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EDUCATION AS A NATURAL RIGHT

ALBERT GRANDE*

I. CLASSICAL FOUNDATIONS OF NATURAL LAW – SLAVERY AND CRIES FOR PERSONAL AUTONTY

Natural rights, that is, moral entitlements inherent in human beings by virtue of being human, emerged during the great age of the Enlightenment.1 Behind the emergence of these rights, however, were millennia of historical development. The eighteenth and nineteenth century formulation of individualistic natural rights evolved out of the ancient concept of natural law. Natural law is one of the dominant themes throughout the history of thought. This concept, has been used to defend the established order and to justify revolutions. Additionally, it has been at the center of civic life, fundamental to such issues as freedom, equality, order, and education:

Next to Christianity itself, probably nothing has had a more profound and extensive effect on the history of Western civilization than the Justinian compilations of Roman law . . . . The chief Roman jurists who made the Justinian code, Gaius, Ulpian, and Paulus, differed in their emphasis of particular legal principles, but they agreed in regarding Natural Law as a system of ideal laws founded in intuition and right reason.2

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1 See R.H. Helmholz, Natural Human Rights: The Perspective of the Ius Commune, 52 CATH. U. L. REV. 301, 301 (2003) (noting widely held belief that natural law emerged during Enlightenment, though it was foreshadowed in seventeenth century writings).

One of the earliest and most powerful expressions of natural law is found in Sophocles’ Antigone:

Yes, for it was not Zeus who gave them forth,
Nor Justice, dwelling with the Gods below,
Who traced these laws for all the sons of men;
Nor did I deem thy edicts strong enough,
Coming from mortal man, to set at naught
The unwritten laws of God that know not change.
They are not of to-day nor yesterday,
But live for ever, nor can man assign
When first they sprang to being. Not through fear
Of any man’s resolve was I prepared
Before the Gods to bear the penalty
Of sinning against these.³

Antigone, with clear conscience, deliberately violates King Creon’s law that denies her brother a decent burial.⁴ Her brother had been a rebel and was thereby denied the honor of a proper burial.⁵ Antigone appeals to the higher unwritten laws of God, the eternal natural laws.⁶ While it is unknown when those laws originated, Antigone’s act of defiance violates written laws in favor of natural law, which respects a sister’s right to bury her brother, despite the king’s prohibition.⁷ Her assertion of the higher natural law foreshadows the Enlightenment’s promulgation of individualistic natural rights.

In his Nicomachean Ethics, Aristotle makes the same Sophoclean distinction between natural and positive law, law created by legally valid procedures. Natural law “everywhere has the same force and does not exist by people’s thinking this or that.”⁸ Positive law is “originally indifferent, but when it has been laid down is not indifferent, e.g. that a prisoner’s ransom shall be a mina, or that a goat and not two sheep shall be

⁴ See id. (confessing to King Creon about her illicit deed).
⁵ See id. (professing weightiness of Antigone’s acts of defiance).
⁶ See id. (following Zeus’s laws rather than king’s law).
⁷ See id. (pronouncing Antigone’s high regard for natural law, which she considers far more authoritative than law created by “mortal man”).
sacrificed, and again all the laws that are passed for particular cases . . . .”

Natural law is “unchangeable and has everywhere the same force.” Similarly, Aristotle continues, “things which are just not by nature but by human enactment are not everywhere the same.” How are these natural laws known? According to Aristotle, they are divined, perceived “through sympathy or intuition.” “No doubt Aristotle . . . maintains that natural law is known by inclination.” Consequently, it follows that natural law is inherently known through inclination, before it is processed cognitively.

Simon explains knowledge by inclination in the following manner: “How do we know that it is wrong to cheat in the execution of a contract? . . . We may be in disagreement on many issues, but we would all agree that it is perfectly disgusting to cheat in the execution of a contract . . . .” Under normal circumstances, cheating in the execution of a contract is so disgusting that it leads us to feel a “real repugnance.” “Here is something unjust by nature, unright by nature.” “It is identified by way of inclination; or rather, the conflict of a certain rule of action with an inclination warns us that this is not right, that it is wrong.”

