

Natural Law and Legal Positivism in the Nuremberg Trials

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Abstract

The purpose of this thesis is to explore how a natural law based jurisprudential philosophy would have proved superior to the Austinian legal positivist prepositions that the Allies worked from in the Nuremberg Trials. This is achieved through defining natural law as it was classically understood by its historical advocates such as Thomas Aquinas and Sir William Blackstone. Natural law's applicability to the Trials builds off the principles articulated by those writers. In the process of making this determination, as to why natural law represents a viable jurisprudential idea, this paper addresses the fundamental conflict between natural law and legal positivism as articulated by John Austin, and positivism's subsequent influences upon the defense and the Allies in their attempts to prosecute the Nazi leaders at Nuremberg.

Natural Law and Legal Positivism in the Nuremberg Trials

In the realm of jurisprudence, there are many different legal theories. Two in particular have proven to be very influential in the development of Western legal tradition: natural law and legal positivism. Natural law holds, essentially, that there is a fundamental moral law or moral source of law above man, the basic precepts of which are reasonably knowable. Man-made law, in order to be just, should be in accordance with and not violate those precepts or principles that natural law articulates. In contrast legal positivism, as articulated by John Austin, basically holds that law and morality are fundamentally distinct and separated. Rather than hold man-made law up to a moral standard in order to determine its validity, legal positivism maintains that law is valid simply by virtue of the command of the “sovereign” (Altman, 2001, p. 74). Though it is preferred that law coincide with morality is subjectively preferable, objectively speaking, morality has nothing to do with that law’s validity as law (Altman, p. 68).

Given these brief definitions, it is easy to see that both of these theories are fundamentally at odds. The prominence of one theory necessarily heralds the demise of the other. Historically, perhaps no set of trials shows the elemental conflict between these two theories on the validity of law more than the Nuremberg Trials. The Nuremberg Tribunal, created as the judicial arm of the United Nations to try leading Nazi war criminals, worked from fundamentally Austinian positivist prepositions; namely that the validity of law comes from its creation by the sovereign and that morality has no bearing on the substance of the law (Altman, 2001, pp. 68-74). The Nuremberg trials presented internationally, for all to see, John Austin’s command theory and his “seperability” thesis, or that legality and morality are fundamentally separated (Austin, 1954, p. 15).

Natural law was largely cast by the wayside throughout the trial of the Nazi criminals. At most, natural law served as a rhetorical device to give moral bite into some aspects of the trial, such as the prosecution's Justice Robert Jackson's opening statement, where he asks, "does it take these men by surprise that murder is treated as a crime?" (The Law of the Case section, para. 9). The fact of the matter is, were it not for the tribunal's prior philosophical commitment to positive law, natural law would have served as the better legal philosophy to try the vicious crimes of the Nazis. To give any proper consideration to the question of whether natural law could have been a viable basis of jurisprudence during the Nuremberg trials, one must first lay out some preliminaries: the basis for the Nuremberg war crime trials, the Allies' and defendants' utilization of Austin's legal positivism, what is meant by legal positivism and natural law, and finally the application of natural law on crimes of international import.

Setting the Stage at Nuremberg

This section will briefly articulate how the Nuremberg trials came into being, whom specifically among the Nazi leadership were tried, the charges they faced, and the trial's outcome. Before articulating the basic precepts and definition of natural law and the tenets of legal positivism, we need to establish the historical stage on which this drama is to take place. As previously iterated, Nuremberg was the creature of the United Nations. The four victorious Allies of the Second World War, the United States, Great Britain, France, and the Soviet Union, were given charge of overseeing the trial. The tribunal that supervised Nuremberg originates with the formulation of the United Nations.

This occurred in August of 1945 when the Treaty of London was signed, shortly after the defeat of Nazi Germany (Washington, 2008, p. 17). In the Treaty of London, the

Allied powers concluded an “Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis,” in which they declared their intention to establish an International Military Tribunal for the trial of those war criminals “whose offenses have no particular geographical location” (Paulson, 1975, p. 137). The Charter of the Tribunal, annexed to the Agreement granted jurisdiction over crimes against peace, war crimes, and crimes against humanity, and over conspiracy to commit the crimes as they were defined in the Charter (Paulson, p. 138).

The tribunal continued to take shape over the series of several conferences between the Allies, including the Yalta Conference (Feb. 4-11, 1945), and the Potsdam Conference (Aug. 2, 1945) (Washington, 2008, p. 17). At Yalta, the Allies determined to specifically try the German leaders as war criminals (Washington, p. 17). At Potsdam the Allied powers drew up the “Potsdam Protocol” which authorized the four Allies would prosecute separate parts of the Nuremberg Trials (Washington, p. 17). Additionally at the Potsdam Conference the location for the Trial was set upon. There are two reasons as to why Nuremberg, a small industrial city in Bavaria, was chosen to be the location of the trials. According to Washington (2008) the first was symbolic; Nuremberg was the town where in 1935 Hitler’s infamous discrimination laws were first drafted. These deprived the Jews of all their civil rights (p. 18). The second reason was pragmatic; Nuremberg was one of the few cities left that was still relatively intact in the aftermath of the systematic bombing of Germany (p. 18). The trials were held at the Nuremberg Palace of Justice from November 20th 1945 till October 1st 1946 (p. 19).

