, all of which he tries ceaselessly — and unsuccessfully — to overcome. Our short response is, Valderamma just is a better player. He is el Pibe, and being the person that he is, he deserves to play for the team. But isn’t that exactly like the Greek answer to the fate of Oedipus — He is Oedipus — an answer that we reject out of hand? Nor can the two cases be distinguished because football is only a game. Try telling that to the young man who doesn’t make the team. In any case, just the same argument might be made in any number of other circumstances, where the question is not who plays for the national team but who is admitted to the national university or who gets the high-paying job. That, we all agree, is not a game, it is life itself.

In this way, the puzzle of human responsibility, of freedom in a causally determinate natural order, prompts us to ask about the nature of justice. How can we say that a person — el Pibe, on one hand, and the unhappy young man who doesn’t make the team, on the other — all of us, in fact, throughout our lives — has what he deserves, when our starting points are so different? How can we talk about responsibility and desert, or justice at all, unless we can in some way account for our differential starting positions as something more than, as we say, “blind luck”? Is there any way for us to validate Oedipus’s belief that we are creatures of desert, responsible, and responsive to justice? Or is it, as Jocasta said, that “chance is all in all”? 
2. RESPONSIBILITY AND RIGHTS

In yesterday's lecture, I traced the philosophy of natural law to its origins in speculation about the human condition in fifth-century Athens. The fundamental question was whether human beings, for all their striving, are anything more than objects, buffeted by the blind forces of nature, blind in the sense that they have no regard for or concern about human purposes or endeavors. One answer to that was no; as part of nature, human beings are not more than objects. The negative response did not stop there. Meaning — moral significance — might be imposed by human effort, the deliberate construction of order (*nomos*). But there is no meaning, at least none that is knowable, beyond that. Disregarding anachronism, one can find in that view the philosophy that we should now call existentialism. It is most visible in Thucydides' account of the Peloponnesian War, the great tragedy that brought Athens' victorious century to a close, which Thucydides described as a matter of fact, traceable to nothing more than ordinary human nature and fortuitous natural occurrences. The alternative view, expressed most forcefully by Sophocles, was the affirmation that there is a justificatory order independent of human will or contrivance, which may be concealed from humankind until it unfolds in the fullness of time. Although one could not know one's place in this order or securely depend on appearances — even oracles had a way of misleading — one could be certain that at the last, one's suffering is not altogether gratuitous, that it had to be. The natural order itself was imbued with purpose. This is the idea that I have identified as normative natural order.

I traced the decline of that notion over the succeeding 2500 years, from a view about the
nature of what is to a variety of moral theories characterized by the claim of certainty that the theory's moral prescriptions are true and can be known certainly to be true. That claim to truth is all that associates such theories with the original ontological assertion. Concern for the truth stands in for concern for what is real.

I said that my intention in these lectures is to restore the ancient Greek notion of normative natural order. The great stumbling block to our acceptance of that notion is what is often referred to as the separation of "is" and "ought," the distinction between description of what is the case and prescription of what ought to be the case. The distinction is not a premise. It is categorical and unquestioned, simply the basis on which any discussion proceeds. So to ask why something happens — why an earthquake destroyed the village, why a child died from a disease — in the sense not of explanation but of purpose, as if to pass moral judgment on the event and blame the earthquake or disease for the harm it caused, is not in case. The very conception of normative natural order is ruled out from the start.

To overcome that, I raised the general issue of human responsibility. Responsibility, I said, marks the difference between persons and things. Only persons are responsible. All human beings are persons, all persons are human beings. But persons are responsible only for conduct that is self-determined. One is not responsible for conduct if he couldn't help it, if he was pushed from behind and bumps into someone, or if he sneezes. But unless conduct is fully determined by the person as he is, it is not self-determined in the necessary sense. It seems to be happenstance, something that happens to him, not by him. So we arrive at a dilemma: For conduct to be free, in the sense that responsibility requires, it must be both undetermined and fully determined. The same puzzle infects
the consideration of justice. How can we account for the vast range of differences of well-being among persons, if the differences are traceable to personal attributes that are simply the effects of nature or nurture for which the persons themselves are not responsible? Why is it just or fair that el Pibe plays for Selección Colombia and has a high income, when a young man without talent wants so much to play and would give anything to have the talent he lacks? And I suggested finally, any explanation that we have is no better than the Greeks’ explanation of why Oedipus was doomed, although he did all that he could to avoid the oracle’s prophecies. The Greeks’ explanation was normative natural order. What is fulfills some purpose, even if we cannot see it. And although the Greeks did not say that Oedipus was responsible for homicide and incest in our sense of responsibility, nevertheless, within the purposive order of nature, Oedipus, being Oedipus, deserved his fate. Whether we fully understand it or not, that purpose explains and justifies all our good fortune, all our suffering.

