

# Nurture and Natural Law

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## PROLOGUE

When I was six or seven, growing up in Somerville, Massachusetts, my father took me on the bus and the MTA into Boston to walk the Freedom Trail. It was his practice to try to do something alone with each of his three sons on succeeding Saturdays. As we progressed along the Trail, smelling the dust and exhaust fumes of old Boston, my father walked me back into the eighteenth century. We strolled over the Common, and looked into Old South Church (the Boston Tea Party started here, he pointed out), down to the Old State House (the Massacre happened in front of it), Fanueil Hall (stopping for lunch nearby at Durgin Park), and up to North Church (the lanterns signalling Paul Revere looked out to Back Bay, which was water then, he explained). At each stop, he would have me picture the people, the conflicts, the emotions that accompanied the Revolution. It was a time of wonder for me. The names of Otis, Hancock, Revere, the Adams cousins, and even Crispus Attucks were impressed into my mind. This, you should know, was shortly before the Southeast Expressway had cut through Haymarket Square, destroying parts of the Italian and Chinese neighborhoods of Boston, and long before the gentrification of Quincy Market. To find the eighteenth century, my father and I had to wend through the vegetable carts and butchers' stalls, avoiding the roaring delivery trucks which appeared in far greater profusion than what can be seen there today. History then had to be found and imagined. It had yet to be cleaned up and placed beside the boutique and atrium restaurant.

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Since that time, history has always been an exercise in imagination to me, as I attempt to transfer myself into the person and time I am reading about. Today, my father (now eighty-five) and I exchange history books and articles. When he visits Ohio, we take automobile treks to find the Old Northwest Territory, Connecticut's Western Reserve, and the industrial revolution. We are the best of friends in our shared quest to know, and we enjoy each other's company immensely.

Now I suggest that if you who read this had a reasonably happy childhood, there was some moment (or moments) of similar awakening for you. As it was for me, I should think that event would be but one small instant in a rich texture of experiences, events, and discoveries that you, your parents, your siblings and relatives, and your childhood friends created and shared. In that texture, I, like you, found and pursued my particular identity, which was exactly what my parents hoped would happen. Since that time, neither I, nor you, have stopped in formation of our selves. And I, like you, continue to seek to make that self "better": in the skills of our respective crafts, in our physical well-being—and perhaps most importantly—in our moral actions. If we don't, we know that we ought to (I really must begin exercising soon). We have setbacks, but the quest continues. We all, I suggest, spend our lives constantly seeking to become better persons.

Now, if that last sentence strikes you as reasonable, then I welcome you to the world of natural law. For what we have jointly found reasonable in that sentence is the following: (1) That we are "beings," existing over time and in place; (2) that we are aware of our "beingness," that is to say, we are each a "self"; (3) that at the root of our being is an individual personality that is unique and can never be replicated; (4) that we all strive to make our selves better, physically, materially, intellectually, and morally; (5) that succeeding in making ourselves better is an exercise in judgment, based on our capacities and on the manner in which we interrelate with our environment and other persons; (6) that we could not have formed our personalities as we have without some vital, caring assistance of other persons; and (7) that we know all this by reflecting upon our (and others') lives, that is to say, upon our shared human experience.<sup>1</sup> Each of those proposi-

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<sup>1</sup> In this, I, of course, differ *toto caelo* from the deconstructionists and other antinomians who hold that reality is unknowable or that, at best, it is

tions is a staple of a natural law philosophy, and each comes from a manner of reasoning that is more reflective than analytical though no less logical.

## I. NURTURE

What my father did for me that Saturday, and what my parents and other relatives did for me every day of my childhood, was to nurture me. They gave me direction, encouragement, example, and material sustenance so that I could "do all that I was capable of doing," as the stock phrase goes. Whatever potentiality for excellence they divined in me they sought to nurture, that is, they sought to provide me with the basis for my own individual achievement.

It was not mere altruism that my parents gave to me, but the broader virtue of nurture. Altruism, defined as giving to another without thought of gain for oneself,<sup>2</sup> is a drier concept than nurture. I can conceive of altruism at arm's length, a distant form of assistance—modern welfare structures, for example.<sup>3</sup> Nurture requires a complex and subtle relationship, and, usually, some degree of intimacy. Nor is it ordinary friendship. If it is friendship, it is at least a special form of friendship. Aristotle described friendship as seeking the good of the other,<sup>4</sup> but the kind of good that nurture seeks is the self-realization of the other. Nurture, therefore, requires more than kindness and certainly more than

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constructed through our own will-directed rationality. Instead, I adhere to the realist tradition in philosophy and begin without justification or any felt need for justification on the ground that human co-rationality and intersubjectivity give us access to reality, permit us to understand reality as it is and as it is experienced by humans, and to make arguments and reach conclusions about reality that we can convince one another of. In other words, the philosophers of the natural law tradition approach philosophy the way any ordinary person approaches life: it's there, and despite its difficulties, it can be understood.

<sup>2</sup> See generally C. DANIEL BATSON, *THE ALTRUISM QUESTION: TOWARDS A SOCIAL PSYCHOLOGICAL ANSWER* (1991) (analyzing social and psychological bases of altruistic behavior); I ERVIN STAUB, *POSITIVE SOCIAL BEHAVIOR AND MORALITY: SOCIAL AND PERSONAL INFLUENCES* (1978) (examining types of influences that cause people to behave positively towards others).

<sup>3</sup> MARVIN OLASKY, *THE TRAGEDY OF AMERICAN COMPASSION* 167-99 (1992) (describing history of welfare programs in United States).

<sup>4</sup> ARISTOTLE, *THE ETHICS OF ARISTOTLE: THE NICHOMACHEAN ETHICS*, Book IX ch. 4, 293 (J.A.K. Thomson trans., 1980) [hereafter *ARISTOTLE, ETHICS*].

pity. It depends upon empathy, but is a special form of action taken at the moral behest of empathy.<sup>5</sup>

True, like altruism, nurture seeks to benefit another, and like friendship, it seeks the good of the other. The good it seeks, however, is an excellence of accomplishment in any of the arts of life, whether knowledge, productivity, aesthetics, or moral acuity. The goal of self-realization is in that excellence of accomplishment, itself an ongoing process that never ends.<sup>6</sup> Nurture looks to the particular endowments of the individual and seeks to provide the basis for that individual's instantiation of her own identity. It fosters growth, "perfects, advances, furthers" the good that is in the other person, to "unfold more completely" one's latent capacities.<sup>7</sup> It respects the individuality of the other person. Think, for example, of how parents enjoy describing the unique personalities of each of their children.<sup>8</sup>

Nurture is not, however, doting kindness. It does not serve another's wants or desires, but rather it looks to another's needs.<sup>9</sup> By "needs," I mean that ensemble of requirements—material, emotional, and moral—that supports a particular individual's achievement of any range of life's goods.<sup>10</sup> Nurture can, therefore, include a real component of discipline, for ultimately, it is the habit of self-discipline that permits us to accomplish anything

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<sup>5</sup> See C. Daniel Batson, *How Social an Animal? The Human Capacity for Caring*, AM. PSYCHOLOGIST, Mar. 1990, at 330, 339-40 (exploring whether empathetic desire to help others arises from egoism or altruism).

<sup>6</sup> JOHN M. FINNIS, NATURAL LAW AND NATURAL RIGHTS 96 (1980).

<sup>7</sup> SARA RUDDICK, MATERNAL THINKING: TOWARD A POLITICS OF PEACE 82 (1989).

<sup>8</sup> Nor can we say that nurture is only an instinctive response of the human animal to preserve his gene pool for future reproductive success. The wide practice of abortion (and indeed of contraception) militate against nurture being merely an instinctive response to increase the chances of survival. Rather, nurture has to be a moral command, bred of our sense of our human selves and identities. And like all moral commands, nurture may be well or ill practiced.

<sup>9</sup> To the question of whether something is good because one desires it, or he desires it because it is good, Aristotle decided upon the latter, but his notion of desire in this case was the organism's seeking to have its natural good actualized, rather than in having its range of pleasures increased. HENRY B. VEATCH, HUMAN RIGHTS: FACT OR FANCY? 101 (1985).

<sup>10</sup> Needs, in this sense, are objective. They are "goods" in need of satisfaction. To take a personal predilection, a person may want potato chips, but need broccoli. Or, a person may want to watch MTV, but need to study her math.

of personal note. Put another way, nurture assists another person in her particular participation in and among life's objective goods.<sup>11</sup>

Under the theory of natural law there are certain values that are objectively good for the human person: life, knowledge, virtue, craft, aesthetics, community, and so on. (There is some variation in the litany, depending upon the theorist.) Nonetheless, the manner of accomplishing or participating in these goods is fully individual. Further, since the manner of participation is a matter of personal judgment, it is also a matter of personal responsibility. One can know how well one is doing in the effort for a greater involvement in the goods of life, that is to say, one can know (if one reflects on it) whether one is indeed becoming a better person. Accordingly, one could also fairly judge whether another person was "wasting his talents," or, "becoming a credit to himself."

Parents tend to blame themselves for the moral and material failings of their children. Indeed, nurture, like all moral actions, needs judgment, craft, and practical reasonableness to be successful. It requires enormous subtlety, a sense of timing and proportion, and a notion of how to measure success in increments. A nurturing parent is daily called upon not only to perceive and exploit opportunities for the child, but to control and mitigate any damage that can occur from all sides, even from the parent's own missteps. All of us can recall attempts at nurture that have failed because of our lack of knowledge, or from poor execution. Nonetheless, nurture, strictly speaking, cannot be said to have failed simply because the recipient turned out to be a ne'er-do-well. That nurture is directed to the self-realization of the other person means that the other person has a responsibility for his relative range of successes and failures. In nurture, one gives for the good of the other. If the other fails to "make good" on the gift (absent a misfortune or harm not of one's making), it is that person's failure, not the parent's.

Nurture, like many other forms of assistance to others, depends upon empathy, a concept noted by moral philosophers such as Aristotle, St. Thomas Aquinas, David Hume, and Adam Smith.<sup>12</sup> But it is more than just associating one's self with another's par-

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<sup>11</sup> FINNIS, *supra* note 6, at 64, 84, 96, 100, 104.