The men on trial were high ranking officials in the Nazi party, government, and military. They were charged with “crimes against the peace,” including, “waging a war of

aggression, war crimes, genocide and mass murder” (Altman, 2001, p. 43). In addition, the defendants were charged with “conspiracy to commit the aforementioned crimes insofar as they formulated a common plan to carry them out” (Altman, p.43).

At Nuremberg, three of the highest Nazi officers, Adolph Hitler, Heinrich Himmler, and Josef Goebbels had committed suicide by the time the Trials were held, but Hermann Goering, Joachim Ribbentrop, Wilhelm Keitel, Alfred Jodl, Ernst Kaltenbrunner, Julius Streicher, Hjalmar Schacht, Martin Bormann (in absentia), Karl Doenitz, Hans Frank, Wilhelm Frick, Hans Fritzsche, Walther Funk, Rudolf Hess, Erich Raeder, Alfred Rosenberg, Fritz Sauckel, Arthur Seyss-Inquart, Albert Speer, Konstantin von Neurath, Franz von Paper, and Baldur von Schirach were tried one by one for individually specified crimes (Washington, 2003, p. 489)

The specific charges brought against these men have their origins in the Treaty of London 1945. As stated previously, the Charter of the Tribunal granted jurisdiction over crimes against peace, war crimes, and crimes against humanity, and over conspiracy to commit the crimes as they were defined in the Charter (Paulson, 1975, 138). The following articles discussed in the agreement are particularly salient, as they defined the newly established crimes that the Nazi leaders would be tried under.

Article 6(a) defines “crimes against peace”:

Crimes Against Peace: namely, planning, preparation, initiation, or waging a war of aggression, or a war in violation of international treaties, agreements or assurances, or participation in a Common Plan or Conspiracy for the accomplishment of any of the foregoing. (Paulson, p. 138)

Article 6(b) establishes “war crimes”:

War Crimes: Namely violations of the laws or customs of war. Such violations shall include, but not be limited to, murder, ill-treatment or deportation to slave labor or for any other purpose of civilian population of or in occupied territory, murder or ill-treatment of prisoners of war on the seas, killing of hostages, plunder of public or private property, wanton destruction of cities, towns, or villages, or devastation not justified by military necessity. (Paulson, p. 138)

Article 6(c) defines “crimes against humanity”:

“Crimes Against Humanity: namely murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war, or persecutions on political, racial, or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal. (Paulson, 1975, p. 139)

Lastly, a statement dealing with conspiracy appears in a paragraph following article 6(c) of the charter. Note that under this particular charge, the defendants were responsible for all actions committed by anyone carrying out the plan.

Leaders, organizers, instigators, and accomplices participating in the formulation or execution of a Common Plan or Conspiracy to commit any of the foregoing crimes are responsible for all acts performed by any persons in execution of such plan. (Paulson, 1975, p. 139)

Despite the charges brought against the Nazis and the enormous amount of testimony gathered for the Trials, almost thirty percent of the twenty-four mentioned major Nazi leaders and one hundred twenty-eight lesser Nazi leaders were acquitted and walked away scot-free. Only eighteen percent received the death penalty (Washington,

2003, p. 486). The overwhelming majority of the defendants received token prison sentences. Indeed of the twenty-four major Nazi leaders who participated in the Holocaust twenty-one were convicted. But of these, only nine were sentenced to prison terms (with most freed within seven years) with the remaining twelve being sentenced to hang (Washington, p. 489). Given the sheer wickedness of the Nazis and the sickening amount of testimony against them the outcome was quite distasteful. “Light enough to please a chicken thief” as prosecutor Josiah DuBois angrily put it (Washington, p. 486).

One of the reasons for the light sentences could be that the tribunal, the prosecution, and defense were influenced by legal positivism. The Nazi defense attorneys in particular would utilize John Austin’s theory of legal positivism to great effect (Washington, 2003, 486). Two of the tenets of Austin’s legal positivism his Command Theory and the notion that there is a fundamental separation of law from morality would be key ideas in the Trials. Specifically, Austin’s Command Theory was utilized by the Nazi defense attorneys while the presupposition of the separation of morality and law lay underneath each side.

Legal Positivism Defined

In order to make good on the above assertion made that the Nuremberg Trials were influenced by legal positivism, we must first briefly define what exactly legal positivism is. This can best be understood by concisely examining how it came about, learning who articulated the theory, and articulating the applicable tenets of this theory in relation to Nuremberg. Once this is accomplished, then examination of legal positivism in the Trials would be in order.

The background history of legal positivism should ultimately be understood as a reaction to natural law. The clearest point of contention between the two theories is the question of the relationship between law and morality. Classical natural law theory has its roots in understanding the relationship between God, morality, law, and man's created nature or the *imago dei*. The turn towards legal positivism occurred in nineteenth century as a result of a waning Enlightenment movement. The Enlightenment turned away from classical natural law with its roots in the relationship between man and God and embraced a more abstract and mechanistic concept of natural law. This was something that natural law writer William Blackstone (1975) warned against in his *Commentaries on the Laws of England* when he spoke of "perplex[ing] the law of nature with a multitude of abstracted rules and precepts, referring merely to the fitness or unfitness of things" (p. 55).