“Knowledge by inclination,” Simon adds, “is not clear.” “[I]t may be certain” knowledge, but it is not a matter of “rational communication.” Inclination cannot be taught; there is a
“tendency toward as much understanding as possible,” but, ultimately, inclination is “incommunicable.” 21 This is true both in Aristotle’s natural-law idea and in Antigone’s unwritten higher law. 22

Despite considerable variations in natural law’s interpretation, conceptually it is intended to provide a basis for norms in ethics, law, politics, and education. 23 Natural law affirms a basis for objective standards, looking for a predetermined order in human affairs. 24 "This is the belief that there exists in nature and/or human nature a rational order which can provide intelligible value-statements independently of human will, that are universal in application, unchangeable in their ultimate content, and morally obligatory on mankind." 25

According to Aristotle, natural law’s principle purpose is to create governmental organization, to wit, “the first and fundamental aim of justice is not freedom for its own sake, but order.” 26 Therefore, the belief that freedom’s aim is to order society, explains Aristotle’s “preoccupation with the best forms of government” in which the order of the state overrides the freedom of the individual. 27 In Aristotle’s ideal state, philosophers possessing the natural intellect and education to achieve the natural purpose of the state, which is the collective pursuit of a virtuous life, would be the rulers. 28

wrong, yet we cannot know why it is wrong, nor effectively tell another why it is wrong. 21

Id. 22 See SOPHOCLES, supra note 3, at 269 (comparing “full clear and plain” kind-made laws, to “unwritten laws of God”); see also SIMON, supra note 12, at 133 (characterizing “knowledge by inclination” as “incommunicable” rather than “clear”). 23 See PAUL E. SIGMUND, NATURAL LAW IN POLITICAL THOUGHT VIII (Winthrop Publishers, Inc. 1971) (explaining natural law has contributed to ideological, political, and scientific developments, and has been translated into moral or written law). 24 See id. (stating natural law helps define “rational order,” so as to evaluate human conduct). 25 Id.

HEINRICH A. ROMMEN, THE NATURAL LAW, A STUDY IN LEGAL AND SOCIAL HISTORY AND PHILOSOPHY 13 (Thomas R. Hanley trans., B. Herder Book Co. 1947) (1946) (describing ancient Greek philosophers Aristotle and Plato as valuing “freedom . . . so far as it realizes order”). 27 See id. (reiterating Aristotle’s view that government should be “the sphere of morality” and aid in “realization of all virtue”). 28 ARISTOTLE, reprinted in THE POLITICS OF ARISTOTLE 12 (B. Jowett trans., Clarendon Press 1885) (explaining those whose intelligence places them “above the toil” should “occupy themselves with philosophy or with politics”).
Yet, Aristotle’s concept of natural law, and his commitment to order raise disturbing questions concerning social justice, as he looks to nature to justify slavery.\textsuperscript{29} Some men, by nature, are slaves: “[w]here there is such a difference as that between soul and body, or between men and animals (as in the case of those whose business is to use their body; and who can do nothing better), the lower sort are by nature slaves . . . .”\textsuperscript{30} By contrast, “those who are in a position which places them above toil, have stewards who attend to their households while they occupy themselves with philosophy or politics” are masters.”\textsuperscript{31} Alf Ross’ admonition is apropos: “[l]ike a harlot, natural law is at the disposal of everyone. The ideology does not exist that cannot be defended by an appeal to the law of nature.”\textsuperscript{32}

For Aristotle, natural law is the source of order, unalterable and just.\textsuperscript{33} Positive law varies with every jurisdiction and is subject to the “vicissitudes” of time and circumstance.\textsuperscript{34} Nevertheless, natural and positive laws are not that remote from one another, as “natural law has to be realized in the positive law since the latter is the application of the universal idea of justice to the motley manifold of life.”\textsuperscript{35}

While imperfections in positive law are inevitable, such flaws are subject to correction by the principle of equity, namely, that the individual case gets it right.\textsuperscript{36} The judge’s function is to apply
natural law to the imperfections of positive law.\textsuperscript{37} Unfortunately, Aristotle has little to say about the content of natural law.