<sup>12</sup> See BATSON, *supra* note 2, at 17-32 (summarizing various philosophical views on egoism and altruism).

ticular needs (e.g., "If I were hungry and on the street, I would want a hot meal."). Rather, nurture's empathy is one that not just identifies with the other, but respects the other's particularity. It sees the other as a *self* like my self, unique and having its own special gifts. Thus, although I have little talent in graphic arts, if I see my four year old son delighting for hours in drawing and molding, I shall seek an opportunity for that talent to develop according to its own potentialities.

Finally, the giving of nurture, though directed at the individual good of the other, is necessary for the moral self-realization of the giver himself. It is an act of moral excellence that requires empathy, judgment, restraint, and respect for the other person. As we would have been hampered in developing each of our respective identities had we not received nurture from someone else, so too, without opportunities to dispense nurture, we would be unable to achieve our own moral individuality. Thus, in one sense, the egoism/altruism dichotomy<sup>13</sup> in psychology is false, for under natural law's conception of human excellence, one cannot instantiate one's own unique personality without (at the same time) engaging in helping others to do the same. It is not a *quid pro quo*. The two are bound up indissolubly in the same activity.<sup>14</sup>

Nurture, then, is a universal necessity and, if the principles of natural law hold true, a universal moral command. It is applied, like all moral commands, in particular circumstances. Although the term is most commonly used regarding parental obligations towards children,<sup>15</sup> the need for differing kinds of nurturing and

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<sup>13</sup> See *id.* at 1-58 (discussing whether concern for others is based on altruism or egoism).

<sup>14</sup> It follows, of course, that Nietzsche and Ayn Rand are totally wrong, and perversely so. Each found charity to be destructive of the ego's own accomplishments. *Id.* at 26-27, 214. In fact, not only does the philosophy of natural law dispute this, I believe that human experience shows it to be false. Just listen to parents discussing the activities of parenting with one another, or more directly, listen, if you could, to the private conversations at the end of the day of a mother and father discussing their interrelated roles in raising their children. In the very quest to nurture the children, each parent defines his and her own moral personality. (And, in the same process, the mother and father nurture one another.)

<sup>15</sup> Often, however, in the nature vs. nurture debate, nurture loses its richer meaning and becomes merely a synonym for behavior that is influenced by a child's environment rather than by his genetic makeup. See, e.g., *SOCIOBIOLOGY, BEYOND NATURE/NURTURE? REPORTS, DEFINITIONS AND DEBATE* (George W. Barlow & James Silverberg eds., 1980) (examining how genetic traits determine social behavior).

the obligation to be a nurturer continue throughout our lives. It is not, as Kohlberg suggested, a transient stage on the way to adult Kantian moral independence.<sup>16</sup> Nor is it a moral attribute, as argued by Gilligan, primarily limited to the female gender.<sup>17</sup> That we may see it most concretely actualized in mothers does not mean that nurturing does not go on in other forms and other relationships.<sup>18</sup> A good teacher nurtures. A good lawyer is a nurturer. Even a child, in dazzling moments of insight, nurtures his mother or father.

If nurture is a universal moral norm derived from natural law, then what does that augur for the law, the polity and social policy?<sup>19</sup> Can we find a system that not only protects persons from the evil and careless acts of others, but encourages and supports

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<sup>16</sup> Cf. 2 LAWRENCE KOHLBERG, *THE PSYCHOLOGY OF MORAL DEVELOPMENT* 146-47 (1984) (demonstrating that young children do good for others to please adults, not because it is appropriate moral behavior). For Kohlberg, nurturance seems to occur at stage three in moral development: "Good boy orientation. Orientation to approval and to pleasing and helping others. Conformity to stereotypical images of majority or natural role behavior, and judgment by intentions." *Id.* at 44, table 1.2.

<sup>17</sup> CAROL GILLIGAN, *IN A DIFFERENT VOICE: PSYCHOLOGICAL THEORY AND WOMEN'S DEVELOPMENT* 62 (1982). Gilligan does not use the term nurture, but an "ethic of care." For example, she writes, "The ideal of care is thus an activity of relationship, of seeing and responding to need, taking care of the world by sustaining the web of connection so that no one is left alone." *Id.*

<sup>18</sup> Even Aristotle noticed the particular excellence in the virtue of friendship that mothers had for their children because of their greater capacity for empathy ("one who shares his friend's joys and sorrows"). ARISTOTLE, *ETHICS*, Book IX ch. 4, *supra* note 4, at 293. When I was a second year law student, my instructor, Judge Jack Weinstein, invited his evidence class to attend one of his trials at our convenience. The one I attended was a negligence suit by two teenage boys who had been blinded as children when they had set off some dynamite caps while playing by a railroad track. After the jury panel had been seated, the judge asked the plaintiffs to enter the courtroom. The two boys, carrying white canes, were guided in. At the moment we all saw them and their scarred eyes, gasps of dismay swept through the panel. One woman immediately stood up, her eyes moving between the judge and the plaintiffs, and said in a voice that was emotional but resolute, "Your honor, I am a mother. I don't know how any mother can be objective in this case. I know I couldn't." The judge excused her from the panel.

<sup>19</sup> Because I am limiting the scope of my inquiry to nurture and the modern natural law ethics, I am placing to one side the enormous literature on "social justice." For the same reason, I must also hold in abeyance commentary or analysis on the debate in current feminist literature on the ethic of caring.

nurturing relationships upon which moral excellence and human happiness depend? Such a system would run counter to the egoism that seems to dominate much of the political spectrum today. When rights become simple powers, and not requirements for the practice of moral excellence; when educational policy becomes pressure group controlled, and is not directed towards the nurturing of the child or the parent/child relationship; when the poor are treated as objects, and not subjects with potentialities of individual self-realization; and when individuals are taught to perceive of themselves primarily as members of victim groups, and not as unique individuals with capacities for accomplishment; a governmental attitude encouraging nurture would be an appropriate (if perhaps unwelcome) antidote. Such a governmental policy should also respect an environment where nurturing relationships already flower, and be wise enough to leave it alone.

## II. NURTURE AND THE NATURAL LAW

First some preliminaries. What do I mean by "natural law"? In this Essay, I shall, in general, limit my discussion to the perspectives offered by philosophers in the Aristotelian school, which is about as mainline a natural law theory as one can find. Let us begin our brief excursus with some working definitions that accord in general with the views of many of the traditional natural law theorists. Nature, we can say, is the way things are, and why they are what they are (e.g., what is a manatee, and why is it different from other water mammals?). Laws in the broadest sense are rules, either describing (or predicting) how things act in fact (e.g., the phases of the moon), or (for purposeful agents) how they ought to act (i.e., moral rules). Laws enacted by the state are an amalgam of authoritative rules, a portion of which declare how persons are to act. In short, laws seek to regulate human behavior towards some end. Ultimately, natural law asks, what is the end of human nature and how can laws assist humans to fulfill that end?

The tradition of natural law is based on the argument that moral and legal rules can be derived from a reflection on human nature.<sup>20</sup> Conceptions of the relationship of nature to humanity

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<sup>20</sup> It was Plato, Aristotle, and the Stoics that made the notion of nature the grounding for morality, and eventually, law. EDGAR BODENHEIMER, *JURISPRUDENCE: THE PHILOSOPHY AND METHOD OF THE LAW* 6-20 (2d ed. 1967). As long as the proposition that nature and law are interrelated has



and to law differ among many philosophers in the tradition.<sup>21</sup> Most, however, start with an idea of human nature,<sup>22</sup> and from

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been maintained, it has, of course, been contested. The Sophists, for example, asserted that nature and law were opposed to one another. *Id.* at 5-6. Kant, in contrast, held that nature could never be a source of moral rules, while the modern philosophies of utilitarianism and positivism remained skeptical of the natural law enterprise. *Id.* at 61-62. *See, e.g.*, Jeremy Bentham, *A Critical Examination of the Declaration of Rights*, in *THE WESTERN IDEA OF LAW* 502-06 (J.C. Smith & David N. Weisstub eds., 1983) (arguing that rights of man derive from government, not nature); HANS KELSEN, *WHAT IS JUSTICE?: JUSTICE, LAW, AND POLITICS IN THE MIRROR OF SCIENCE* 137-97 (1957) (criticizing notion that natural laws are basis for human morality). Nonetheless, the natural law tradition persists. Since 1980, in particular, there has been an effusion of significant natural law writing. *See, e.g.*, CHARLES COVELL, *THE DEFENCE OF NATURAL LAW: LAW AND JUSTICE IN THE WRITINGS OF LON L. FULLER*, MICHAEL OAKESHOTT, F.A. HAYEK, RONALD DWORKIN, AND JOHN FINNIS (1992) (comparing natural law principles among modern political theorists); FINNIS, *supra* note 6 (providing overview and analysis of current natural law theory); DAVID GRANFIELD, *THE INNER EXPERIENCE OF LAW: A JURISPRUDENCE OF SUBJECTIVITY* (1988) (examining whether classicist and modern theories of natural law may provide basis for moral conduct); RUSSELL HITTINGER, *A CRITIQUE OF THE NEW NATURAL LAW THEORY* (1987) (critiquing modern natural law theory of Germaine Grisez and John Finnis); ALISDAIR MACINTYRE, *AFTER VIRTUE: A STUDY IN MORAL THEORY* (1981) (arguing that 18th century naturalism law does not provide basis for morality); *NATURAL LAW THEORY: CONTEMPORARY ESSAYS* (Robert George ed., 1992) (presenting current views on natural law theory); DOUGLAS B. RASMUSSEN & DOUGLAS J. DEN UYL, *LIBERTY AND NATURE: AN ARISTOTELIAN DEFENSE OF LIBERAL ORDER* (1991) [hereafter RASMUSSEN] (arguing that Aristotelian principles can support Lockean theory of rights); VEATCH, *supra* note 9 (analyzing natural law's role in providing system of ethics); LLOYD L. WEINREB, *NATURAL LAW AND JUSTICE* (1987) (analyzing relationship between natural law, legal positivism, and justice).

<sup>21</sup> *See, e.g.*, GRANFIELD, *supra* note 20, at 177-216 (emphasizing intersubjective essence of natural law); HITTINGER, *supra* note 20, at 1-92 (analyzing natural law theory of Germaine Grisez and John Finnis). Some natural lawyers, such as Herbert Spencer, perceive humanity as an aspect of nature and urge that human laws reflect that fact. *See, e.g.*, HERBERT SPENCER, *THE PRINCIPLES OF ETHICS* (1978). Others, like Lon Fuller, see natural law as part of a more focused inquiry on what constitutes the nature of law itself. LON L. FULLER, *THE MORALITY OF LAW* 96-106 (1964).