On the whole, Enlightenment naturalism—based on reason alone—led to a rationalistic conception of the natural law. As a result natural law became increasingly detached from its classical roots as characterizing the relationship between the nature of God and man:

The Enlightenment...brought the dormancy of winter to natural law. The term was bandied about, but its interpretation was radically changed, from situated precepts guided by human nature [the *imago dei*], historical experience, and prudence, to abstractions that neglected both their institutional history and their carefully crafted justifications. (Gray, 1999, p. 576)

If we trace the history of legal positivism, it leads us back to Jeremy Bentham (1748-1832) who first articulated an early version of the theory, which was further

developed by John Austin's positivist command theory of law (Altman 2001 pp. 64-66). Austin's command theory in particular, was heavily utilized by the defense during the Nuremberg Trials. While some of Austin's conceptions of legal positivism were explicitly rejected by the Nuremberg, one of the most key conceptions of positivism was retained: that law does not necessarily need to be linked to morality. Therefore it is with Austin's particular form of legal positivism with which we are chiefly concerned.

Where Austin and all forms of legal positivism diverge most fundamentally from the more traditional natural law theory is in its position on the role of morality in determining law's validity. In contrast to natural law, legal positivism sees no necessary connection between morality and genuine legal obligation (Altman, 2001, p. 68).

According to its adherents, the existence and contents of a law do not depend on whether or not it is based on a moral standard (Altman p. 68). Indeed, in a passage outright rejecting the very idea that natural law is based on, Austin holds that "To say that human laws which conflict with the Divine law are not binding, that is to say, are not law, is to talk stark nonsense" (Austin, 1954, p. 221). Law rather derives its legitimacy from being posited, that is, being brought legally into existence by a supreme legislative power (Altman, p. 74). The identity of the sovereign is not a question of legal right, but a question of who satisfies certain conditions. As he puts it in a well-known passage:

The superiority which is styled sovereignty...is distinguished from other superiority...by the following marks or characters: 1. The bulk of the given society are in a habit of obedience or submission to a determinate and common superior...2. That certain individual, or that certain body of individuals, is not in a habit of obedience to a determinate human superior. (Austin, pp. 193-194)

In essence, a positivist will argue that legal obligation is explained in terms of power, coercion, control, and/or rules apart from standards of moral right or wrong. Austin's theory of law heavily influenced American jurists. One of whom was the renowned Justice Oliver Wendell Holmes, the father of legal realism, a sister jurisprudence to legal positivism. Holmes held the idea outlined in his famous work, *The Path of Law*, that law should be viewed through the utilitarian lens as a tool of social control, experience, and raw statist power of a sovereign. Like Austin, Holmes embraced the idea that law is valid apart from any moral considerations. Indeed, Justice Holmes even exceeded Austin by declaring, "for my own part, I often doubt whether it would not be a gain if every word of moral significance could be banished from the law altogether" (Holmes, 2009, p. 3).

By the time of the Nuremberg Trials, it can be seen that legal positivism effectively replaced natural law as the dominant jurisprudential philosophy. The tribunal's commitment to positivist's conceptions of the separation of law and morality can be seen in the way that they respond to the Nazi defense's arguments. Even more telling are the ways in which the prosecution, exemplified by Robert Jackson, approached the German question.

Legal Positivism at Nuremberg

With the definition of legal positivism and its articulation by John Austin we can now move onward toward examining how the Trials were influenced by his ideas. The defense for the Nazi leadership's legal innocence relied heavily on positivism, particularly John Austin's Command Theory. This use of Austin's theory was pioneered by Nazi defense attorney Hermann Jarheiss, who was a professor of law at Cologne

(Washington, 2003, p. 494). In following Austin, Jarheiss seized upon the Allies' positivist notion of international law when he asked: Can we as German citizens be judged by the Allied powers (i.e. other sovereign nations) under a higher law called international law? If so then neither Germany nor any of the Allied powers are sovereign states in the Austinian sense of the word (Washington, p. 494). By appealing to Austin's legal positivism, Jarheiss set the philosophical boundaries in which the trial was to take place. This would shift the trial in the favor of the Nazis for a time while the Allies struggled with harmonizing their positivist ideas of sovereignty with an effective prosecutorial plan.

In the meantime, Jarheiss capitalized on Austin as much as he could, relying on an "act of state" defense (Washington, 2003, p. 486). An act of state defense, following Austin's logic, would hold that the laws that the Fuhrer, as the sovereign of Germany, put into action laws that were legally posited, and as such those laws demanded obedience. The individuals carrying out the "laws" would be under the protection of the state and absolved from any moral responsibility. They were only just "following orders." The objective of these laws and military commands was that the Nazi's systematic slaughter of Jews, gypsies, and other social undesirables. Furthermore, even though the Nazis had done morally reprehensible things, they could not be charged with guilt because morality is not a necessary component of the law.

The Allies never gave a fully satisfactory response to Jarheiss' use of Austin's Command Theory his act of state defense, or the question of jurisdiction. Paulson, author of "Classical Legal Positivism at Nuremberg," notes that the Allies rejection of these primary defenses of the Nuremberg Trials could not be "justified on either legal or

philosophical grounds.” Paulson derisively refers to this arbitrary decision as “Allied Policy” (Washington, 2003, p. 494).

Now we must turn to the prosecution. While of course most legal positivists would hold that mass murder is wrong, outside posited law, they would have little basis for establishing reasons for it. The only way the dedicated legal positivists of the prosecution could ever legally condemn the actions of the Nazis was an appeal to a higher human law. This would take the form of international law as enforced by the tribunal and the United Nations. However, unfortunately for the Allies, the “sovereignty” of international law over Hitler’s Nazi Germany was limited to a precious few, vaguely worded treaties. Given Jarheiss’ contentions about German sovereignty, one of the biggest obstacles for the prosecution was the lack of legal authority these treaties made with the German regimes had with the Third Reich. This would be an obstacle that Robert Jackson, one of the chief prosecutors for the Allies would attempt to overcome by using a positivist approach to international law.