There is one salient distinction between Antigone's and Aristotle's assertions of natural law. That is, Antigone's affirmation of the individual, in defiance of the king's written law, stands in marked contrast to Aristotle's emphasis upon the political order.\textsuperscript{38} Strictly speaking, in Aristotle, there is no autonomous-individual natural law concept.\textsuperscript{39} Rather, the state is his overriding concern: the order of the state is grounded in natural law.\textsuperscript{40}

Aristotle's collective subordination of the individual to the primacy of the state is widespread in the ancient world with one remarkable exception—Stoicism.\textsuperscript{41} Stoics utilize the natural law theory as the basis of individual autonomy.\textsuperscript{42} Thus, Stoics share more beliefs with philosophers of the Enlightenment than Aristotle.

Stoicism's contribution to natural law as a source of individual sovereignty is considerable. Stoic ethical teachings emphasize universalism in that all people are considered citizens of the world, that is, citizens of the human republic.\textsuperscript{43} As Stoics created moral universalism,\textsuperscript{44} they are unlike Aristotle in that they are individualists. Stoics extol the universal human republic where all are equal by nature—a very un-Aristotelian notion.

Provides judges an outlet of authority to resist applying uniform positive law to a situation where the rules produce unfair results”).

\textsuperscript{37} Id. (explaining judges apply natural law in ruling).

\textsuperscript{38} See supra text accompanying notes 7 and 26 (comparing Aristotle's and Sophocles' respective views about natural law).

\textsuperscript{39} See supra text accompanying note 30 (justifying slavery).

\textsuperscript{40} See Roger A. Shiner, Aristotle's Theory of Equity, 27 Loy. L.A. L. Rev. 1245, 1263 (1994) (noting that “Aristotle's conception of ethics, politics, and law is fundamentally organic - the state and its citizens, their decisions and its laws, are part of the natural world”).

\textsuperscript{41} See James Muldoon, Symposium: Rethinking Rights: Historical, Political, and Theological Perspectives: Article: Historical Perspective: Spiritual Freedom - Physical Slavery: The Medieval Church and Slavery, 3 Ave Maria L. Rev. 69, 72 (2005) (asserting slavery's pervasiveness in ancient world).

\textsuperscript{42} See Andrew Huxley, Book Review, Golden Yoke, Silken Text, 106 Yale L.J. 1885, 1940 (1997) (announcing Stoics' main goal was to preserve moral autonomy through natural law).

\textsuperscript{43} See SIMON, supra note 12, at 30 (finding that “[o]ne of the most striking features of the Stoics' teaching in ethics is their universalism, their sense of human unity, their belief that human affairs are governed by rules that hold universally”).

\textsuperscript{44} See id. (concluding that “[a]fter Plato and Aristotle, they are the main founders of moral universalism”).
While the Stoic sage carries introspective happiness, he is not just self-absorbed, but kind towards others. Happiness is the exercise of right reason in accordance with nature. Nature and reason are one. Human beings have an innate capacity for right and wrong. The Stoic view seems to mirror Immanuel Kant’s categorical imperative, which will be discussed later.

Innate understanding of right and wrong also provides a basis for law. Natural law is universally valid, unchangeable and eternally true. Common intelligence can distinguish good laws from bad, justice from injustice: “[t]his, therefore, is a law, O judges, not written, but born with us, which we have not learnt, or received by tradition . . . .” The test for whether or not a law accords with nature is whether or not it agrees with reason. Epictetus, an emancipated slave himself, declared that slavery laws are “laws of the dead, an abysmal crime.” Such [slavery] laws are in violation of natural law, against human dignity. Epictetus affirms natural law as a basis for freedom and equality. Nature has produced all, making us prone to mutual affection and friendship.

Epictetus transcends Aristotelian primacy of order; he possesses a moral indignation that argues powerfully against slavery. It can be argued that Stoicism, as exemplified by Epictetus and other Stoics, used natural law to promulgate human dignity more decisively than early Christianity.

St. Paul, for example in Ephesians tells slaves to “be obedient unto them that according to the flesh are your masters, with fear

45 See generally ROMMEN, supra note 26, at 21 (acknowledging repudiation of “base sensuality, pursuit of wealth, and pride of life,” in favor of “happiness of mind through the truth, the good, and the beautiful”).