<sup>22</sup> Sometimes equated with human good, derived from reason. *See* FINNIS, *supra* note 6, at 35-36. By human nature, I mean the commonality of humanness shared by all individual men and women at all stages of their biological existence. The traditional noun "man" in this sense, even with its unfortunate gender restrictiveness, carries the notion of an individual human both in one's particular identity and in the collective essence of one's

that conception, seek to find the norms by which human law should be formulated.<sup>23</sup> That approach is the hallmark of the Aristotelian school.

The norms are normally derived by a reasoned reflection on human life and existence in its individual and social aspects. Once derived, those primary normative principles are available to guide both the law maker and the individual, either imperatively or aspirationally, into proper modes of action. Thus, the natural law tradition rejects arriving at moral and legal norms from the more narrow utilitarian concept of human nature as driven by a pleasure/pain calculus. Likewise, the tradition (usually) rejects the Kantian route of arriving at imperatives rationally and independently of a conception of nature.<sup>24</sup> Whether state of nature/

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shared humanness with others. "Humankind" misses the individualistic half of the concept, while "each and every human person" misses the shared essence of what it is to be human. It is possible that the failure of present day philosophers to arrive at an acceptable substitute for the word "man," which would meld the particular and the generic in a single noun, is but an aspect of the disintegrative positivism of much of today's legal and moral philosophy.

<sup>23</sup> John Wild defines natural law as "a universal pattern of action, applicable to all men everywhere, required by human nature itself for its completion." JOHN WILD, *PLATO'S MODERN ENEMIES AND THE THEORY OF NATURAL LAW* 64 (1953) (emphasis omitted). In a similar vein, Ronald Garet offers that natural law is "a theory that associates its claims about the ordering of basic social relations with claims about human nature. Natural law theories elaborate a vision of human nature and attempt to make that vision available to political philosophy." Ronald R. Garet, *Natural Law and Creation Stories*, *NOMOS XXX: RELIGION, MORALITY, AND THE LAW* 218, 218 (J. Roland Pennock & John W. Chapman eds., 1988). I think it evident that even those who look at nature generically and those who concentrate on the internal nature of law are both centrifugally pulled into the human focus. I have suggested elsewhere that Fuller's defense of his theory against the criticisms of H.L.A. Hart pushed Fuller into acknowledging the dependency of his view on a moral theory of human action. See David F. Forte, *Natural Law and Natural Laws*, 26 *UNIVERSITY BOOKMAN* 75, 82 (1986) (arguing "good" of law is connected to "good" of man). Another author has suggested that Hart's minimal theory of natural law is far stronger than even Hart apparently believed. See DANIEL W. SKUBNIK, *AT THE INTERSECTION OF LEGALITY AND MORALITY: HARTIAN LAW AS NATURAL LAW* (1990).

<sup>24</sup> See VEATCH, *supra* note 9, at 11-33. Note also Veatch's and Hittinger's criticism of John Finnis and Germaine Grisez on whether norms can indeed be deduced from human nature as it is, or whether a "Kantian turn" towards rationalism is a useful supplement. *Id.* at 93-104; HITTINGER, *supra* note 20, at 10-93 (criticizing Finnis' and Grisez' modern natural law theories); see also WEINREB, *supra* note 20, at 108-15 (criticizing Finnis' natural law theory).

law of nature theorists like John Locke are part of or opposed to the natural law tradition remains contested.<sup>25</sup>

Although proponents of natural law sometimes disagree as to its source, content, and justification, natural law seems to fulfill the continuing need of the Western legalist to have some touchstone by which to judge the goodness or badness, or even perhaps the validity or invalidity, of positive law.<sup>26</sup> Accordingly, if nurture is a moral excellence, we can judge whether the legal system is assisting or hindering that good. We can assay whether certain social programs are, in the true sense of the word, justified.

Indeed, whether or not positive laws are justified is one of the primary utilities of natural law theory.<sup>27</sup> If a positive law formally and substantively meets the standard of justification, the natural lawyer normally concludes that the law so promulgated carries with it an obligation of the subject to obey.<sup>28</sup> Thus, the notion of "the rule of law" morally binding all to obey justified positive enactments (as opposed to the arbitrary power of a person or group compelling obedience solely by coercion) is commonly a necessary attribute of most natural law theories.<sup>29</sup> As Aristotle put it, "[H]e who asks Law to rule is asking God and Intelligence

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<sup>25</sup> See VEATCH, *supra* note 9, at 4-10 (questioning whether state-of-nature theorists ascribe to natural law theory). One study finds nearly everybody in the natural law tradition. See FRANCIS H. ETEROVICH, *APPROACHES TO NATURAL LAW FROM PLATO TO KANT* (1972) (tracing evolution of natural law theory from ancient Greek to contemporary philosophers). The general argument of Weinreb is that the state of nature theorists eventually led Western thought away from a focus on the concept of nature to the state as the source of law. See generally WEINREB, *supra* note 20. For an intermediate position, see A. JOHN SIMMONS, *THE LOCKEAN THEORY OF RIGHTS* (1992).

<sup>26</sup> To Georgio del Vecchio, for example, "The conception of absolute justice is one of the fundamental needs of the human mind." GIORGIO DEL VECCHIO, *THE FORMAL BASES OF LAW* 14-15 (John Lisle trans., MacMillan Co., 1969) (1914). d'Entrèves declared, "Natural law is the outcome of man's quest for an absolute standard of justice." A.P. D'ENTRÈVES, *NATURAL LAW: AN INTRODUCTION TO LEGAL PHILOSOPHY* 93 (2d rev. ed. 1972).

<sup>27</sup> Yves Simon makes the connection succinctly: "[N]othing would be right by enactment if some things were not right by nature." YVES R. SIMON, *THE TRADITION OF NATURAL LAW: A PHILOSOPHER'S REFLECTIONS* 118 (Vukan Kuic ed., 1992).

<sup>28</sup> See, e.g., FINNIS, *supra* note 6, at 314-20 (proposing that positive laws rooted in natural law principles generally compel greater obedience).

<sup>29</sup> See *id.* at 270-76 (asserting that legal systems adhering to "Rule of Law" promote notions of common good).

and no others to rule; while he who asks for the rule of a human being is bringing in a wild beast."<sup>30</sup>

Whether a positive law is justified or not is, of course, question begging. Consequently, natural law philosophers are almost invariably drawn to the issue of justice, and to elucidate justice, they usually require an implicit or explicit theory of rights. And a theory of rights returns one to a reflection on the nature of the human person.

The circularity of the reflective process (although not necessarily one of circular logic), beginning and ending with the concern of what it is to be truly human, often takes the natural law theorist into fields of inquiry beyond philosophical logic. These theorists have used history, theology, science, and art to illuminate the central inquiry.<sup>31</sup> Yet despite the wide-ranging openness of the natural lawyer to different perspectives on what constitutes the essence of human enterprise, many modern observers who have had contact with the idea of natural law have the impression that it is a narrow and static set of rules, something like a philosophical Decalogue. In casual conversation among academics, the question is often heard, "Do you believe in natural law?" as if it is a creed and not a reasoned theory.<sup>32</sup> Some think of natural law as

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<sup>30</sup> ARISTOTLE, *POLITICS*, Book III ch. 16, 143 (T.A. Sinclair trans., Penguin Books, 1964) [hereafter ARISTOTLE, *POLITICS*]. And Giorgio del Vecchio writes: "It is not without deep-seated reason that in all ages and countries the idea of natural law, that is, one founded on the very reality of things and not on the simple 'placet' of the legislature, has been cultivated." DEL VECCHIO, *supra* note 26, at 15.

<sup>31</sup> The works of Aristotle, Cicero, and Grotius are some classical examples. See, e.g., ARISTOTLE, *POLITICS*, *supra* note 30 (analyzing interaction between government and citizenry); ARISTOTLE, *ETHICS*, *supra* note 4 (defining characteristics of goodness, virtue, and happiness); CICERO, *DE OFFICIIS* (Walter Miller trans., 1975) [hereafter CICERO, *DE OFFICIIS*] (developing theory of duty), CICERO, *DE RE PUBLICA* (T.E. Page et al. eds., Clinton W. Keyes trans., 1966) [hereafter CICERO, *DE RE PUBLICA*] (using history of Roman republic to analyze forms of government); GROTIUS, *THE RIGHTS OF WAR AND PEACE (DE JURE BELLI AC PACIS)* (A.C. Campbell trans., 1901) (analyzing rights of states in war and peace).

<sup>32</sup> According to Alf Ross, the Scandinavian positivist, "Natural law seeks the absolute, the eternal, that shall make of law something more than the handiwork of human beings and exempt the legislator from the pains and responsibility of decision." ALF ROSS, *ON LAW AND JUSTICE* 258 (1974). Elsewhere, he concludes, "Such an attitude to life is typically infantile." *Id.* Jeremy Bentham was more pithy, calling natural law "nonsense upon stilts." 2 JEREMY BENTHAM, *Anarchical Fallacies*, in *THE WORKS OF JEREMY BENTHAM* 105 (John Browning ed., 1962).

a self-contained set of immutable principles, anthropomorphically operating as Holmes' "brooding omnipresence in the sky,"<sup>33</sup> a stern demigod high in the legal mythos handing down laws to humans or judging which human laws shall stand.<sup>34</sup> That inaccurate image of natural law may in fact derive from our notion of law imbued in us by positivist legal philosophers of the last two centuries. If law is a command backed by a sanction, then natural law must be (if it existed) a Calvinist higher order meticulously regulating how people can construct their affairs.<sup>35</sup> People often impute to others what they see in themselves.

In fact, most natural law philosophers not only have a broader attitude as to what constitutes "law" than do the positivists, they also emphasize the contextual manner in which the principles of natural law operate.<sup>36</sup> If human nature is a constant, the human personality is radically individualistic. If the social realm is an essential element of every person's "humanness," the variety of interpersonal experiences is nonetheless infinite.<sup>37</sup>

There is a further particular harm that comes from a static image of natural law, besides its inaccuracy. It sees law as essentially restrictive and not enabling. In contrast, for many natural law theorists, the notion of natural law does not restrict the function of law, but enlivens it: "[T]he law first educates men and then

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<sup>33</sup> Holmes actually made the remark about the common law, not natural law, but the negative image is the same. *Southern Pacific Co. v. Jensen*, 244 U.S. 205, 222 (1917) (Holmes, J., dissenting) ("The common law is not a brooding omnipresence in the sky but the articulate voice of some sovereign or quasi sovereign that can be identified. . .").