Jackson centers his argument on the fact that Weimar Germany, prior to the rise of Hitler’s Nazi government, had entered into several treaties with other nations regarding rules of the conduct of warfare, such as the Kellogg-Briand pact which outlawed war (Delahunty, 2013, p. 76). Jackson contended that Nazi Germany, despite changing regimes, was still obligated to abide by those agreements, and thus their willful disregard was cause for legal action taken by the Allied powers with whom the treaties were signed (Delahunty, p. 77). Jackson points to the Weimar Constitution’s provision that “the generally accepted rules of international law are to be considered as binding

integral parts of the law,” and that the treaties signed were part of those “generally accepted rules” (Adams, 2000 p. 27).

Perhaps one of the more revealing passages on how the Allied powers perceived international law as having a higher claim to national law comes from Robert Jackson’s opening statement. He sets out his claim that the Tribunal was taking part in a new era in which law would be brought upon lawlessness, a new time in which even the heads of nations would be answerable to the international community:

The ultimate step in avoiding periodic wars, which are inevitable in a system of international lawlessness, is to make statesmen responsible to law. And let me make clear that [when] this law is first applied against German aggressors...we are able to do away with domestic tyranny and violence and aggression by those in power against the rights of their own people when we make all men answerable to the law. This trial represents mankind's desperate effort to apply the discipline of the law to statesmen. (The Responsibility of This Tribunal section, para. 7)

However, Jackson notes how little regard the Nazi leadership had for international law, “They cannot show that they ever relied upon International Law in any state or paid it the slightest regard” (Adams, 2000, p. 26). Indeed Nuremberg psychiatrist Dr. G.M. Gilbert took note of the kind of rationalization employed by Nazi leaders to distance themselves from any perceived duty to honor international treaties. Dr. Gilbert (1948) remarks on the following conversation between one of the Nazi leaders on trial, Joachim von Ribbentrop, who was the Minister of Foreign Affairs during the war, and Rudolph Hess, a fellow prominent Nazi politician:

Ribbentrop was arguing with Hess but getting nowhere, since Hess has no recollection of the world events recounted in the Indictment. Ribbentrop then remarked to me “Why all this fuss about breaking treaties? Did you ever read about the history of the British Empire? Why, it’s full of broken treaties, oppression of minorities, mass murder, aggressive wars, and everything.” (p. 221)

From Justice Robert Jackson’s own admission and Ribbentrop’s moral equivocation, it should be readily apparent that the Nazi’s cared little for the alleged sovereignty of an already rather weak foundation for international law, founded on the Tribunal’s adherence to a higher order international law under positivist presumptions. Nor did legal positivism do the Allies any favors in regards to overcoming Jarheiss’ arguments stemming from Austin. Rather than facing the implications of legal positivism and state sovereignty, the prosecution turned toward the ideals that the U.N. represented. That someday the heads of states would be answerable to the higher international community.

Defining Natural Law

Thus far, we have primarily discussed the Nuremberg Trials, its background, setting, and influences in the form of legal positivism. We have examined how positivism influenced the tribunal, the prosecution, and the defense. While natural law has been referred from time to time, it is in this section in which we shall more fully explore it and its implications. As stated previously, natural law holds that there is a fundamental moral law, or moral source of law, that is transcendent and preexisting (Aquinas, 1996, p. 52). The classic natural law position holds that the source of law is derived from the moral nature of God. Moreover, this moral law is tentatively knowable through exercise of right

reason in light of conscience. Why? The answer in classical natural law lies in the definition of “nature” and “natural.”

In the context of the classical natural law tradition, human nature has its foundation in the *imago dei*; the image of God. It is through the *imago dei* that the authority of God’s eternal law is engraved upon our very being. The Apostle Paul, in the book of Romans, called this, “the law written on the heart” (Romans 2:15 English Standard Version). God created mankind to be reflections of His moral nature. That is why man has unique capacities for morality, rationality, love, emotion, and free will. We are made to be partakers in God’s eternal law according to the nature He has given us. This is why St. Thomas Aquinas describes natural law as “the participation of the rational creature in the eternal law” (Budziszewski, 1997, p. 56). It is this participation in the eternal law of God which makes natural law valid as a source of morality and human enacted law. The significance of this participation is that our fundamental concepts of right and wrong, indeed the very idea of “rightness” or “wrongness,” do not arise solely from ourselves. It is not something that we make up. It is the result of a gifted nature, the *imago dei*, which God has inseparably woven and integrated into man’s very being.

It follows that since God is good, and our nature is fashioned according to His image, that what is truly *natural* to us are actions and principles which correspond to that fundamental *nature*. Had the Fall never occurred, every inclination would be a natural inclination in keeping within our divine image-bearing nature. But the Fall did take place. We rebelled; the iron ring of the mind pulled away from the divine magnet, and in consequence the iron ring of the inclinations fell free (Budziszewski, 1999, p. 70).

Natural law is a study of teleology because in reflecting on inclinations that are in accord with nature, we can still trace something of the purposes they were meant to serve.