47 ROMMEN, supra note 26, at 23 n.10 (quoting Cicero in his speech for T.A. Milo).

48 See Cristobal Orrego, H.L.A. Hart’s Arguments Against Classical Natural Law Theory, 49 AM. J. JURIS. 297, 310 (2003) (noting natural law’s traditional requirement is “practicable reasonableness”); see also Jack B. Sarno, A Natural Law Defense of Buckley v. Valeo, 66 FORDHAM L. REV. 2693, 2728 n.261 (1998) (quoting Thomas Aquinas as writing “[w]hatever is contrary to the order of reason is, properly speaking, contrary to the nature of man, as man; while whatever is in accord with reason is in accord with the nature of man, as man.”).

49 ROMMEN, supra note 26, at 24.

50 Id. at 25 (emphasizing humans all are “parts of one great body” created by nature).

51 Id. at 24 (denouncing slavery).
and trembling, in singleness of your heart, as unto Christ.”

Since early Christians believed the new kingdom imminent, they tended to resign themselves to the political and social order. Moreover, Christians believed if a man was called to be a slave, he should not be free: “[f]or he that was called in the Lord being a bondservant, is the Lord’s freedman: likewise he that was called being free, is Christ’s bondservant.”

Early Christians were allowed to hold fellow Christians as slaves. In the fourth century, St. Basil could not even fathom a single reason for which Christian slaves ought to be freed. According to St. Augustine, slavery is a remedy as well as a penalty for sin, and it was God who bore the direct responsibility for appointing both masters and slaves. All slaves, then, deserve to be slaves.

Even though the new kingdom appeared increasingly less imminent to Christians, they tended to accept the institution of slavery as necessary. No man is innocent of sin. Slavery, therefore, is necessary for controlling sin in society. “[T]he canons of the church reinforced civil law in protecting owners against the loss of slaves....” No slave could be ordained unless he had first been emancipated. “The fact that Christians accepted the institution [of slavery] until the eighteenth century without marked protest suggests a high degree of tolerance.”

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55 See David Brion Davis, The Problem of Slavery in Western Culture 86 (Cornell University Press 1966) (noting Christians were permitted to hold other Christians as slaves, provided they treated them as “spiritual brethren”).
56 See id. (commenting on Saint Basil’s failure to interpret an opposition to slavery, being that in his Epistle, Saint Paul had “set a precedent for admonishing and returning fugitives to their masters”).
57 See Muldoon, supra note 41, at 76 (stating, “St. Augustine argued, slavery, like other forms of physical coercion, was necessary for the good order of society in man’s fallen state”).
58 See Davis, supra note 55, at 89 (asserting that Christian Church not only accepted slavery, but exerted effort to secure masters’ property right over their slaves).
59 See id. (noting Church’s functional conception of slavery).
60 Id.
61 Id.
62 Id.
As late as the thirteenth century, St. Thomas Aquinas reconciled slavery with Christianity, finding it "consistent with that part of the natural law which was still applicable to sinful man." By contrast, slavery conflicts only with the first intention of natural law (before the fall), but not to the second intention, which is adjusted to man's limited capacities, his sinful nature. Slavery is useful and necessary; it is agreeable to man's natural reason in a sinful world.

Aquinas comes close to believing in the natural inferiority of slaves, asserting slavery is a condition of the body; and the mother, since she provides the substance of the body, transmits this condition to her offspring. This line of reasoning is very much like Aristotle's argument regarding slaves' natural inferiority, in that they are characterized by body rather than by mind.

Stoicism's use of natural law as a foundation for the moral autonomy of the self is crucial to Western civilization's commitment to the primacy of the individual. Noted historian Norman F. Cantor summarizes the Stoic contribution to natural law eloquently:

The concept of natural law (taken from Stoic philosophy) assumes that the world operates according to rational principles, that there are universal principles of reason. The law of the state was regarded as the positive, detailed implementation of natural law, and any law that was repugnant to reason had to be bad law.

