

THE DEATH AND RESURRECTION OF NATURAL LAW

DANIEL MIRABELLA

I INTRODUCTION

One of the central discussions that have preoccupied legal theorists throughout the centuries is whether the law must conform to higher standards of justice and morality. The natural law tradition or elements of it date far back to the time of Socrates and the Stoics.¹ Natural Law theorists, affirmatively responding to the above discussion, contend that the validity of state positive law relies on its adherence to unwritten higher principles of justice and morality². However, with time, Natural Law Theory (NLT) came under attack, as a growing number of legal theorists argued that positive law has no moral component and that morality and the law ought to be kept separate. This growing body of criticism developed into a new theory of law known as Legal Positivism as it concerned itself with what is posited. That is, law as it is, rather than law as it should be. In this essay, I purport that it was the rise of Legal Positivism and the scientific and empirical spirit characterising the period which led to the demise of NLT in the nineteenth century. Further, I will submit that NLT experienced its resurgence in the twentieth century, merely as a result of the horrific atrocities of World War II.

¹ Costas Douzinas and Adman Gearey, *Critical Jurisprudence: The Political Philosophy of Justice* (Hart Publishing, 2005) 79.

² Mark C. Murphy, *Philosophy of Law: the fundamentals* (Blackwell Publishing, 2007) 36.

II NATURAL LAW THEORY

Before we proceed any further, it is first necessary to explore the tradition of NLT. NLT is thought to have first been introduced by the Ancient Greek thinkers, Socrates, Plato and Aristotle purporting that the law existed for the purpose of facilitating the pursuit of the good life, by members of the community.³ For Aristotle, the law could only be fully understood in terms of its purpose.⁴ The Roman Orator, Cicero (106-43 BC), contended that positive law ought to be assessed against the ‘true law’ which can be accessed through ‘right reason’ as this law is in ‘agreement with nature’ and the eternal law of God⁵. But it was not until St. Thomas Aquinas (1224-74) that NLT took on its most solid form.⁶ The highly influential Aquinas identified four types of law, with ‘natural law’ being the ‘eternal law’ discoverable by humans through reason. Thus ‘natural law’ was separate and superior to ‘human law’ which was regarded as providing the working details which ‘natural law’ leaves indeterminate.⁷ Finally, it was the contributions of Francisco Suarez (1548-1617) and Hugo Grotius (1583-1645) which laid the foundations for the secularisation of natural law.⁸ Towards the end of the eighteenth century, natural law began to fall out of favour and would eventually disappear altogether throughout the nineteenth century, which we turn to now.

³ Douzinas and Gearey, above n 1, 84.

⁴ *Ibid.*

⁵ Brian H Bix, *Jurisprudence: Theory and Context* (Sweet & Maxwell, 5th ed, 2009) 68.

⁶ *Ibid* 69.

⁷ *Ibid.*

⁸ Brian H Bix, *Jurisprudence: Theory and Context* (Sweet & Maxwell, 3rd ed, 2003) 71.

III THE NINETEENTH CENTURY

The nineteenth century opened with the French revolution and was a century which saw vast economic and technological changes, with capitalist enterprise aggressively expanding as a dominant feature of the century⁹. It was the century that saw the rise of the nation state and unrestrained empire building, but most importantly it witnessed the virtual institutionalisation of the previous 'Age of Reason' that had characterized the eighteenth century¹⁰. This century saw the birth of the social sciences such as the introduction of Sociology, Economics and Political Science. It was believed that all intellectual endeavors could be pursued from a scientific basis and ideas and human behavior, investigated with a scalpel and microscope. Increasingly, science was viewed as the fundamental tool of progress. It was believed all elements of society could be objectively studied, and as result provide an accurate basis for large scale social engineering.¹¹ Natural law, based on morality and incapable of being subjected to objective analysis, would fade away as it failed to stand up to scientific rigor and the challenge from Legal Positivism.

⁹ J M Kelly, *A Short History of Western Legal Theory* (Oxford University Press, 1992) 303.

¹⁰ The 19th Century, *Encyclopedia Britannica* (5 April 2011) <<http://www.britannica.com/EBchecked/topic/551385/social-science/38918/The-19th-century>>.

¹¹ Chris Roederer and Darrel Moellendorf, *Jurisprudence* (Juta and Company Ltd, 2007) 45.