Having established grounds for the preeminence of natural law as based in the *imago dei*, we can more readily see natural law in its universality. Thomas Aquinas, in his *Treatise on Law* (1274), points out that the general principles of the natural law are the same for all, both as to rectitude and to knowledge (p. 66). That is, basic moral precepts such as “do good and avoid evil,” “do unto others as you would have them do unto you,” and “do not murder the innocent” are universally recognized. C.S. Lewis (1952), writing about natural law in *Mere Christianity* illustrates this point:

Try to think of a country where people were admired for running away in battle, or where a man felt proud for double-crossing all the people who had been kindest to him. You might as well try to imagine a country where two and two made five. (p. 19)

The fact that the general principles of natural law are the same for all in can even be seen in fallen human humanity. Even in a fallen state, people still have to justify their actions from primary moral principles, even if they do not overtly acknowledge them. (Budziszewski, 1997, p. 67). In order for ideologies to have any sort of appeal, they must cloak themselves in fundamental moral language and/or principles. C.S. Lewis (1955), writing about natural law in the *Abolition of Man*, one of the most profound defenses of natural law written in the 20th century, illustrates this phenomenon. Lewis gives the example of an “Innovator” (i.e. someone who “creates” new values) who is a racist or extreme nationalist, and proclaims that all other values must either be channeled or yield

to the ultimate goal of the advancement of his own people (pp. 54-55). According to Lewis (1955),

no kind of factual observation and no appeal to instinct will give him a ground for this opinion...he is in fact deriving it from the [natural law]: a duty to our own kin, because they are our own kin. This is a part of traditional morality. But side by side with it in the [natural law], and limiting it, lie the inflexible demands of justice, and the rule that, in the long run, all men are our brothers. Whence comes the Innovator's authority to pick and choose? (pp. 54-55)

In essence, the Innovator upholds one value that is derived from general principles of natural law; that we should honor our kin by upholding our duties to family, and extends the logic to his meta-kin, or race. Slavish adherence to this "new value" produces immorality because it fails to take into account other basic principles of natural law. Just as Lewis points out, justice is due to everyone not just our kinsmen, as all men are brothers because we all ultimately go back to Adam. The "new values" are actually fragments from the natural law itself, arbitrarily wrenched from their context and then swollen to madness. They still owe to natural law any shred of validity that they might possess (Lewis, p. 54).

Natural law is universal and manifested in the way we articulate values. But what of natural law and actual man-made law itself? What is the interplay between them? Natural law lawyers throughout the ages have delved into this very question, but here it would be particularly appropriate to consult Sir William Blackstone (1723-1780), a famous English jurist and writer on natural law.

Blackstone (1979), in his *Commentaries on the Laws of England*, opens with an articulation of what law actually is. Accordingly law, in general, is seen as derived from God's creative acts. "Law, in its most general and comprehensive sense, signifies a rule of action" which may apply "indiscriminately to all kinds of actions," for example, laws of "gravitation, optics or mechanics." (p. 54). Because God is the source of these physical laws, all of these are seen as "rules of action which are prescribed by some superior, and which the inferior is bound to obey" (p. 54). However, the difference between these natural laws of the universe, which govern inanimate objects, and the natural law governing human beings is very important: humans have free will (Blackstone, p. 55). However, human beings are just as dependent as any created entity on the Creator's laws for their ultimate well-being and happiness. Blackstone (1979) describes this concept best when he writes:

For [God] has so intimately connected, so inseparably interwoven the laws of eternal justice with the happiness of each individual, that the latter cannot be attained but by observing the former; and, if the former be punctually obeyed, it cannot but induce the latter. In consequence of which mutual connection of justice and human felicity, he has not perplexed the law of nature with a multitude of abstracted rules and precepts, referring merely to the fitness or unfitness of things...but has graciously reduced the rule of obedience to this one paternal precept, "that man should pursue his own true and substantial happiness." (p. 55)

Here it may be important to note that when Blackstone speaks here of "true and substantial happiness," he is not referring to happiness as mere pleasure seeking as some dominant modernists philosophies such as utilitarianism maintain. Rather his concept of

happiness is more Aristotelian in nature. That is, true and substantial happiness (eudemonia) results from being virtuous and that this prime requisite of virtue be accompanied by its “equipment:” honor, external and bodily goods, and lastly pleasure which is merely a byproduct of these (Budziszewski, 1997, 21). Aristotle’s focus is on true happiness arising from virtue, a concept that Aquinas (1996) Christianized when speaking of the *imago dei* when he wrote that, “it...[is] a natural inclination to that which is in harmony with the eternal law [which is the Divine essence]; for we are naturally adapted to be the recipients of virtue” (p. 52). To return to Blackstone’s point, God, who is fundamentally the font of all righteousness, has ultimately designed us to be truly happy when we act in accordance with the *imago dei*, reflecting back to the Creator His own likeness. Building upon this, Blackstone (1979) holds that the natural law is the foundation upon which all other law must rest:

This law of nature, being coeval with mankind, and dictated by God himself, is of course superior in obligation to any other. It is binding over all the globe in all countries, and at all times: no human laws are of any validity, if contrary to this; and such of them as are valid derive all their force and all their authority, mediately or immediately, from this original. (p. 56)

This concept of natural law covered here is the principle that man-made law, in order to be just, and thus assure its validity as law, should be made in accordance with those precepts or principles that natural law articulates. This concept of natural law actually goes back beyond Blackstone to some of the greatest Christian thinkers. It was first expressed by St. Augustine (354-430), who said that, “an unjust law is no law at all” (Aquinas, 1996, p. 78). Later this concept was more fully explored and articulated by St.