I go on from there.

Rejecting the all-embracing conception of the Greeks, we are looking to see whether there is any place in the natural order of things that intersects with our moral experience, a place where the description of things as they are, without reference to any particular human purpose, implicates normative conclusions. The only phenomenon that meets that description — as opposed to the view that nothing meets that description — is persons, regarded as bearers of rights.

It is unsurprising that the search should take us there. For, as we have seen, the vast range of differences among persons’ individual well-being is what most calls for normative explanation, and a reference to rights is the usual way of saying that such an explanation is available. Not only is it
right that el Pibe plays for the national team, but he has a right to play. Not only is it not right that
the inept young man not play, but, more to the point, he has no right to play. That rights have
normative implications or, if you like, are normative concepts, is evident. Perhaps it is the case that
rights can be overridden — a question that arouses some controversy — but they unquestionably
have a strong bearing on how one ought to behave. More controversial is the other side of the
matter; that who has rights and what rights they have is a matter of fact.

For a start, the grammar of rights is instructive. We speak about many sorts of rights in the
normative mode. “Everyone ought to have a right to food and shelter,” “Everyone ought to have a
right to education, or a right to a job,” by which we mean that the government ought to guarantee
food and shelter, education, or employment. The grammar changes when we reach the level of
“natural rights” or “human rights.” Then, it is no longer appropriate to use the normative mode.
“Everyone ought to have a natural right to food and shelter.” “There ought to be a human right to
education,” or “to work.” We do not speak that way unless “right” is put in quotation marks, and for
good reason. Either there is such a right or there is not. Of course, a right may or may not be
honored. And one can say that this country or that ought to honor the human right to food and
shelter, to education, and to work better than it does. But to whom, to what, could the claim that
something ought to be a natural right, or a human right, be addressed? It amounts to an assertion that
the natural order ought to be different. Rather, natural rights, human rights, are asserted as a matter
of fact, to which the proper response is not, “I think — don’t think — that would be a good idea,” or
“I agree” or “I don’t agree,” but simply, “True” or “False.”

Now, the short response is: There are no natural, or human, rights. To say that a right is
“natural” or “human” is to say only that one thinks it is a very important right, which ought to be recognized for all persons. Although the statement, “There ought to be a natural right to food and shelter” is meaningless, the statement that “every nation ought to recognize a right to food and shelter for all its people” is not. And, speaking carefully, that is all that the former statement means.

The adjective “natural” or “human” is a rhetorical flourish and nothing more. The Universal Declaration of Human Rights, which includes everything that anyone could ever have claimed as a right, supports that position. At best, it is a political platform and not a statement of fact.

But the facticity of rights is not dispatched so easily. Judith Thomson made rights the focus of years of fruitful scholarship, but in the end, she concluded that rights are unanalyzable. They are simply “moral facts.” Putting aside the objection that there are not supposed to be any moral facts, what are they? Thomson seems generally to disregard the implications of the very phrase she uses. Furthermore, even if one steps away from natural rights or human rights, the facticity of rights remains. Whatever their status, we speak of them as matters of fact, in the indicative mode. We say, “I have a right to...” “You have no right to...” in just the way we say that a person has a big car or a good wine cellar. But if it is a matter of fact, what is the fact, to what in the world does it refer? Judith Thomson’s statement that rights are “moral facts” puts the question starkly. That is not enough, because without further explanation it contradicts the separation of “is” and “ought” that is taken for granted. Thomson may mean to say only that we shall not get anywhere if we try to analyze rights further and that we can put our time to better use in other ways. But to say that rights are irreducible, unanalyzable moral facts does not answer a question; it poses one.