IV THE DECLINE OF NATURAL LAW AND RISE OF POSITIVISM

Legal Positivist Hans Kelsen (1881–1973), acknowledged in his *Pure Theory of Law* (1934), ‘the changeover of [mainstream] legal science from natural law to positivism went hand in hand with the progress of empirical natural sciences and with a critical analysis of religious ideology.’¹² It was indeed, David Hume (1711-76) in his work *Treatise of Human Nature*, who first attacked the idea that right reason could lead to objective moral truth; that we cannot objectively know what is right or wrong through moral reasoning¹³. What has become known as ‘Hume’s Law’, basically claims that we can never validly deduce an ‘ought’ from an ‘is’.¹⁴ Therefore for Hume, law ‘must be regarded as separate from morals’.¹⁵ Following the same empirical spirit, Legal Positivism was born with Jeremy Bentham (1748-1832) and John Austin (1790-1859) as its most prominent pioneers. Jeremy Bentham’s view of natural law was expressed in his vicious attack on the natural law ideas of Blackstone’s *Commentaries* (1765), where he viewed natural law as a ‘formidable non-entity’ and natural law reasoning as a ‘labyrinth of confusion’ based on moral prejudices.¹⁶ Bentham was most disturbed by the mysticism and complexity that surrounded the law of the British Common Law System. Bentham sought to reform a system where the law was retroactive, incomprehensible to the layman, and concealing what were sometimes considered the corrupt interests of

¹² Augusto Zimmermann, ‘Evolutionary Legal Theories— The Impact of Darwinism on Western Conceptions of Law’ (2010) 24(2) *Journal of Creation* 103, 106.

¹³ Raymond Wacks, *Understanding Jurisprudence* (Oxford University Press, 2005) 25.

¹⁴ Moral Cognitivism vs. Non-Cognitivism, *Stanford Encyclopaedia of Philosophy* (5 April 2011) < <http://plato.stanford.edu/entries/moral-cognitivism/>>.

¹⁵ M DA Freeman, *Lloyd’s Introduction to Jurisprudence* (Sweet & Maxwell, 8th ed, 2008) 117.

¹⁶ Roger B M. Cotterrell, *The Politics of Jurisprudence: A Critical Introduction to Legal Philosophy* (University of Pennsylvania Press, 1992) 122.

judges.¹⁷ In critiquing the theory underpinning the common law system, Bentham disapproved of any appeal to the law of nature which he expressed as nothing more than ‘private opinion in disguise’.¹⁸

Bentham’s critique of natural law was influential and inspired the important work of John Austin’s *the Province of Jurisprudence Determined* (1832).¹⁹ Austin, commonly considered the founder of contemporary Legal Positivism, believed, as did Bentham and Hume, that questions of what the law is, is separate from, and ought to be kept separate from questions of what the law should be. This position is best expressed by Austin:

The existence of law is one thing; its merit or demerit is another. Whether it be or not be is one enquiry; whether it be or not be conformable to an assumed standard, is a different enquiry. A law, which actually exists, is a law, though we happen to dislike it.²⁰

Austin indeed pioneered the ‘analytical form’ of jurisprudence purporting the presentation of legal systems as structures of ‘laws properly so called’ without regard to their moral quality.²¹ The ideas of Bentham and Austin spread widely throughout the nineteenth century and indeed NLT could scarcely be found anywhere outside of Catholic circles.

¹⁷ Raymond Wacks, *Understanding Jurisprudence* (Oxford University Press, 2005) 47.

¹⁸ *Ibid* 48.

¹⁹ Marett Leiboff and Mark Thomas, *Legal Theories: Contexts and PractiCes* (Lawbook Co, 2009) 262.

²⁰ Brian H Bix, ‘Legal Positivism’ in Martin P Golding and Willam A Edmundson (eds), *The Blackwell Guide to the Philosophy of Law and Legal Theory* (Blackwell Publishing Ltd, 2005) 29-30.

²¹ Kelly, above n 9, 315.

V THE TWENTIETH CENTURY RESURGENCE OF NATURAL LAW

The twentieth century saw two world wars, the proliferation of weapons of mass destruction and the invention of the word ‘genocide’. While Legal Positivism remained the dominant legal theory up until mid-century, it would soon attract criticism after its failure to protect against the grave abuse of power granted by the protection of national sovereignty in the Second World War. WWII was one of the most catastrophic events the world had seen and truly shook the established world order leading to the revival of natural law. I submit that the two major reasons for this revival can be attributed to the impact of the Nuremburg Trials and the post-war human rights phenomenon, both consequences of WWII.