Thomas Aquinas. In answering the question of whether every human law is derived from the natural law, Aquinas (1996) replied in the following,

Now in human affairs a thing is said to be just, from being right, according to the rule of reason. But the first rule of reason is the law of nature...consequently every human law has just so much of the nature of law, as it is derived from the law of nature. But if in any point it deflects from the law of nature, it is no longer a law but a perversion of law. (p. 78)

Aquinas's concept of law as fundamentally perverted when it violates the law of nature, has proven to be a boon to modern practitioners of nonviolent civil disobedience such as Martin Luther King Jr. King explicitly acknowledges his debt to Aquinas in the *Letter from Birmingham Jail* (p. 23). Furthermore, King expanded on Aquinas's teaching on civil disobedience when he insisted that those who disobey an unjust law should do so publicly, explain the reasons publicly, and accept the legal consequences of their disobedience (pp. 23-24). In insisting on these principles, King made clear to everyone that in disobeying a particular law the protesters were not acting out of contempt for legal justice but out of a desire to uphold it.

The International Force of Natural Law

In order to answer questions of natural law's legitimacy as an international legal authority, we must first consider the alternative arrangement under legal positivism. Generally, in most discussions on law, we presuppose the legislative arm of the nation-state as the primary source of positive law, and often nations operate similarly. International law under such conditions requires that nation-states give to up part of their sovereignty and submit to a greater international authority (Cutler, 2001, p.135).

Undoubtedly this is an unattractive notion for sovereign states that value their sovereignty (Cutler, p. 135). As we have seen in the example of Nazi Germany this approach to international law is of questionable value in light of the fact that there must be a submission of national autonomy.

Samuel von Pufendorf, a prominent natural law thinker, viewed the law of nations as a reincarnation of natural law for nation-states. In other words, a moral law which all states are required to adhere (1991, p. 62). This is an important principle in that nation-states are already required to adhere to a greater and higher authority of international law. Under this natural law writ large, nation-states do not have absolute authority of action apart from moral considerations within the bounds of their state.

The implications of this line of thinking are compounded when one considers Hugo Grotius's views on the equal validity of natural law on the actions of states as well as individuals, fleshing out the link between natural law and the law of nations. As Hommes (1983) explains, Grotius sees the laws of nature as being "equally valid for individuals and states" (p. 62). In essence, the precepts of natural law are not inherently limited to only individual persons, but to states as well (Hommes, p. 62). Just like any man before God, nation-states have a duty to their constituents to act in a moral manner, as the point of law is to promote men's "security or convenience" (Pufendorf, 1991, 53).

Classical international law theory asserts that the nation-state is bound to the natural law as much as the individual, it provides a solid basis for international relations. For the Nuremberg Tribunal the advantage of using the natural law would be manifold, for "if certain actions are right or wrong by nature at least there is a corpus of moral truth that is beyond dispute; the morality of the precepts of natural law are beyond dispute, that

they are not only right for all but known to all” (Budziszewski, 1997, 83). Thus, natural law seems to require that both states and individuals prescribe to its precepts. As long as it holds individuals and states on equal moral ground, natural law does form a necessary foundation upon which to institutionalize international law and invest it with greater authority.

Given the universal quality of natural law and the fact that nation-states as well as individuals are subject to it, it would be best to show an actual case building itself on natural law to further the point. Such a case would have to answer the sticky question of establishing jurisdiction. This is a question from the section dealing in legal positivism at Nuremberg that the tribunal never satisfactorily addressed under positivism. For advocates of natural law there is such a case that does indeed build upon principles of natural law. To make it even more relevant to the Nuremberg Trials, the case was concerned with an escaped Nazi leader that under the court’s ruling was brought to justice in the 1960s. This was the Eichmann Trial.

The Eichmann Trial

Adolf Eichmann was an Austrian member of the Nazi SS during the Second World War (Judgment, p. 68). He climbed through the ranks as an active bureaucrat and in November 1941 Adolf Eichmann achieved the rank of lieutenant colonel in the Nazi SS (Judgment, p. 86). He was put in charge of Section IVB4, this was to deal with “Jewish affairs, and evacuation affairs” which involved deporting Jews to concentration camps in occupied Eastern Europe (Judgment, p. 86). Specifically, Eichmann personally oversaw large-scale deportations of Jews to extermination camps at Belzec, Sobibor, and Treblinka in Poland (Judgment p. 139.)

At these camps hundreds of thousands of Jews were asphyxiated by gas on an industrial scale with as many as 600,000 at Belzec, and 250,000 at Sobibor, and 700,000 at Treblinka, (Judgment pp. 139-143). Later, when the Allied Powers defeated Germany, Eichmann escaped to Argentina where he lived under a false name until he was tracked down and captured on May, 11 1960 by agents of the State of Israel (Judgment, p. 46). Eichmann was judged by the Jerusalem District Court on April, 11 1961 (Arden, 1994, p. 244). He was indicted on 15 criminal charges including crimes against humanity, war crimes, crimes against the Jewish people, and membership in a criminal organization (Cesarani, 2005, p. 252). He was held accountable for the deplorable settings on board the concentration camp trains and for seizing Jews to fill those trains (Cesarani, pp. 310-311). Eichman was found guilty of crimes against humanity, war crimes, and crimes against Jews, Poles, Slovenes, and Gypsies. Additionally he was found guilty of being a member of an illegal organization, the SS (Cesarani, pp. 310-311). Eichmann was subsequently executed on May, 31 1962 (Cesarani, p. 320).