Stoicism's doctrine of individual sovereignty, that is, absolute right of control over oneself, profoundly inspired the modern world's espousal of individual human rights—inalienable rights. Philosopher Sidney Hook writes "Ideologically, modern democratic theory owes more to Stoic philosophy and Roman law

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63 See id. at 95–96 (justifying slavery).
64 See id. at 96 (explaining slavery may be reconciled with natural law).
65 See id. at 89 (explaining "das Relive Naturrecht," first termed by Ernst Troeltsch, which is the concept that "natural law adapted and modified for sinful man").
66 Id. at 96 (stating slavery is brought upon children through their mothers).
67 See supra text accompanying note 31 (explaining Aristotle's theory that those with physical strength should carry out physical labor for those with intellectual strength, so that intellectual superiors will have free time to devote to politics and philosophy).
than to Christian Dogma." In light of Christian's theologians' accommodation to slavery, Hook's claim is well-founded, particularly in medieval and early modern times.

II. ENLIGHTENMENT NATURAL RIGHTS AND INDIVIDUAL AUTONOMY

Natural law, though crucial to the development of natural rights in the modern world, was not always on the side of higher moral law. It provides Antigone with a noble appeal to an unwritten higher law that demands a proper burial for her brother, but it also provides justification for the institution of slavery, e.g., Aristotle and his disciples, both non-Christian and Christian. Aristotle lacks a concept of individual moral autonomy. Rather, the state grants rights based upon the individual's function. In addition, slaves perform a bodily (manual labor) function that deprives them of the capacity for citizenship and intellectual freedom.

Given Aristotle's intellectual preeminence in the Middle Ages and in the early modern world, it is little wonder that he is not a primary source of emancipation. Antecedents of Enlightenment declarations of individual human (natural) rights are found in Stoicism's commitment to individual human rights. Epictetus, recall, proclaims the brotherhood of all men, and that slavery laws are dead. His denunciation of slavery far exceeds anything uttered by the early church fathers.

The most profound philosophical expression on behalf of individual human autonomy is found in the works of Immanuel


70 See Rommen, supra note 26, at 13 (explaining the state's opinion on individuals); ARISTOTLE, POLITICS § 5, 1254b6-7 (Benjamin Jowett trans., Clarendon Press 1885) (explaining relationship between soul and body).

71 See Aristotle, supra note 70, at § 5, 1254b8 (positing that inferior beings by nature are slaves).

72 See Helmholtz, supra note 1, at 301 (commenting on origin of rights emerged during Enlightenment era).

73 Compare Smith, supra note 53, at 676 (noting that early Christians resigned themselves to social and political norms) with Martha C. Nussbaum, Symposium: Classical Philosophy and the American Constitutional Order: Comments, 66 CHI.-KENT. L. REV. 213, 217 (1990) (explaining that "Epictetus, himself once a slave, crusades tirelessly against the relevance of these class distinctions, insisting that the only slavery and freedom worth considering are in the individual soul").
Kant (1724 - 1804). Kant lays the foundation for the modern principle of individual freedom based upon a priori moral laws:

*Freedom* (independence from being constrained by another's choice), insofar as it can coexist with the freedom of every other in accordance with universal law, is the only original right belonging to every man by virtue of his humanity. This principle of innate freedom already involves the following authorizations, which are not really distinct from it (as if they were members of the division of some higher concept of a right): innate equality, that is, independence from being bound by others to more than one can in turn bind them; hence a man's quality of being his own master (*sui iuris*), as well as being a man beyond reproach (*iusti*), since before he performs any act affecting rights he has done no wrong to anyone; and finally, his being authorized to do to others anything that does not in itself diminish what is theirs, so long as they do not want to accept it - such things as merely communicating his thoughts to them, telling or promising them something . . . .74

Kant's renowned categorical imperative derives from innate moral laws. These moral laws tell us what we ought to do, apart from any practical consequences.75 Rational moral beings ought to conform to universal standards of behavior.76 These moral laws are autonomous, the source of human freedom in ethical life.77 They are not positive laws, that is, they are not empirically based or theoretical descriptions; rather, they are laws unto themselves, intrinsic moral laws reminiscent more of Antigone's higher moral laws (unwritten) than to Aristotle's concept of natural law. Moral laws are valid in themselves, and they are never a means to an end.