<sup>34</sup> "The natural-law doctrine undertakes to supply a definitive solution to the eternal problem of justice, to answer the question as to what is right and wrong in the mutual relations of men." Kelsen, *supra* note 20, at 137.

<sup>35</sup> Roscoe Pound describes natural law as an ideal law to which "the positive law, the body of norms, that is, authoritative models or patterns of decisions, should be made to conform." ROSCOE POUND, *JUSTICE ACCORDING TO LAW* 6 (1958). He tags this ideal law as "positive natural law." *Id.* Russell Hittinger appropriately rejoins, "[I]t is a mistake to envisage natural law as a ready-made body of law (a meta-positive law, as it were) to which the problems of human positive law can immediately be referred." Russell Hittinger, *Introduction* to SIMON, *supra* note 27, at xxvii (1992).

<sup>36</sup> "When [fundamental principles of justice] are modified under changed circumstances, moral duty also undergoes a change, and it does not always remain the same." CICERO, *DE OFFICIIS*, *supra* note 31, at 33 (I.x.32).

<sup>37</sup> See VEATCH, *supra* note 9, at 108-12 (arguing that creativity and individuality are integral part of human nature).

empowers them to decide," wrote Aristotle.<sup>38</sup> In other words, the law (properly formulated), nurtures.

### III. NURTURE AND RIGHTS

For natural lawyers, the ethic of caring has traditionally been termed "subsidiarity," meaning assistance.<sup>39</sup> "Nurture," I think, is the better descriptive. Nurture comprehends not only the obligation to assist, but also connotes the supportive, interpersonal, and individualistic kind of relationship that the natural law tradition affirms.<sup>40</sup>

What then are the human needs that need nurturing? And who, in the indeterminable variety of possible relations and circumstances over time, has an obligation to meet these needs? When can the state compel me to be my brother's keeper? It seems clear we cannot assist everyone equally. As St. Thomas Aquinas puts it, "[N]o man is sufficient to bestow a work of mercy on all those who need it."<sup>41</sup> Not only would such a task be impossible, it would be destructive of one's own individuality. Nor, on the other hand, can we become totally isolated, even by choice, from assisting anyone else's beneficial objectives, or from accepting the dependency we have on others for the constitution of our own lives and identities.<sup>42</sup> Where to begin? Where to draw principled limits?

First, we should assume, as did the ancients, that for nurture to

<sup>38</sup> ARISTOTLE, *POLITICS*, Book III ch. 16, *supra* note 30, at 143.

<sup>39</sup> FINNIS, *supra* note 6, at 146.

<sup>40</sup> As Finnis defines subsidiarity, "[T]he proper function of association is to help the participants in the association to help themselves or, more precisely, to constitute themselves. . . ." *Id.*

<sup>41</sup> SAINT THOMAS AQUINAS, *ON LAW, MORALITY, AND POLITICS* 191 (William P. Baumgarth & Richard J. Regan eds., 1988). Aquinas also stated, "Absolutely speaking it is impossible to do good to every single one: yet it is true of each individual that one may be bound to do good to him in some particular case. Hence charity binds us, though not actually doing good to someone, to be prepared in mind to do good to anyone if we have the time. . . ." 2 ST. THOMAS AQUINAS, *SUMMA THEOLOGICA* Pt. IIa-IIae, Q. 31, art. 2, reply obj. 1 (Richard C. Meyer ed., Fathers of the English Dominican Province trans., 1947). See JUDITH N. SHKLAR, *THE FACES OF INJUSTICE* (1990) for an argument that one's obligation to others is more wide-ranging. For a discussion of others who hold that one's responsibility to others is universal, see FINNIS, *supra* note 6, at 195.

<sup>42</sup> See FINNIS, *supra* note 6, at 141-50 (highlighting human need for friends, family, and community).

have any place in a social order, the first rule must be: at the least, do no harm.<sup>43</sup> One cannot harm and nurture at the same time.<sup>44</sup> But harm presupposes that another enjoys fundamental immunities. Thus a theory of rights must provide a source of necessary immunities (including the loss of certain immunities when one threatens another with harm). As we discover what we may, or perhaps, must do *for* other people, we must set limits on the means we utilize on what we can do *to* them. Assistance can only be based, therefore, on aiding the good of the other. Assistance that purports to use harm as a "necessary means" to someone else's good would not only be an invasion of right, it would be illogical and contradictory to its purpose. In a word, it would be immoral.

Furthermore, a theory of needs-based obligations without a theory of immunities could be used to justify a regime of positive rights, seemingly with no protection against a state that smothers individual rights in the name of benefitting citizens whilst leaving virtually no room for the constitutive activities of the individual human personality.<sup>45</sup> A bare theory of negative rights, on the other hand, provides little protection for the fragile network of supportive relationships upon which each of us depends.

The rub is this: if we have too weak a theory of rights, the indi-

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<sup>43</sup> "The first office of justice is to keep one man from doing harm to another, unless provoked by wrong. . . ." CICERO, *DE OFFICIIS*, *supra* note 31, at 23 (I.vii.20).

<sup>44</sup> Simply because someone does not like something, or believes it is painful, does not mean there is harm. Properly proportioned discipline (of children and adults) is not a harm if done towards encouraging the development of moral habits. Aristotle is blunt: "[T]he man who lives in accordance with his feelings would not listen to an argument to dissuade him, or understand it if he did. And when a man is in that state, how is it possible to persuade him out of it? In general, feeling seems to yield not to argument but only to force." ARISTOTLE, *ETHICS*, Book X ch. 9, *supra* note 4, at 336.

<sup>45</sup> See VEATCH, *supra* note 9, at 179-80 (arguing that government social programs invariably entail impairing rights of some to benefit others). In the draft Ukrainian Constitution, for example, Article 24 guarantees equality, but permits special privileges if established by law. Article 40 permits freedom of expression unless it rouses religious hatred. Article 10 declares that "private property is inviolable," but Article 48 contains the reservation: "The exercise of the right of ownership must not contradict the interest of society as a whole or of individual citizens." DRAFT CONSTITUTION OF THE UKRAINE (prepared by working group of Constitutional Commission of Parliament of Ukraine, Jan. 1992).

viduality of the person could be swallowed up in an enforced obligation to assist others and society. If we have too strong a theory of rights, we divide and separate humans from one another, break essential connections between them, and, indeed, make weaker, not stronger, the individual human identity. A governmental policy that increases separation in the name of individual rights breaks the nurturing connections upon which human individuality ultimately depends. The dilemma for the natural law theorist is in reconciling a theory of needs with a theory of rights. A natural law theory must therefore combine the notion of individual right with individual good for there to be a coherent ethic of assistance.

#### IV. NURTURE AND THE GOOD

Just how does the Aristotelian school of natural law arrive at its notion of an objective human good, which would include the value of nurture? Putting aside the preliminary arguments (mostly epistemological) that lead ultimately to its major operating premises, the Aristotelian natural law school holds that things in nature are in motion (i.e., transition, change, development). It holds that every thing moves (either by its own internal mechanisms, or by external force) from potentiality to actuality; that the nature of every thing distinguishes what its particular potentialities are;<sup>46</sup> that there is a point (or state) of flourishing that every thing could enjoy if its potentialities were fully actualized (its end, or *telos*, which is its "good"); and that one can define what the appropriate state of flourishing would be for any class of things (healthy red oak trees, for example). Furthermore, every individual thing within a class has its own, never to be repeated or duplicated, aspect of flourishing (no two mature, fully grown red oaks are the same).<sup>47</sup> What then is the nature of being human? What is a person's end? What "good" is he striving for?

Now, because the Aristotelian image of things in motion towards an end does not comport with the conceptualizations of modern science,<sup>48</sup> some of the more recent advocates of the Aris-

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<sup>46</sup> Or in some cases, what they can be, depending on the nature of action taken upon it, as a block of stone can be a statute or a paper weight, according to the purpose and execution of the craftsman.

<sup>47</sup> A cogent and far more sophisticated restatement of the Aristotelian argument can be found in VEATCH, *supra* note 9, at 58-67.

<sup>48</sup> See BATSON, *supra* note 2, at 67-73 (contrasting approaches of Aristotelian and Galilean sciences). Those Cartesian premises of modern science have their own problems in attempting to describe nature as it really



totalitarian school simply short circuit that process and move directly towards discussing human nature.<sup>49</sup> But they come to the same general conclusions as Aristotle did. Retaining, therefore, the position that things in the world are knowable through human observation, and that their coherence is apprehensible to human reason, the modern natural law advocates maintain, like Aristotle, that the nature of the human being is to seek happiness and well-being through the practice of virtue. The practice of virtue is the state of flourishing, the end, the good, the perfection of human potentialities that human nature aims at, even though the achievement of the end is by voluntary action and not by any pre-determined "natural" mechanism.<sup>50</sup> Hence (putting aside the practical relevance of good and bad fortune), an individual is the responsible agent of the achievement of her natural end (i.e., the practice of virtue), and can be appropriately blamed or praised depending on how well she acts in achieving it.<sup>51</sup>

That there is a more phenomenological methodology to the observation of human nature today is not contradictory to the reasoned reflection on human experience that Aristotle himself espoused.<sup>52</sup> In any event, the modern advocates of natural law arrive at the same outcome that Aristotle did: the end (the state of human flourishing) of all humans is happiness; happiness consists of the practice of virtue (actually, happiness attends the practice of virtue); virtue is a habit of moral action towards oneself and others (classically, the search for truth and the practice of justice, courage, and benevolence).<sup>53</sup> To achieve the state of well-being

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is. See VEATCH, *supra* note 9, at 222-49 (comparing Aristotelian scientific approach to modern scientific approach); Forte, *supra* note 23, at 77-80 (comparing Aristotelian science to contemporary scientific theories).

<sup>49</sup> Or, in the case of Finnis, fundamental human goods discoverable by practical reason. FINNIS, *supra* note 6, at 35-36.

<sup>50</sup> VEATCH, *supra* note 9, at 82-83.