There were several major obstacles that the Jerusalem Court under judges Landau, Halevi, and Raveh had to overcome to justify their indictment of Eichmann. Among these was the question of jurisdiction. What right did the Israeli government have to try Eichmann at all? As the Court stated,

Relating to our jurisdiction to try this case, it is the duty of the Court to examine its competence *ex officio* even without the question being raised by the Accused; indeed, even if the Accused had consented to be tried by this Court, we would not have been entitled to try him unless the law empowers us to do so. (Judgment, p. 3)

The court ultimately appealed to natural law to provide the answer. Their first task was to examine the “Nazis and Nazi Collaborators (Punishment) Law of 1950” (hereinafter referred to as “the Law”) upon which they charged Eichmann under (Judgment 3). The Law was in danger of being dressed as being *ex post facto* since “carrying out an act constituting a crime against the Jewish People” was made a crime long after the existence of the Nazi regime (Judgment, p. 3). Addressing this question, the Court turned to Sir William Blackstone’s exposition of *ex post facto* laws. Here Blackstone reads that an

ex post facto of this objectionable class is those by which after *an action Indifferent in itself* is committed, the legislator then for the first time declares it to have been and crime and inflicts a punishment upon the person who has committed it. Here it is impossible that the party could foresee that an action, *innocent when it was done*, should be afterwards converted to guilty by a subsequent law. (Judgment, p. 5)

The Court held that the Law could not be seen as *ex post facto*, reasoning that mass murder forbidden by the Law could no way be construed as an “indifferent action in itself” and that “neither has the retroactive legislation dealt with a created new crime that had not hitherto been unknown” (Judgment, p. 5). In support of this assertion, the Court pointed out that all nations, Germany included, before and after the Nazi regime, had recognized mass murder as crime. Taking a note from Aquinas, the court said that the “law” and “criminal decrees of Hitler are not laws” (Judgment p. 6). Pointing out that these laws had been set aside with retroactive effect, even by the German courts themselves (Judgment 6). Furthermore, the court argued that the very fact that the Nazis

took extensive measures “to efface the traces of their crimes” such as the destruction of the Gestapo archives clearly proved the Nazis guilty mind (Judgment, p. 6).

Having shown that the Nazis and Nazi Collaborators (Punishment) Law was not *ex post facto* through careful exposition of Blackstone, the Court turned to Blackstone, Coke, and Grotius to establish jurisdiction through application of law of nations. The rationale employed by the Court is an interesting one. The Court held that the genocidal crimes perpetrated by the Nazi leadership against several people groups of the world, including the Jews, gave the crimes a universal character. They note that,

The abhorrent crimes defined in this Law are crimes not under Israeli law alone.

These crimes which offended the whole of mankind and shocked the conscience of nations are grave offences against the law of nations itself. In absence of an International Court, the international law is need of the judicial and legislative authorities of every country to bring criminals to trial. The jurisdiction to try such crimes under international law is universal (Judgment, p. 9).

To uphold this claim, the Israeli court noted the long standing tradition of universal authority under the law of nations (Judgment, p. 9). This goes far back as the *Corpus Juris Civilis* under which the towns of northern Italy had already in the Middle Ages taken to trying specific types of dangerous criminals (such as assassins) who happened to be within their jurisdiction, without regard to the places in which the crimes in question were committed (Judgment, p. 9). The Court then points out that maritime nations, such as Great Britain, have “since time immemorial enforced the principle of universal jurisdiction in dealing with pirates” as according to Sir Edward Coke who calls them “*hostis humani generis*” or “enemies of all mankind” (Judgment, p. 9).

Furthermore the Court calls on Blackstone to comment on the fact that pirates by their nature,

[Have] renounced all the benefits of society and government, reducing himself afresh to the savage state of nature, by declaring war against all mankind; all mankind must declare war against him. Every community hath a right by rule of self-defense to inflict that punishment upon him which every individual would in a state of nature have otherwise been entitled to do. (Judgment, p.10)

Much like pirates or Italian outlaws, the Nazis through their lawless acts of mass genocide declared war against all mankind. The universal character of their crimes thereby opened themselves to universal jurisdiction.

The last component of the Court's rationale for the conviction of Eichmann concerns The State of Israel's "right to punish." This would primarily be derived from natural law thinker Hugo Grotius who in 1625 wrote on an application of natural law to the law of nations in *De Jure Bell ac Pacis* that addresses the very question that the court sought to address. The Court draws attention to chapter 20 of Grotius' work and notes that the author says that "in order that he who punishes may duly punish, he must possess the right to punish, a right deriving from the criminal's crime" (Judgment, p. 10).