The answer to the question is that the matter of fact to which rights refer is human
responsibility, which, as I said above, is an indubitable, structural fact of our experience. To say that a person has a right to do or to be something is to say that he is responsible for what he does or is. Nothing more. That, only that, is the fact to which a right refers. Having a right to do something does not mean that one will do it or ought to do it. More often than not, it suggests that one perhaps ought not do it. A right to do something is also, necessarily, a right not to do it; for if one did not have a right not to do it, there would not be any point in saying that one has a right to do it. Referring to that for which one is responsible, rights constitute our autonomous selves. Having a right, one is free and self-determining in that respect and is responsible for its exercise (or nonexercise). Not having a right, one is subject to the causal order of nature or, as we usually have in mind, to humanly imposed constraint; one “cannot help it,” is not responsible, and does not incur desert. One does not have a right to fly unaided; in that respect we are subject to the (natural) law of gravity, and we are not responsible for failing to fly to the aid of a cat stuck in a tree. If one lacks the funds to pay for an airplane ticket (and the lack is not because one wasted the money gambling nor because one failed to take easy, obvious steps to obtain the funds) one is not responsible for failing to fly to another city for a parent’s birthday celebration. But if one has the funds, one has the right, and may be responsible for not attending. And if having the funds, one is not sold a ticket for an impermissible reason, like racial prejudice, his right — that is, his exercise of responsibility — is denied. The normative natural order is then the order in which we, as natural beings, are also bearers of rights and exercise responsibility.

That is a lot to swallow. Let me elaborate and add some footnotes. We are speaking of rights as attributes of a person simply as a person, not as a Colombian or an American, professor or student,
member of this club or that. That is, since all human beings are persons and all persons are human beings, we are speaking of human or, as they used to be called, natural rights. As a person in any of those roles, one may be granted additional rights, or not granted additional rights that others are granted, for instrumental reasons. If one is granted additional rights, then within the bounds of and according to the terms of the community that grants them, a person is responsible for what he does. To say that one has a right is not to say necessarily that the right is honored; if it is not, within that community the person is not responsible for the consequence in question. To say that one has no right is not to say that one necessarily lacks the power, and if he exercises the power, he will be subject to blame for acting without right. But if a person does exercise power, albeit without right, that demonstrates that he has the right to liberty that enables him to do so. So, a thief who has no right to steal a wallet, is responsible for doing so, and subject to punishment is able to do so only because he has the right — the right to liberty — to determine his conduct. It would be another matter entirely if he lacked that right. We should put him in a cage — or prison — and prevent him directly from stealing a wallet.

Because we tend to think of rights as things that can be granted or withheld, honored or ignored, it is easy to think of them not as a matter of fact but as something that one ought, or ought not, to have. But it is just that facticity of rights — “moral facts” — that gives all the difficulty. In just the same way, responsibility is a matter of fact (although it may be a much contested matter of fact). A person is or is not responsible for this or that action. It makes no sense to say that a person ought to be responsible. It would be like saying that a chipmunk ought to be responsible. To whom could such a statement be addressed? Of course, a person may behave responsibly or not, and if he
behaves irresponsibly, he may incur blame, but however he behaved, he would not be blamed if he were not responsible for the conduct in question.

For human beings, therefore, apart from nature and part of it, rights specify the boundary between those attributes — strength, intelligence, good looks, wealth, generosity, industriousness, or, on the other hand, weakness, stupidity, plainness, poverty, meanness, laziness — that are constitutive, that constitute us individually as autonomous, responsible beings, and those attributes — the ones that I mentioned or others — that are merely circumstantial, that happen to us, as natural beings, within a chain of cause and effect, or, it may be, that are humanly imposed. So long as one refers to a person's attributes descriptively, there is no need to distinguish constitutive and circumstantial attributes. But when one refers to a person normatively, as an autonomous being, acting responsibly and incurring desert, one needs to make that distinction, because a person is not responsible for, and incurs no desert for, circumstances that happen to him, not by him. Circumstantial attributes are subject to amelioration or limitation for instrumental reasons, reasons of social policy, because they are not deserved but merely circumstantial. Constitutive attributes, on the other hand, are deserved, constitute a person as he is normatively, and may not justly be limited or, without unjustly depriving some other, ameliorated. It is because El Pibe's prodigious athletic ability is constitutive that he deserves a place on Selección Nacional — and, of course, it is because the other young man's lack of ability is also constitutive that he does not deserve a place on the team.