The Nuremburg trials (1945-46), were a series of trials held in Nuremburg which tried the former leaders of the Nazi regime for war crimes committed during WWII.²² Positive Law, as mentioned above, was the default legal theory of the period. This meant that law which had a legitimate source, that is, had been properly enacted by the state, were not to be rendered invalid as a result of their immorality.²³ The prosecutors at the Nuremburg Trails could not fault the actions of the Nazi leaders since they were following the legitimately enacted laws of the State. Therefore, to be successful, they had to look past Legal Positivism and appeal to natural law. The Chief-Prosecutor, Robert H. Jackson (1892-1954), in fear

²² *Encyclopedia Britannica*, above n 10.

²³ Augusto Zimmermann, ‘Legislating Evil: The Philosophical Foundations of the Nazi Legal System’ (2010) 13 *International Trade and Business Law Review* 221, 231.

of failure, avoided appealing directly to natural law, but instead appealed to universal criminal jurisdiction ‘by locating a deep normative core in the existing practices of civilized nations’.²⁴ The decision in the Nuremburg Trials resulted in the birth of the ‘Nuremburg Principle’, which basically imposes an obligation upon individuals to disobey laws which are clearly recognisable as violating higher moral principles.²⁵ So while the judgment never referred to natural law directly, in essence it was the deciding factor.

After WWII, there was a desire to establish a new world order governed by International law. It was hoped the newborn United Nations, pioneered by President Franklin D. Roosevelt, would live up to the task of protecting the world from another global war.²⁶ The UN Charter (1945) drew heavily from natural law principles in entrenching an objective set of natural fundamental rights that would apply across all nations irrespective of positive state law which applied to every person merely for being human.²⁷ These basic human rights, while mentioned in the preamble and article one of the UN Charter, were actually listed in the Universal Declaration of Human Rights (1948).²⁸ This document inspired the invention of numerous declarations and other conventions around the world such as the European

²⁴ Lawrence Douglas, ‘The Shrunken Head of Buchenwald: Icons of Atrocity at Nuremberg’ (1998) 63 *Representations* 39, 46.

²⁵ Gabriel A Moens, ‘The German Border Guard Cases: Natural Law and the Duty to Disobey Immoral Laws’ in Suri Ratnapala and Gabriel A Moens (eds), *Jurisprudence of Liberty* (LexisNexis Butterworths, 2nd ed, 2011) 271.

²⁶ Jussi M Hanhimaki, *The United Nations: A Very Short Introduction* (Oxford University Press, 2008) 11.

²⁷ Rodger D Citron, ‘The Nuremberg Trials and American Jurisprudence: the Decline of Legal Realism, the Revival of Natural Law, and the Development of Legal Process Theory’ (2006) *Michigan State Law Review* 385, 398.

²⁸ Robert Maddex, *International Encyclopaedia of Human Rights: Freedom, Abuses, and Remedies* (CQ Press, 2000) 347.

Convention on Human Rights²⁹. These rights were not meant to act as a higher law that would invalidate state laws or be enforced by international police, but rather as a benchmark which nation states could measure their positive state laws against.³⁰ America in particular, drew strongly from the human rights tradition, especially drawing upon rights guaranteed in their constitution, which saw civil disobedience take hold as a part of the civil rights movement against racial discrimination and other social movements of the 1960's.³¹

The events of WWII also sparked renewed interest in NLT in jurisprudence academic circles. Starting with Gustav Rabruch, previously a positivist, expressed in his *Rechtsphilosophie* (1945) that Nazi laws did not 'partake of the character of law at all; they were not just wrong law, but were not law of any kind'³². Further the Nuremberg Trials and the 'Grudge Cases' sparked a famous debate between legal theorist Lon Fuller (1902-78) and H L A Hart (1907-92), which would get to the heart of the tension between law and morality. Fuller contended that the Nazi laws were invalid because internal morality was absent from their legal system. On the other hand, Hart argued that immorality should not invalidate laws but rather, retrospective laws should be enacted to fix problems of bad law.³³

Spanning across centuries NLT has indeed proved resilient. With the rise of positivism and the empirical spirit of the period, natural law was not to be found during the nineteenth century through to the mid twentieth century.

²⁹ Ibid 130.

³⁰ Ibid 169.

³¹ Kelly, above n 9, 426.

³² Ibid 419.

³³ Leiboff and Thomas, above n 19, 159.

However, the events and atrocities of WWII were so shocking that they forced a re-emergence of natural law under the guise of human rights and sparked new debates and a sustained academic interest in natural law which still thrives till this day.