The Court expounds on Grotius by acknowledging that the "object of punishment may be the good of the criminal, the good of the victim, or the good of the community" (Judgment, p. 10). Accordingly, the right of punishment under natural law allows for the victim to take the law into his own hands to punish the criminal, but these natural rights have been limited by organized society and delegated to the courts under the state

(Judgment, p. 10). Since these rights have been given to the sovereign state, the state may now prosecute such wrongdoing. For as Grotius articulates,

it must be known that kings [i.e. sovereign states], and any who have the equal rights of kings, may demand that punishment be imposed not only for wrongs committed against them or their subjects, but also for all such wrongs as do not specifically concern them, but violate in extreme form any persons, the law of nature, or the laws of nations. (Judgment, p. 11)

Seizing upon the principles articulated by Grotius, the court held that it was the moral duty of every sovereign state to enforce the natural right to punish, possessed by the victims of the crime whoever they may be, against criminals whose acts have “violated in extreme form the law of nature or the law of nations” (Judgment, p 11).

To summarize, the “Nazis and Nazi Collaborators (Punishment) Law” was held to be valid based on natural law principles of the ancient wrong of mass murder. It could not have been declared an ex post facto because of Blackstone’s distinction that an ex post facto “must be a crime that is indifferent in itself,” and in no good sense could genocide ever be construed as such (Judgment, p. 5). The problem of jurisdiction and similarly the right to punish were established by the Court’s interactions with the writings of Sir William Blackstone, Sir Edward Coke, and Hugo Grotius.

Through Blackstone and Coke the Court invoked the ancient doctrine of universal jurisdiction, noting how the universal nature of the crimes being perpetrated (e.g. piracy) played a large role in determining that jurisdiction. Eichmann, who played a role in genocide of entire peoples committed just such a universal crime against mankind. Through Grotius, the Court was enabled to enact punishment on Eichmann seeing as it is

the moral duty of every sovereign state to enforce the natural right to punish against criminals whose acts have “violated in extreme form the law of nature or the law of nations” (Judgment, p. 11).

Conclusion

Therefore natural law most certainly has a place in international relations. Because of natural law’s status as flowing from the eternal law of God, it has a place on the international stage. Its strength lies in its unique ability to be a compass accounting for nations, upholding them up to an intrinsic, transcendent standard of right and wrong. Natural law in its classic form is ancient and venerable. Positivism is recent and a rejection of natural law’s principles. Natural law is universal, applicable to all people, including human government. Positivism is narrow in its approach, and limited to the nature and ability of the sovereign. Natural law is firmly grounded in justice and real truth. Positivism builds upon the shifting sands of political power. Natural law transcends, and is grounded in an extrinsic source; the eternal law of God made knowable to man via the *imago dei*. Positivism can only see law as it is, and cannot distinguish between the valid government of a free people and a group of robbers exerting their will over masses of victims. In short, under natural law, everyone, even the state, has to adhere to a greater and higher authority.

The implications of this line of thinking are compounded when one considers that just like any man before God, nation-states have a duty to their constituents to act in a moral manner, as the point of law is to promote what the mind would recognize as right. For there truly is a fundamental moral law that is above man, establishing natural law’s authority ultimately grounded in God’s eternal law. The fact that we are made in the

image of God, created with a conscience and intellect to discern good from evil, cuts to the heart of any excuse that we would lay down before Him. Natural law's basic precepts are by the very nature of the *imago dei* can reasonably be known to all. Because the precepts of natural law are reasonably knowable, man-made law, in order to be just, should be made in accordance and not violate those precepts or principles that natural law articulates. When law does violate those precepts, it becomes unjust. It is not a law at all, but rather a perversion of it.

In the case of the Nuremberg Trials, Hitler's infamous discrimination laws which deprived the Jews of all their civil rights is a perfect example of a law that contradicts serving common good. The Nazi discrimination laws should not have been perceived as law at all. Had the prosecution at Nuremberg adopted a natural law approach to the Nazi question for conviction, it would have provided them with legitimate grounds to do so.

In closing, natural law could have been a viable jurisprudential philosophy at the Nuremberg Trials. Under a natural law paradigm where the basic tenets of morality, such as "do not murder," and "punish only the guilty" are not only right for all, but are known to all, corrupt human institutions like Hitler's Third Reich would be accountable. The leaders who planned mass murder, extermination, enslavement, and deportation of entire peoples would have never been able to hide behind the skirts of legal positivism and Jarheiss' employment of Austin's command theory.

Rather than straining to "desperately apply the discipline of the law to statesmen" via international law based on the dubious bindings of ineffectual treaties such as the Kellogg-Briand pact, there should have been a re-recognition of the universal applicability of the natural law. Indeed, as the Eichmann Trial showed, the question of

natural laws' viability as a jurisprudential philosophy is made manifest. The Israeli court's masterful handling of the writings of natural lawyers helped present a solution to one of the most troubling problems besetting natural law as an international force: the problem of jurisdiction. By addressing the universal character of the sin of genocide, the court was able to establish the presence of a universal jurisdiction based on natural law through the writings of Blackstone, Coke and Grotius. Instead of separating morality from law as the positivists would, the Israeli court embraced it, resulting in a well-founded conviction ending in just execution. This stands in stark contrast to the Nuremberg Trials where many other Nazi leaders under positivist philosophy simply walked or received minimal sentences.

Historically, perhaps no set of trials shows the elemental conflict between the two theories on the validity of law more than the Nuremberg Trials. It is unfortunate that the international military tribunal at Nuremberg so readily cast out natural law in looking to convict the Nazis. However, they still could not escape the power of the natural law to condemn evil. That is why Justice Jackson, in his opening speech to the trial, utilized natural law to give moral bite into his opening statement when speaking of the millions upon millions of dead at the Nazis' hands: "Does it take these men by surprise that murder is treated as a crime?" (The Law of the Case section, para. 9).

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