Consider what is called in the United States "affirmative action," the practice of giving favorable treatment to a person because of his race or ethnic background or, in this case usually, her gender. In the United States, the phrase refers mainly to African-Americans, but also to some other
minority groups of persons who are mostly not well off. You will know which are the comparable
groups in Colombia. Are the educational handicaps of a person in such a group — poverty, lack of
educated parents, bad schooling — constitutive or are they circumstantial? If the former, simply who
that person is, like el Pibe's athletic prowess, then they are as he deserves, they constitute him as he
is, and there is no reason why society should ameliorate them. But if they are circumstantial, the
effects of circumstances beyond his control, which he “couldn't help,” then they are without
normative significance, not as he deserves, and they ought to be ameliorated, to satisfy the demand of
justice. But, of course, amelioration is not cost-free. Amelioration, that is affirmative action, for that
person requires the limitation of someone else's opportunities to use his favorable attributes to his
advantage, and, unless those attributes are not constitutive, the limitation will be unjust. If we make
a place at a university or in a job for one person because of his undeserved disadvantages, we must
take a place away from someone else who would otherwise have been admitted. The same could be
asked of other attributes, like a high IQ or a low IQ, with respect to anyone. You can always
ameliorate or the reverse, if not directly, then by the example of the Wizard of Oz. If we cannot give
the Scarecrow a brain, we can give him a college degree, which will look good on the wall and get
him a better job. If we cannot give the Cowardly Lion courage, we can give him a medal and a seat
on dais, which is probably all he wanted anyway. And if we cannot take away the powers of the
Wicked Witch of the West, we can tax her profits. So long as a person has his rights, and only his
rights, responsibility makes sense and the demands of justice are met. If a person has more or less
than what he has a right to, justice is denied.

But isn't this manner of speaking — the constituted self and its attributes, and the
circumstantial self and its attributes — wilfully confusing? There is, after all, only one person with all his attributes. Yes, so long as the matter at hand is not a matter of a person’s desert — or responsibility. If that is our concern, attention to the distinction is unavoidable, because desert depends on responsibility, and responsibility depends on the freedom that is excluded by causal order, that is to say, on rights. The unity of our being is not a part of the puzzle; rather, it is an essential aspect of the solution. For responsible conduct is self-determined, that is, both not determined and fully determined, according to one’s self. That is the human condition, and only the human condition. Things, animals, are not persons, not responsible, have no rights. Similarly, angels, whose nature it is always to will the good, have no rights. Angels have no need of rights, because responsibility, for angels, is out of the question. They have no freedom to do other than what they do.

Rights are the answer to the puzzle of Oedipus. Rejecting the notion of normative natural order, we accept the notion of rights, not only those specific rights that are the subject of political debate — the right to vote, and so forth — but generally. Recognizing the unique status of human beings as persons, autonomous and self-determining natural beings within the causal order of nature, we overcome the antinomy of freedom and cause and are enabled to resolve the puzzle of justice. Given his rights and only his rights, a person is treated justly. Insofar as he is a bearer of rights and autonomous, he incurs desert or, as we say, has his just deserts. Insofar as he is a natural being, he has no rights; the background order is not deserved but it raises no question about desert. It simply is the case, what we think of in terms of justice as entitlement, what a person has anterior to and without regard to his individual desert. The complete idea of justice requires both desert and entitlement.
Let me restate the argument and pull it together.

The Greek notion was that the human condition, within the natural order, reflected the purposiveness of that order. There is no separation between what is and what ought to be. According to that understanding, human freedom, as we think of it, is only appearance, because of the underlying purposive necessity of the natural order. Oedipus, exercising his own will to avoid the oracle's prophecies, nevertheless fulfilled them. What we should regard as the injustice of that outcome — undeserved suffering, undeserved because he "couldn't help it" — is transcended by the overriding assumption that the course of events is normatively justified. The antinomy of freedom — what we think of as freedom — within the causal order is resolved by locating justice itself within the natural order, conceived not simply as causal order without purpose but as a normative order.

No such resolution of the problem of freedom is open to us. For the initial premise, which is beyond discussion except in theological terms, is that the natural order is fully expressed in terms of causes, to the exclusion specifically of any justificatory purpose. The question why — for what reason, to what end — did the hurricane do so much damage, why — for what reason, to what end — did the child die from meningitis, is unanswerable, not because we do not know the answer, nor because we lack sufficient knowledge or insight, but because the question is meaningless. Reasons and purposes cannot be predicated of things like hurricanes and diseases.

So we require a different resolution of the problem of freedom. For we know — as a structural fact of our experience — that persons, unlike things, are responsible and incur desert. Yet we know that how we are constituted in the first instance and how we are constantly reconstituted by natural occurrences (as well as, frequently, by human contrivance) are things that we (often) cannot
help, for which we are not responsible. Instead of resolving that antinomy by projecting it outward, onto the natural order, we resolve it by projecting it inward, onto the person himself, herself. We distinguish between attributes that constitute us as persons, with respect to which we exercise freedom and incur desert, and those that are merely circumstantial, which happen to us as mere circumstances of our natural being, for which we are not responsible and incur no desert. We call the former constitutive attributes rights. That is the whole meaning of rights. And they are essential, because, as we are so often told, there is no responsibility without rights. And human beings, as persons, are responsible.