<sup>51</sup> *Id.* Good fortune may assist, but ultimately every person is responsible for the excellence of her own life.

<sup>52</sup> "For the starting point is the fact; and if this is sufficiently clear there will be no need to ascertain the reason why. Such a person can easily grasp first principles if he is not already in possession of them." ARISTOTLE, *ETHICS*, Book I ch. 4, *supra* note 4, at 67 (emphasis omitted). John Finnis's method of apprehending the basic goods of life has a similar methodology. See FINNIS, *supra* note 6, at 64-69. See generally WILLIAM A. LUIJPEN, *PHENOMENOLOGY OF NATURAL LAW* (1967) (exploring various theories of law including legal positivism, objectivism, existentialism, and natural law).

<sup>53</sup> ARISTOTLE, *ETHICS*, Book I ch. 7, *supra* note 4, at 75-76; see *id.* Book II ch. 7, at 103-06 (relating expanded list of virtues and vices to moral mean);

wherein virtue may effectively be practiced, a number of elements are necessary. There must be a state whose structure both allows and assists the practice of virtue. The coercive and educational force of law must be used (indeed, can only be used) to enforce justice (protect one in the enjoyment of one's rights); to help provide an infrastructure (economic, educational, military, and the prevention of natural harms) in which the individual's physical well-being and his exercise of virtue can flourish; and directly to induce and assist the individual in the practice of virtue.<sup>54</sup> In other words, the objective of law is to seek the common good, that is to say, the good (a state of human flourishing) that is common to all persons (in their respective individualities).<sup>55</sup>

## V. NURTURE AND HUMAN FLOURISHING

What then are the elements of human flourishing, and how does nurture relate to them? To begin, let us see how contemporary natural law theorists distinguish human needs from human goods.<sup>56</sup> Henry Veatch, for example, lists as human needs,

food, clothing, and shelter; association and companionship with others; knowledge and understanding; and opportunities for rest and relaxation, and for aesthetic enjoyment, for the practice of religion, and, indeed, for the so-called finer things of life.<sup>57</sup>

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*cf.* CICERO, *DE OFFICIIS*, *supra* note 31, at 17 (I.v.15) (asserting that morality arises from basic virtues of justice, prudence, fortitude, and temperance).

<sup>54</sup> ARISTOTLE, *ETHICS*, Book X ch. 9, *supra* note 4, at 337.

<sup>55</sup> "[T]he securing of a whole ensemble of material and other conditions that tend to favor the realization, by each individual in the community, of his or her personal development." FINNIS, *supra* note 6, at 154. The common good, of course, includes justice, i.e., the protection of one's negative rights and liberties. RASMUSSEN, *supra* note 20, at 143.

<sup>56</sup> Many philosophers begin with the individual *qua* individual, eliminating the accidents of contemporary society, and construct from there what one's rights and obligations necessarily must be, or what one would necessarily agree to be bound by. A natural law theorist, on the other hand, may survey life as actually lived and arrive at certain "needs" or "goods" as fundamental to being human. Compare JOHN RAWLS, *A THEORY OF JUSTICE* 11-22 (1971) (analyzing how humans devise system of justice based on principles of fairness) with FINNIS, *supra* note 6, at 81-85 (asserting that all human societies share same basic values). Although that inquiry sometimes overlaps with a utilitarian assessment, the natural law theorist generally views human needs and goods as generic and objective, and not a numeric compilation of so many subjective preferences. See, for example, MacIntyre's criticism of utilitarianism. MACINTYRE, *supra* note 20, at 62-64.

<sup>57</sup> VEATCH, *supra* note 9, at 117. Edgar Bodenheimer, in whose memory the essays in this journal are written, notes that common human traits

Elsewhere, Veatch articulates a more extensive rendering of needs, but in the end, emphasizes that the "mere possession" of these things is "not the whole story." The question is how wisely and intelligently these things are used in the ultimate moral obligation of living well and virtuously.<sup>58</sup>

How does one live well and virtuously? It is by participation in the self-evident goods of human existence. John Finnis offers the following: knowledge, life, play, aesthetics, friendship, practical reasonableness (constructing a life's plan), and spirituality.<sup>59</sup> Needs, therefore, are instrumental. I need sustenance in order to live, books in order to learn. Goods, on the other hand, are goods-in-themselves, valuable because the state of human flourishing only occurs according to one's participation in those goods. In that sense, listening to Mozart's Jupiter symphony is non-instrumental; it is an aesthetic experience in and of itself.

Goods, of course, can at times be instrumental. I can listen to the Jupiter Symphony as I study for my music appreciation exam. On the other hand, some things serve as needs and goods at the same time. Life itself is a good that is also a necessary instrumentality for the enjoyment of all other goods.

Nurture is similar. Nurture is a need of all persons to develop their individual potentialities. We are all perpetually dependent to a greater or lesser degree on other persons in the achievement of life's goods. Life requires sustenance, knowledge requires

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include the need for food, the sex drive, the need for security and safety, for recognition and esteem, for love, and for knowledge. EDGAR BODENHEIMER, *PHILOSOPHY OF RESPONSIBILITY* 54-56 (1980).

<sup>58</sup> VEATCH, *supra* note 9, at 79-80. Even when considering the problem of desperate needs, Veatch continues to be tugged by the principle of individual responsibility. *See id.* at 182-83 (arguing that individuals are ultimately responsible for providing for their own needs).

<sup>59</sup> FINNIS, *supra* note 6, at 59-90 (1980). Similarly, Germaine Grisez's list of human goods are

human life, which includes health and safety; all the arts and skills that can be cultivated simply for the sake of their very exercise; beauty and other objects of aesthetic experience; theoretical truth in its several varieties; friendship, both as relationship in immediate liaison and organization in larger communities; the use of intelligence to direct action; the effective freedom to do what one chooses with the whole force of an integrated personality; and a proper relationship to the fundamental principles of reality—i.e., to God.

Germaine G. Grisez, *A New Formulation of a Natural-Law Argument Against Contraception*, 30 *THOMIST* 343, 348 (1966).

teaching, aesthetics requires example, friendship requires friends, play requires playmates, spirituality requires a relationship with some transcendent other, productivity requires reliable partners. In this sense, a person cannot be a person without the nurturing assistance given by another. Nurture is as much a requirement as is safety.

At the same time, the giving of nurture is a moral good necessary for one's happiness. It is easily granted by natural lawyers that one's flourishing cannot occur without other persons to interact with. But there is more to interacting with other persons than there is in interacting with paints and a canvas, or with a profit and loss sheet, or with a spring field in need of plowing. When I interact with another person, I interact with another self. I experience the other, inter-subjectively, as, *in essence*, equal to myself.<sup>60</sup> And thus, the "good" of the other person is as important to me as is my good. Indeed, my own flourishing cannot succeed without my participation in the flourishing of others. In sum, I cannot pursue my own individual flourishing without offering nurture to others. In the very act of nurturing another, I experience my self more concretely. If a governmental policy works to deny me nurturing opportunities, it denies me an essential part of my human flourishing.

In sum, the obligation to nurture derives from a notion that the human person requires as an essential element of one's individual human identity the receiving and giving of assistance, and the alternate engagement in and disengagement from interpersonal relationships. The ancient and medieval proponents of natural law were fully at home with the idea in their notion of obligations and more specifically in their definition of friendship. Aristotle concluded that a friend is one who seeks the good of the other, and that no person could achieve happiness (his natural end) without virtuous friends.<sup>61</sup> In his long, fatherly, and preachy letter to his son, away at school in Greece, Cicero admonishes that

everything that the earth produces is for man's use; and as men, too, are born for the sake of other men, that they may be able mutually to help one another; in this direction we ought to follow nature as our guide, to contribute to the general good by an interchange of acts of kindness, by giving and receiving, and thus

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<sup>60</sup> GIORGIO DEL VECCHIO, *JUSTICE: AN HISTORICAL AND PHILOSOPHICAL ESSAY* 77-78 (A.H. Campbell ed., Lady Guthrie trans., Edinburgh Univ. Press, 1956) (1924).

<sup>61</sup> ARISTOTLE, *ETHICS*, Book IX ch. 9, *supra* note 4, at 293, 303-07.

by our skill, our industry, and our talents to cement human society more closely together, man to man.<sup>62</sup>

Or as the more suspicious Pufendorf put it,

[A]ll the advantages that attend human life today derive from men's mutual assistance. There is nothing in this world, save the great and good God Himself, from which greater advantage can come to man than from man himself.<sup>63</sup>

It is in inducing and assisting the individual in the practice of virtue that requirements of nurture arise. In Finnis's words, the degree of human flourishing depends upon "the quality of interaction among persons."<sup>64</sup> Nurture is perhaps the highest quality of interaction among persons, for its objective is to provide supportive assistance that enables the other person independently to flourish, to achieve excellence in his particular practice of the virtues.

## VI. NURTURE AND THE LAW

From these observations it follows that a society that increases the opportunities for nurture also increases the chances for human happiness. How can the law assist? Seeing that the perfection of persons lay in their practice of moral virtue, many of the ancients looked to the state for the necessary means. Eventually, Cicero hoped, men would "do of their own accord what they are compelled to do by law," but the nature of men's appetites was such that a well-run state was of absolute necessity.<sup>65</sup> Aristotle expected that education, directed by the family or the polity, would train the person in moral virtue. But for those who did not respond to such encouragement, who looked only to their selfish impulses, the coercive power of the state had to restrain them.<sup>66</sup> Some modern Aristotelians, on the other hand, are almost Lockean in their defense of individual rights against the state,<sup>67</sup> and

<sup>62</sup> CICERO, *DE OFFICIIS*, *supra* note 31, at 24-25 (I.vii.22).

<sup>63</sup> SAMUEL PUFENDORF, *ON THE DUTY OF MAN AND CITIZEN ACCORDING TO NATURAL LAW* 34 (James Tully ed., Micheal Silverthorne trans., 1991).

<sup>64</sup> FINNIS, *supra* note 6, at 22.

<sup>65</sup> CICERO, *DE RE PUBLICA*, *supra* note 31, at 17 (I.ii.2).

<sup>66</sup> "[I]n general, feeling seems to yield not to argument but only to force." ARISTOTLE, *ETHICS*, Book X ch. 9, *supra* note 4, at 336.

<sup>67</sup> As Veatch puts it,

no agency of society, of family, of friends, or of whatever can make or determine or program an individual to be a good man, or program him to live a life that a human being ought to live.

insist that the needs of human persons, no matter how great, do not give rise to positive rights with claims on others to assist.<sup>68</sup>

The modern Aristotelians may have a point. Granted that cooperation and nurture should be encouraged in a society, the fact is that the practice of nurture is so individual, so dependent upon the nuances of a relationship at any one time, that it would seem foolish if not arrogant of the state to try to define and enforce when assistance should be given. After a winter storm last December, for example, my two sons and I built a stegosaurus dinosaur out of snow in the backyard. We all three engaged in the human good of play. To do so, we had prior "needs" of certain things. We needed snow (an element of good fortune), and life and health. We needed a backyard, and leisure, and knowledge of what a stegosaurus looked like (which meant we needed education, the results of other persons' participation in research and knowledge, and books, and a system of free communication), all of which to be available to me had to come from the fruits of work and an efficient economic system. Building the stegosaurus was fun, and it also provided my sons with training in cooperation, the development of motor skills, the manipulation of a material element, an experience in aesthetics (it was a pretty good stegosaurus), and some good exercise. How could any state have "constructed" such a range of circumstances so that those opportunities would have been available for me at that time?

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Instead, attaining one's natural end as a human person is nothing if not a "do-it-yourself" job.

VEATCH, *supra* note 9, at 84. For John Finnis, there are absolute rights, derived from the absolute obligations one owes another never "to choose directly against any basic value, whether in oneself or in one's fellow human beings." FINNIS, *supra* note 6, at 225. In contrast, Veatch holds that rights derive not from our obligations to others, but from our obligations to ourselves. Quoting from another philosopher, Veatch asserts, "I ought to develop my own potential for flourishing. So, others ought not to prevent me from developing my potential. . . . So, by the principle of universalizability everyone has such a right." Gilbert Harman, *Human Flourishing, Ethics, and Liberty*, 12 PHIL. & PUB. AFF. 307, 318-19 (1983), *quoted in* VEATCH, *supra* note 9, at 165 n.26. Rasmussen & Den Uyl deduce a range of primary Lockean rights not from one's pursuit of the good, but from the inherent potential of every person to pursue the good. Thus, one who is acting against his own perfection still has as much right to liberty as does the well-motivated person. RASMUSSEN, *supra* note 20, at 109.

<sup>68</sup> "My answer must take the simple form of a simple denial that individuals have any positive rights. There are no such things." VEATCH, *supra* note 9, at 180.

How could I justify using the coercive mechanism of the law to take sufficient property from other persons to satisfy my needs of time and a backyard to make snow sculptures?

Rather, it seems evident from historical observation that a legal system that permits a wide range of personal activity (economic and otherwise) in life's goods provides the most fertile basis for the kind of society that is conducive to the practice of moral virtue. But certainly, that cannot state the end of it. Even if we have a (relatively) free economic society where the myriad forms of nurture can best thrive, we also have a milieu where greed, selfishness, isolation, and self-destructiveness also thrive. That too comes from the evidence of human experience. Is the state without any power to go beyond mere prevention of harm and actually encourage (or even sometimes compel) other-regarding behavior of individuals? If a parent can have a range of discipline over a child (while still morally respecting the dignity and individuality of the child), cannot society (through appropriately constructed means of consent) discipline its adult members (while still respecting the dignity and individuality of each person)?<sup>69</sup>

The answer of natural law is, within limits, affirmative. The state can assist the formation of a virtuous society.<sup>70</sup> There are two justifications for the limited intervention of the state to improve the moral activities of the individual. One justification is

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<sup>69</sup> Rasmussen & Den Uyl hold that such a proposition cannot instill virtue, for there is no free choice involved, and, in fact, instills the wrong lessons: that state action is the answer to all of life's problems. RASMUSSEN, *supra* note 20, at 212-13. They overlook the educative role of the state as exemplar and the human mechanism of virtue as the habit of acting rightly that Aristotle so trenchantly observed. ARISTOTLE, *ETHICS*, Book II ch. 1, *supra* note 4, at 91. Further, the objection that forcing a person to assist another does not increase the subject's virtue is true but irrelevant. If one should question what logic there was in forcing another to act virtuously, since virtuous action requires voluntariness, the answer of the ancients, was, in effect, that substantively, without the coercion, the subject was not about to act virtuously anyway. There was another person in need who should have been provided for. So at least the substantive need is fulfilled, and the form of the virtuous act is maintained. Furthermore, because of law's educative function, the habit of acting helpfully to another may eventually be internalized so that the subject will act voluntarily and morally after all. ARISTOTLE, *ETHICS*, Book X ch. 9, *supra* note 4, at 337-38.

<sup>70</sup> For an extraordinarily thorough examination of the relation of the political order to virtue in history, see PAUL A. RAHE, *REPUBLICS ANCIENT AND MODERN: CLASSICAL REPUBLICANISM AND THE AMERICAN REVOLUTION* (1992).

by need. The other justification is by co-ordination. In each case, the purpose of state action is to assist the recipient of aid in the achievement of her (morally justified) life's plan, and to educate by discipline or example the giver in appropriate moral conduct (whether the enforced giver accepts and internalizes the lesson is her responsibility).

I begin by restating that nurture is relational, radically individualistic, and would seem to have the best chance to flourish in a society in which the material, temporal, and other opportunities for mutual support are available. By and large, therefore, because of the infinite range of circumstances and relationships necessary for nurture to thrive between humans, a limited state and a wide range of personal liberties is necessary. That is a logical conclusion supported by empirical observation of how individuals thrive in free political and economic societies. But it does not follow that the state therefore has no right to educate me in the proper exercise of my freedom (i.e., using it towards the exercise of virtue towards others), for the law necessarily sets an authoritative standard. Nor does the notion of a limited state necessarily prohibit it from inducing me to achieve a higher level of participation in life's goods (e.g., subsidizing museums rather than rock concerts).

I require liberty to participate more fully in the objective goods of life, but there is no one pathway of human flourishing for me to the exclusion of all others. It is not true that only I know which options are best (I make mistakes). That comes too close to the utilitarian fallacy. Rather, if I flourish through the practice of moral virtue (my human "end") by pursuing a worldly craft well, for example, it does not matter fundamentally what I do, so long as I do it as excellently as I can. Freedom assists me in choosing and executing a life's plan in which the ensemble of life's goods works best for me, but I cannot do it alone. I am not omniscient or all-powerful. Neither authoritarianism or radical individualistic autonomy can be justified by the notion that there is only one best way for me.

I am a law teacher. I attempt to pursue my craft in a spirit of excellence. I attempt to practice moral virtues in the manner of teaching and researching. Suppose that I had innate talents for mathematics. Suppose, because of life's accidents, or harms, or whatever, I never knew I had those talents. Suppose that had I pursued math, I would have been a far better astrophysicist than I am a teacher. Does that mean I am not flourishing? That my life



is a failure? That I cannot practice virtue? Suppose I must give up teaching through illness, or because the law school closes, or because I must devote more time to the upbringing of my family. Does that preclude me from the practice of virtue? Rather, does it not mean that life would offer me opportunities for the practice of other virtues, courage or fortitude, for example, rather than intellectual wisdom? I may have a life's vocation, but its epiphany is in the daily living of it.

Liberty is a necessary requirement for the moral practice of practical reason in forming a life's plan based on craft and virtue. But if, for justifiable and proportionate reasons (war and draft, for example) my liberties are lessened, no wrong has been done to me (unless the war is unnecessary). If, for justifiable and proportionate reasons (public education, for example), some of my property is taken through taxation, no wrong is done to me (unless those in charge spend my compelled contribution unwisely). In sum, a wide range of liberty is necessary to achieve human flourishing. Any intrusion into that liberty must be justified. But an intrusion is justified if based upon the same objective good that my right to freedom of action is based upon. It is the objective good of human flourishing that is the touchstone upon which liberty, limited government, and limited intrusions are all based.

## VII. THE JUSTIFICATION FOR LIMITED STATE ASSISTANCE

I now turn to when such limited intrusions by government can be justified under natural law theory. The first justification is because of need. Can the need of another be such to justify depriving me of any of my individual rights, and if so, which rights and how much? And if I grant that some needs of others can justifiably intrude upon my rights, how can I do so without losing any justification for negative rights altogether? That is the great apprehension of many modern natural law writers. As defenders of the limited state, they reasonably fear that any justification for the imposition of claims against individuals based on need would logically destroy the basis of negative rights and immunities. Forcing a person to give his lawfully obtained property or time to benefit another person invades immunities with seemingly no logical stopping point.<sup>71</sup>

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<sup>71</sup> For Veatch, Rasmussen, and Den Uyl, the good of practical reasonableness or even the ultimate human good of constructing a life of

But there is a logical stopping point. St. Thomas Aquinas articulated how positive rights based on need can be both justified and limited. Asking, whether it is lawful to steal through stress of need,<sup>72</sup> Aquinas answers in the affirmative. “[I]n a case of extreme need, . . . that which [a man] takes for the support of his life becomes his own property by reason of that need.”<sup>73</sup> It is noteworthy that Aquinas does not say that the theft is excused. He says that there is no theft. There is, in fact, no taking of another’s property because need has made it the taker’s property “by reason of that need.” How did the property holder lose his right to his own property?

To begin with, it should be emphasized again that in the Aristotelian tradition, rights are derivative of the good. They do not exist independently of the good. Aquinas is not saying that needs, in and of themselves, give rise to a right. Fundamental goods do. Based upon the logical requirement of universalization (shared by other traditions, such as the Kantian and natural rights schools), the recognition of a good or end to human existence necessarily obliges me to respect that good in others as well as in myself. Consequently, the good of life gives rise to a right to life, and the good of knowledge to free communication, the good of seeking the spirit to freedom of religion, the good of practical reasonableness to a wide range of liberties, the good of friendship to freedom of association. These are universal rights because the fundamental goods are universal.

Thus, under natural law, it is the good, not the existence of other negative rights, that defines the limits to rights. I have no right to take another person’s life for the benefit of a friend, because life is an objective good of the other person. I have no right to associate in order to commit a crime, because association is for the mutual benefit (in all moral things) of its members.