Rather than speaking of constitutive and circumstantial attributes, we ordinarily speak of a person’s entitlements, those things that properly are his without regard to the individual exercise of freedom, and desert, that which is his because of his exercise of freedom and the responsibility that flows from it. If you think of entitlement and desert as both positive and negative, you have the wholly normative analogue of what I have called circumstantial and constitutive attributes. The notion of rights, what Thomson calls moral facts, or matters of normative fact, enables us to bridge the otherwise unbridgeable gap between what is and what ought to be, as did, for the Greeks, the notion of normative natural order.

What rights, then, does a person have? Proceeding from the premise that all and only human beings are persons, that is, are autonomous and exercise freedom, what human rights are there, rights that all human beings merely as human have? Rights are an implication of autonomy, so one starts from there. I should say that the human (or natural) rights are these:
1. The right not to be subjected to constraints too great to be resisted. Since humans are, as a matter of fact, persons, they must have a domain of autonomous action. The domain must not be restricted by the power of others.

2. The right to physical and mental well-being. Perhaps it is always possible to try. But one must have some capacity, some possibility of effective action, to believe that it is worthwhile to try. So there is a right to well-being. The satisfaction of basic human needs — food, shelter — is an aspect of this right. Could one have freedom wholly as a matter of mind, or spirit, without any effectiveness as an agent? Would a being that was aware of self and not-self but had no capacity to have an effect on the latter exercise any freedom, that is, be a person? I do not think so, unless it had at one time had such capacity. I do not see how otherwise it could be aware of its own selfhood. That would, in any event, be the limiting case, and it can perhaps be left at that.

3. The right to education. Effective agency, autonomous action, is a matter of intellect as well as will. One needs to have a capacity for reflection that is congruent with one’s situation.

4. The right to moral consciousness. One needs to be aware of
oneself as not merely a source of power, like an electrical storm or a wild beast, but as a moral actor. One has a right to development as a moral being.

5. The right to moral opportunities. One must not have all one’s choices made for him, even if they are made in his favor. One must not be so educated or trained, like Rousseau’s citizen or Winston in 1984 that he always chooses the good, or what passes for the good. Angels are not persons. There is a human right not to dwell in paradise.

Other human rights are sometimes mentioned. The right to what one has. The right to equal dignity and respect. The right to life. Each of those asserted rights refers to some value that may be thought to be of great, even overriding importance. I do not want to contradict that. I should say, however, without elaborating the point here, that none of them is an indisputable condition of responsibility. For that reason, I do not qualify them as rights but rather as, perhaps, basic components of the good.

What of the community? Is there a human right to live in a community with other human beings, or with at least one other human being? The story of Genesis speaks to that, as it does to so much else. I do think, echoing Hobbes, that the animal homo sapiens is not a fully human being in the sense that implicates personhood without the company of at least one other human being. (Might he or she — or it — achieve personhood in the company only of some other animals? That does not
seem to me impossible. But it would, I think, require us to abandon the current fixed premise that only human beings are persons.) Only persons have rights. So, I should say that there is not a human right to live in a community with other humans, but that living in a human community or, perhaps, having lived in a human community (like life itself) is a condition of having rights.

The human rights that I have identified are glaringly imprecise. And, inasmuch as they belong to all human beings, they do not differentiate among individuals. Yet responsibility is insistently individual. How concretely do we justify differential individual attributes? On what basis do we say that el Pibe’s athletic ability is constitutive, that he has a right to it, or what amounts to the same thing, that because of his athletic ability he has a right to play for Selección Nacional and all the rewards that go with that, but the young man who wants desperately to play does not. The rights common to all are important, desperately so, in a world where they are so often denied for so many. But we need also to understand the basis for differential rights: not what all have in common, but what rights each of us has as an individual, which differentiate us normatively.

We do not start not from an abstract principle. The notion of autonomy is not a derivation of reason (even, incidentally, for Kant, whose moral theory sought not to derive autonomy from reason but rationally to derive the conditions of autonomy, taken as a given) but is acquired from our concrete experience of persons as persons. And here we are not deriving rights from the quality — personhood — that all humans possess, but seeking to determine which of an individual’s particular attributes they have as of right and which not, which the community ought to recognize and which are subject to the community’s overriding concerns. There is no source for that distinction except the deep normative conventions of the community itself. By conventions of the community, I do not
mean that whatever is, is right, but rather what the Greeks meant by nomos: the reflective, constantly reconsidered, weightiest aspects of the community’s way of life, its deepest understanding about the contradictory values of liberty and equality that define the community and prescribe what an individual can withhold from, or demand from, the community, and what the community can withhold from, or demand from, an individual. That means that the rights that define a person are always in some state of flux. There, in the nomos of the community, the abstract conjunction of is and ought is brought concretely down to earth.

Because this aspect of rights is so dependent on an understanding of the community, I can speak much more confidently about my own community, the United States, than about anyplace else. Speaking about the United States, I can illustrate what I have in mind. In 1994, when I wrote a book called Oedipus at Fenway Park, I compared Oedipus to Roger Clemens, a pitcher for the Red Sox, instead of, as here, el Pibe. (That explains the curious title.) I considered various issues about rights in the United States, including the highly contentious question whether a person who is gay has distinct rights associated with his or her sexual orientation. I concluded that the nomos of the community at that time, reflected in the open acknowledgment of gay sexuality by public figures, the participation of openly gay persons in every kind of public event, the frank portrayal of gay sexuality in the theatre, movies, fiction, and so forth, all indicated that there is a right to one’s own sexual identity, whether deliberately chosen or not, and that part of the right is the right to engage voluntarily in sex with another adult person of either sex. That was not formally accepted as a constitutional right at that time and was certainly not accepted by everyone either as a right or as morally acceptable. All that I meant is that a person was generally acknowledged to be responsible,
to have responsibility, for decisions about his or her own private sexual conduct. Since then, in 2003, the Supreme Court has recognized that as a constitutional right. I believe that most people agree with that decision. Many do not. There are further legal battles to be fought. The legal right of gay persons, male or female, to marry a person of the same sex is a current controversial issue, sure to be a subject of debate in the 2004 presidential elections (notwithstanding, I might add, much more urgent national issues).

What of Colombia? I should like to say something about that, but I also recognize that it is not my own community — although the period when I lived with my family in Bogotá is an important part of my life and Colombians have been among my dear friends for many years. I shall, with some hesitation, say what I can and ask you to forgive me if I appear to speak out of turn. No issue in Colombian life seems to me more important than the disparity of wealth, and it seems to me that the disparity must be addressed as a matter of rights. The poorest people of Colombia demand a greater share of well-being. It is not a matter just of desire or even need. There are countries where many people live with a good deal less. The wealthier people of Colombia resist that kind of redistribution on any but a very small scale. That is not just greed. Many people in Colombia who would count among the reasonably wealthy live in circumstances that are not regarded as special or excessive in many other countries. On both sides, what drives the conflict and makes it so intractable is the claim of right. Poor people assert that their poverty is undeserved, not rightfully theirs, and, therefore, that it is unjust and should be ameliorated. Wealthy people assert that their wealth is rightfully theirs and, therefore, that it would be unjust to take it from them. Whatever one may think about that position today, it is not so very long ago in Colombia that it was consistent with

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the conventions, the *nomos*, of the community. It is more difficult to sustain that position today, but conventions die hard.

I do not suggest at all that nothing is needed except a conversation about rights. It would be fatuous to ignore the immense practical and political difficulties of resolving the conflict. I do believe, however, that a serious discussion of the issue as a matter of right, the rights of all those involved, which is to say all Colombians, has also a large role to play. For, after all, as Hobbes so clearly explained, without rights, there is nothing but power, and clubs are trumps.

Finally, I return to the question I asked at the beginning. Is what I have outlined properly regarded as a theory of natural law? The answer, I think, is yes. It is a theory that locates the normative aspect of our experience within the natural order, in the irrefutable perception of human beings as persons. And is it worth our attention? Again, the answer is yes. It does not itself provide a moral calculus, nor even a moral compass. It requires us to look toward and look beyond the actual conditions of the community in which we live. But it is not without significance. The largest significance is that it rejects a utilitarian calculation of the good as sufficient in itself. It insists that the recognition of persons as persons, honoring their rights, is the only path to the good, not the highest good perhaps, but the humanly good. And it tells us, without giving a certain guide to success, the manner and means for achieving it.