For Aquinas, property is a real right, but it is a human right, an instrumentality for the accomplishment of individual moral vir-

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individual participation in the range of human goods necessarily requires the enjoyment of an extremely wide range of liberty. Indeed, any interference with legitimate (i.e., non harmful) choices by a free person would need to be justified. VEATCH, *supra* note 9, at 206-07; RASMUSSEN, *supra* note 20, at 108-09.

<sup>72</sup> 2 AQUINAS, SUMMA THEOLOGICA, *supra* note 41, at Pt. IIa-IIae, Q. 66, art. 7.

<sup>73</sup> 2 *id.* at Pt. IIa-IIae, Q. 66, art. 7, reply obj. 2.

tue.<sup>74</sup> One element of moral virtue is to assist others in need (to the extent one can without impinging on one's own morally legitimate uses). But since one cannot succor everyone in need, it is left to the individual to choose whom to aid in charity. Aquinas does not construct general positive rights out of need, because most needs are inchoate in relation to any individual. He is clear that in those circumstances, no specific duty can be said to attach.<sup>75</sup> The needs are too general and contingent. Thus, because of the moral good involved in certain specific relationships, assistance to members of one's family or to friends is normally morally preferable to that of strangers.

But where a person's life intersects with your own, even at a moment, and he is in dire need of food, for example, you have a moral obligation to save that person out of your "superabundance," that is to say, out of property you can spare to meet his need (without proportionate danger to you, i.e., causing yourself to starve).<sup>76</sup> In that situation, because of the specificity of the two selves (you and the starving man at one place in time), and the utter dependence of the other person upon you, the duty you have to him is no longer inchoate, but specific. By force of circumstance, it vests. If you have a specific duty to provide sustenance at the time, he has a specific right to it.<sup>77</sup>

It follows, therefore, that in cases of extreme need, where one's moral obligation would incontestably require one to assist another (there being no practical alternative except your aid), a specific duty has arisen and a claim-right derives from it. Indeed, in law, we fasten such duties to parents in the raising of their children, simply because that relationship is such that specific duties

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<sup>74</sup> "Things which are of human right cannot derogate from natural right or Divine right." 2 *id.* at Pt. IIa-IIae, Q. 66, art. 7, reply.

<sup>75</sup> Aquinas is specific: "Yet he that is able to give food is not always bound to feed the needy." 2 *id.* at Pt. IIa-IIae, Q. 71, art. 1, reply.

<sup>76</sup> Or causing another in your care to starve. One never can seek to do good through harm.

<sup>77</sup> Aquinas concludes,

Nevertheless, if the need be so manifest and urgent, that it is evident that the present need must be remedied by whatever means be at hand (for instance when a person is in some immediate danger, and there is no other possible remedy), then it is lawful for a man to succor his own need by means of another's property, by taking it either openly or secretly: nor is this properly speaking theft or robbery.

2 *id.* at Pt. IIa-IIae, Q. 66, art. 7, reply.

can be attached to it. There is no reason why the principle should not apply to other specific relationships (even if not contracted for) that arise in other arrangements of life. If the need is dire and manifest, and, because of the lack of alternatives, the duty to assist is specific, the moral duty gives rise to a right of assistance, and the state could justifiably enforce that assistance.

The second justifiable mechanism by which the state could assist the practice of virtue is through the notion of co-ordination. Unlike state-of-nature theorists, and other egoist-based political theories, natural lawyers have never had much trouble in justifying (to themselves at least) the legitimacy of the state. It exists because it is an efficient mechanism of coordinating material needs among persons, because it can protect persons from harm, because it can assist those in the performance of their moral duties, individually as well as collectively, because it fulfills the moral needs of persons for social/political interaction, and because properly run, it can provide moral exemplars to the citizens. A particular state, or regime, becomes illegitimate when it materially fails to achieve those objectives.<sup>78</sup>

By a reasonably responsive manner of eliciting consent, the state may direct resources gathered from the citizens to projects that advance the common good, that is, things which assist individuals to achieve moral excellence in their particular life's plans. Thus, building an infrastructure of highways, or of water distribution, of a sound currency, or of education, or of care for the hungry or ill, can legitimately be coordinated by the state. The state may encourage certain morally beneficial activities: tax exempt status for philanthropic or religious organizations, for example. It may encourage productive associations, or aesthetics (perhaps by spending more money, within reason, on a public building simply to make it more beautiful). Those who administer the state are under the moral obligation to be true to their craft as well. Governmental programs should not be maintained because they benefit the self-seeking interests of administrators (or of groups of citizens). If the good can be more efficiently achieved by non-regulation, or by less regulation, the state (i.e., those in authority) would be morally bound to withdraw. More accurately, because the good of interrelationships is best obtained by freedom to construct and pursue those relationships, the obligation is

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<sup>78</sup> The verbal summary is mine, but the concepts are evident in Aristotle, *The Politics*; Cicero, *De Re Publica*; and Finnis, *Natural Law and Natural Right*.

on the state to justify any intrusion designed to make those relationships more morally productive.

#### VIII. SOCIAL POLICY THAT NURTURES: RESCUE, ABORTION, EDUCATION, AND WELFARE

What then should the policy of the state be to engender nurture? Nurture, I have argued, instantiates individuality in another person by facilitating the self-directed and informed choice among the infinite ways of participating in the fundamental goods of human existence. There are, therefore, two limits implicit in the nurturing of another. There is the extrinsic limit of immunities: one cannot seek to help another through harm. In addition, there is an intrinsic limit: aid which makes the receiver too dependent, which, on balance, limits the receiver's capacities for voluntary virtuous action, is contrary to the purpose of nurture.<sup>79</sup> As no individual action that violates either of these limits could be morally justified, so too would any government policy that did so be unjustified.

Suppose we left behind for a moment attitudes based on some ideologies of the day (e.g., will-directed autonomy, or religiously derived notions of what a society should look like), and we looked at some present policies in the law solely on the basis of whether those policies encourage or discourage the necessary virtue of nurture. What could we speculate as to what the policy implications would be if the government sought to assist the giving of nurture while being respectful of the fact that the nature of nurture requires that it be primarily an individual decision based on particular and transitory circumstances? What different perspective could we bring to serious issues of conflict like the duty to rescue those in need, how to approach the reality of abortion, the failures in education, or the human tragedies of those on welfare?

The following speculations are necessarily curt and tentative. Each of these policy areas has an enormous literature dedicated

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<sup>79</sup> Thus, providing free drugs to addicted persons would not be, in most circumstances, a nurturing act (unless, perhaps, when survival is at stake). On the other hand, reducing the chances for one to harm another is not incompatible with a nurturing ethic. Accordingly, incarcerating dangerous criminals to protect the safety of others is not contradictory to a regard for the independence of others. Indeed, incarcerating such criminals may well be a duty of the state, not only to protect citizens from harm, but also to secure part of the infrastructure (safety) in which citizens can develop their individual capacities for virtue.

to it. Thus, the views offered here are only suggested points of departure and certainly do not imply that solutions are easily obtained. In fact, line drawing in each area can be daunting. In each of these areas, however, it is clear that public policy has thus far failed. The failure may not be so much in execution as in applying the wrong standard. Perhaps the standard of nurture offers a better hope.

### A. *Duty to Rescue*

If Aquinas was right, then the common law has been wrong for many centuries on the duty to rescue.<sup>80</sup> If a person is in dire need of rescue and one can save him without danger to oneself, the law would certainly be justified in enforcing that duty. But not according to the common law.

Suppose A, standing close by a railroad, sees a two-year old babe on the track, and a car approaching. He can easily rescue the child, with entire safety to himself, and the instincts of humanity require him to do so. If he does not, he may, perhaps, justly be styled a ruthless savage and a moral monster; but he is not liable in damages for the child's injury, or indictable under the statute for its death.<sup>81</sup>

Although the common law might recognize that such a duty is compelled by "higher law," it would not enforce it, but leave the withholding of saving assistance to be "condemned by the voice of conscience, whose sentence of punishment for the recreant act is swift and sure."<sup>82</sup> The natural law tradition differs. Cicero insisted on the point:

There are, on the other hand, two kinds of injustice—the one, on the part of those who inflict wrong, the other on the part of those who, when they can, do not shield from wrong those upon whom it is being inflicted.<sup>83</sup>

But the common law's (and modern rights theory's) notion of the autarkic personality continues. As such, the law educates

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<sup>80</sup> See W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 56, at 375-77 (5th ed. 1984) (defining duty to aid one in peril).

<sup>81</sup> *Buch v. Amory Mfg. Co.*, 44 A. 809, 810 (1897).

<sup>82</sup> *Union Pacific Ry. v. Cappier*, 72 P. 281, 282 (1903).

<sup>83</sup> CICERO, *DE OFFICIIS*, *supra* note 31, at 25 (I.vii.23). Also see Judith Shklar's definition of passive injustice: "By passive injustice I do not mean our habitual indifference to the misery of others, but a far more limited and specifically civic failure to stop private and public acts of injustice." SHKLAR, *supra* note 41, at 6.

badly, and teaches that the moral imperative to assist others in dire circumstances need not be fulfilled.<sup>84</sup> Nonetheless, if the common law imposes liability on a parent for failing to save her child from imminent peril,<sup>85</sup> the same principle should logically apply to other relationships, either formed or created through force of circumstance, where one party is in desperate need of assistance from another. "Good Samaritan" legislation can and has been passed, immunizing from suit those, such as physicians, when they do seek to rescue.<sup>86</sup> But, in addition, it does not seem to be unjustified to compel rescue attempts in life threatening circumstances if there is no reasonable danger to the rescuer.<sup>87</sup> Vermont has a statute that St. Thomas Aquinas could have written.

A person who knows that another is exposed to grave physical harm shall, to the extent that the same can be rendered without danger or peril to himself or without interference with important duties owed to others, give reasonable assistance to the exposed person unless that assistance or care is being provided by others.<sup>88</sup>

Admittedly, very difficult questions remain as to how to measure "danger," and when the call to assist is so intrusive that it does in fact ask too much of the would-be rescuer. Indeed, in certain medical situations, the notion of "saving" the desperately ill may be problematical. However, based on the natural law ethic of assistance, it seems plausible that some baseline could be articulated.

### B. Abortion

If instead of looking at the abortion controversy as a conflict

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<sup>84</sup> See *DeShaney v. Winnebago County Dep't of Social Servs.*, 489 U.S. 189 (1989) (holding that social workers' failure to protect child from father's violence did not violate child's civil rights).

<sup>85</sup> See Joel J. Finer, *Toward Guidelines for Compelling Cesarean Surgery: Of Rights, Responsibility, and Decisional Authenticity*, 76 MINN. L. REV. 239, 257 (1991) (exploring duties parents have to protect their children from harm).

<sup>86</sup> In international law, the right to intervene to rescue in dire circumstances seems at last to be emerging. One precedent may well be the rescue mission to Somalia.

<sup>87</sup> A deeper moral problem, faced by abolitionists of the last century and pro-life activists today, arises when the state affirmatively forbids rescue.

<sup>88</sup> VT. STAT. ANN. tit. 12, § 19(a) (1973); see also MINN. STAT. ANN. § 604.05(1) (West 1988) (defining duty to assist); WIS. STAT. ANN. § 940.34(2)(a) (West 1988) (imposing an obligation to summon assistance). I am grateful to Professor Joel Finer for this information.

between two (asserted) rights holders,<sup>89</sup> what would we conclude from a perspective based upon nurture? If there is a duty of care and nurture to those who, by whatever circumstance, are placed into our dependency,<sup>90</sup> then the law again educates badly if it does not assist us in recognizing that relationship. If modern rights theory offers a barrier between mother and child, then it may prevent one who is in need of nurture from receiving it, and permits another to deny oneself the moral benefits of nurturing.<sup>91</sup> Indeed, the image the law makes of the abortion decision is one of such singularity and loneliness, that neither party is seen as deserving solicitation or care. Both lives are lessened.<sup>92</sup> Perhaps a new paradigm can be offered, where, instead of there being two rights holders in opposition to one another, there is a larger ethic of care and nurture directed to all persons involved.

But what should one do in a state where an anti-nurturing policy has been entrenched? We should, at the least, mitigate the current effects of the law. There seems to be large agreement that there are too many abortions. Given that there are 1.6 million abortions annually and only 25,000 infant adoptions, something seems desperately awry.<sup>93</sup>

One can offer the pregnant woman practical options to encourage a nurturing result (as well as encouraging mutually respectful forms of behavior that decreases the chances for unwanted pregnancies).<sup>94</sup> For example, such options could include medical care, adoption opportunities (and appropriate

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<sup>89</sup> See, e.g., LAURENCE TRIBE, *ABORTION: THE CLASH OF ABSOLUTES* (1990) (analyzing abortion issue as struggle between rights of women and rights of fetuses).

<sup>90</sup> Under natural law, it is hard not to see the fetus as a person, for there is the unfolding of various human potentialities into human actualities, and, like the born person, the fetus remains human and a self throughout the process.

<sup>91</sup> Neither does modern law fully address the needs of nurture for the pregnant mother or so many families themselves in need of nurture in order to nurture.

<sup>92</sup> Relational theory would not work either. See generally GILLIGAN, *supra* note 17, at 62 (exploring theories attempting to explain women's experiences in psychological terms). The first rule remains: do no harm. One cannot justifiably benefit one set of relations by affirmatively harming another person in an essential good.

<sup>93</sup> Infant adoptions are those under two years of age and encompass all children, including those with special medical needs. Mary Beth Seader, *Plenty of Room for the Children*, WASH. TIMES, Aug. 16, 1992, at B5.

<sup>94</sup> Programs to discourage pregnancy are possible, but the same moral



counselling), and, logically, information such as approved in *Planned Parenthood v Casey*<sup>95</sup> which encourages empathy with the developing human fetus upon which the moral decision to nurture can be predicated. In each case, the question would be whether the governmental policy encourages the giving of nurture to those who need it and the experience of giving nurture to those who have the opportunity to do so.<sup>96</sup>

### C. Education

The policy of education of the young offers a lesson. Even though the practice of nurture is radically particularistic, there are certain universals, so that a range of nurturing policies for an entire group of the population can reasonably be formulated. Education is one example, perhaps basic health care is another. It would seem that the state should have two objectives in a general nurturing education policy. The first is to assure that all young people receive proper training in the fundamentals of education: language, mathematics, aesthetics, physical health, and social and civic skills. Secondly, the policy should be to encourage parental involvement, for parents have primary nurturing responsibilities in making individualized decisions geared to the propensities of their own children.<sup>97</sup>

For the first, the current failure of general educational policy

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limitations apply: do they cause harm in the enjoyment of any of the primary goods of life? This obviously opens up the complex issue of sexuality.

<sup>95</sup> 112 S. Ct. 2791 (1992). Nor, in an ethic of nurturing, should public policy fail to address the needs of the pregnant woman involved.

<sup>96</sup> It seems clear that the (proposed, at this writing) Freedom of Choice Act, by prohibiting such governmental assistance and information approved in *Casey*, cannot be morally justified by any reference to the moral good of nurture. See Freedom of Choice Act of 1993, H.R. 25, 103d Cong., 1st Sess. (1993) (prohibiting states from restricting woman's right to abortion before fetal viability or at any time if necessary to protect health or life of woman).

<sup>97</sup> The underlying rationale of Chief Justice Burger in permitting the Amish to remove their children above the eighth grade from public school was that the Amish accomplish the good of nurturing as well if not better than does the public school for children at that age. See *Wisconsin v. Yoder*, 406 U.S. 205, 223 (1972) (citing fact that Amish can do better job of preparing Amish children for adult life in Amish society than can public school system); see also *Meyer v. Nebraska*, 262 U.S. 390 (1923) (striking down law seeking to assimilate foreigners by forbidding foreign language instruction in public schools); *Pierce v. Society of Sisters*, 268 U.S. 510 (1925) (invalidating Oregon statute that required young children to attend public school in order to assimilate them into American society).

remains evident<sup>98</sup> and should, of course, be addressed on its own merits. For the second, however, there are interesting options. Assuming basic competence among available schools, offering parental choice among schools seems to be morally appropriate: it encourages nurturing and the receiving of appropriate individualized nurture. Preventing parents from exercising responsible nurturing decisions is precisely the self-regarding governmental policy that is opposed to the principles that we have enunciated.<sup>99</sup>

#### *D. Welfare*

How can a policy be nurturing when it discourages the very acts of self-realization that each person is obligated and entitled to pursue? Here too, there seems a clear consensus that there are too many Americans dependent on welfare and that the current policy is not working towards alleviating that problem.

Early in American history, most (privately based) welfare policies required a personal relationship between the giver and receiver, the distribution of assistance for specific needs, and the requirement that the recipient "do something" if at all possible in exchange for help. All the fundamental elements of nurture were present, including the actions that induced self-sufficiency, self-esteem, and eventually, independence of the recipient. In general, the welfare agencies at that time encouraged "filiation and bonding," essential elements of intimacy for nurture to bloom.<sup>100</sup>

In contrast, current welfare programs are anti-nurturing. Case workers, overwhelmed, have little contact with recipients. The very volume of paperwork makes the recipient distant and anonymous from the distributor of services. The economic structure of welfare offers unusually strong disincentives for the recipient to

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<sup>98</sup> See *A NATION AT RISK: THE IMPERATIVE FOR EDUCATIONAL REFORM: A REPORT TO THE NATION AND THE SECRETARY OF EDUCATION*, UNITED STATES DEP'T OF EDUC., NAT'L COMM. ON EXCELLENCE IN EDUC. (1983) (comparing lack of educational achievements in reading, mathematics, time in school, and quality of teachers in United States schools as opposed to those in other developed countries).

<sup>99</sup> In line with the principle of encouraging nurture and avoiding harm, a school choice program would necessarily have to have fail-safe provisions to deal with children caught in schools that are failing because more responsible parents have opted to send their children elsewhere.

<sup>100</sup> The best comparative analysis of the effects of past and present welfare policies can be found in Marvin Olasky's work, from which this summary is drawn. See OLASKY, *supra* note 3, at 6-41 (delineating why current welfare programs work to support culture of poverty).

plan and execute a strategy for economic independence. And the same structure discourages nurturing relationships through which the individual's self-realization in the goods of life could be furthered.<sup>101</sup> Such a policy cannot be morally justified under the ethic of assistance that derives from natural law.

In light of the fact that nurture succeeds in an environment which is relational and particular, it would seem that attempts to make welfare "more efficient" at the national level will not accomplish the moral goal. Rather, a devolution in funds and control to local institutions (public and private) where, as in schooling, the recipient might exercise some personal choice (with the state setting basic and uniform standards) would offer some reasonable hope of success.<sup>102</sup> Considering the moral and economic harm that the current policy is inflicting, something along an entirely different direction seems morally imperative.

#### CONCLUSION

A brief reflection on these policy areas indicates that the state cannot take the place of the nurturing acts between individuals. It can assist the formation of those relationships. It can seek to prevent the vulnerabilities present in intimate relationships from resulting in harm (spousal abuse or abortion, for example), but it cannot construct its own alternative to how humans can beneficially interact. It can coordinate the generic basics of security, subsistence, and education; it can encourage patterns of nurturing (parental involvement in education, a wider range of information available in abortion decisions, welfare policies that reward bonding and independence); it can seek to prevent harm (rescuing those in need), but it cannot regulate the variety of interpersonal decisions upon which effective nurturing depends. In sum, the state is morally obliged to respect the goods that come from a reasoned reflection on human nature. And those goods, including nurture, depend upon the individual's own commitment to excellence.

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<sup>101</sup> *Id.* at 167-99.

<sup>102</sup> *See id.* at 200-33.

## EPILOGUE

*While I was completing this Essay, word arrived that a beloved uncle of my wife's had died. He had suffered for some time from amyotrophic lateral sclerosis (ALS). During the years, as the use of his body progressively diminished, he maintained a gentle and infectious happy spirit that was his hallmark in more vigorous days. He privately brooded about many things, but never complained about his illness, continuing on with a quiet fortitude. He saw himself through his children's college graduations, and the marriage of his daughter. During his last months, his family drew around him, chatting with him, washing and feeding him. He dictated letters to his wife and children. One Saturday he died suddenly and peacefully in the middle of the day. He had, throughout, continued to nurture and be nurtured, and even in the last stages of his illness, his humanity flourished.*

*The best thing society could do in those circumstances was, perhaps, to coordinate appropriate medical care, and otherwise, leave the intimacies between that man and his family alone and unrestrained. For in the end, the act of nurture is an act of love; and nurture, mutually given and received, is a celebration. And a society whose laws encourage nurture calls out of us the best parts of our humanity.*