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75 See Timothy W. Floyd, Realism, Responsibility, and the Good Lawyer: Niebuhrian Perspectives on Legal Ethics, 67 NOTRE DAME L. REV. 587, 596 (1992) (noting categorical imperative is “binding on all . . . regardless of the consequences”).
76 See id. (citing Kant's example about how even lying to murderer about location of his victim to save his life would be wrong, because all lying is immoral).
Moreover, Kant’s categorical imperative declares that no individual human being is ever to be treated as a means to an end. Every person has an innate right to be respected as an autonomous moral human being whose freedom should not be infringed upon for utilitarian purposes. Consider the following Kantian analysis:

[The right not be made a slave, the right not to be punished if I am innocent, and the right not to be experimented on without my consent. These are all rights that would be defended by the utilitarian. Why? Because societies that do not grant these rights are likely to be more fearful, insecure, and thus unhappy than societies that do grant these rights. Is this really the correct reason? A persuasive case that is not the correct reason has been made by the contemporary Kantian John Rawls. Take slavery. According to Rawls, there is something perverse from the moral point of view in thinking that we must suspend judgment on the morality of slavery until we find out if the benefits to the slaveholders do or do not outweigh the burdens placed on the slaves. This is because there is a prior question of right here that the utilitarian overlooks—namely, does the slaveholder have a right to any of the benefits that he derives from the unjust exploitation of his fellow human beings? Rawls thinks that anyone who truly values the rights and dignity of persons will answer no to this question and will thus argue that the benefits to the slaveholders should never be counted in the first place and that the utilitarian calculations (do the benefits outweigh the burdens?) will never be allowed to get off the ground. Slavery is wrong because it allows some to benefit through their unjust exploitation of others (through violating a right against unjust exploitation) and not because a system that allowed them such exploitation would be unlikely to promote the general welfare. On the Kant-Rawls view, slavery would be wrong even if it did promote the general welfare.]

Slavery, then, or any other type of human exploitation, is unconditionally wrong, as it violates human autonomy and

equality. Everyone has his own dignity, and is not to be used as
an object for someone else’s end.\textsuperscript{79} There is, therefore, a
democratic basis to Kant’s moral laws. Kant does not view
ordinary people as inferiors, but individuals to be treated with
respect, who should not to be taken advantage of. The less
fortunate are to be cared for; charity is a consequence of moral
law.

Kant’s axiom that human beings should be treated as ends in
themselves and never as means, and that human beings have
dignity based upon their rational capacity to choose, provided a
foundation for Enlightenment’s belief in natural rights.\textsuperscript{80} His
ethical system, a consequence of the categorical imperative, has
resonated through the generations. Among contemporary neo-
Kantian philosophers, none has been more influential than John
Rawls.

Rawls’s A Theory of Justice,\textsuperscript{81} is a landmark in social justice
theory, and the most expansive application of Kant’s ethical
system. Rawls’s vision of a just society is premised upon what he
terms “the original position.”\textsuperscript{82} This initial situation describes a
just society of rational, moral human beings who agree on certain
principles: “the first requires equality in the assignment of basic
rights, while the second holds that social and economic
inequalities . . . of wealth and authority are just only if they
result in compensating benefits for everyone, and in particular
for the least advantaged members of society.”\textsuperscript{83}

Every person’s well-being depends upon a scheme of
cooperation whereby everyone enjoys a satisfactory life,\textsuperscript{84}
including the benefit of education. There is no morally defensible

\textsuperscript{79} See David A.J. Richards, Public Reason and Abolitionist Dissent, 69 CHI.-KENT. L.
REV. 787, 791 (1994) (citing Kant’s proposition that each man is “an end in himself”).
\textsuperscript{80} See Roza Pati, Rights and Their Limits: The Constitution for Europe in
(explaining that “various interpretations of the concept of ‘natural rights,’ have been
essential parts of the French Enlightenment movement . . . . In particular, the German
philosopher Immanuel Kant contributed substantially to the conception and essence of
rights” when he explained that “we, as human beings, should always treat humanity with
liberty and equality, without one trying to overpower the other purely for personal gains
in the most selfish manner”).
\textsuperscript{82} Id. at 11.
\textsuperscript{83} Id. at 13.
\textsuperscript{84} See James W. Nickel, Rethinking Rawls’s Theory of Liberty and Rights, 69 CHI.-
KENT L. REV. 763, 764 (1994) (explaining veil of ignorance and original position allows
individuals to choose principles to live by regardless of specific personal characteristics).
explanation for inequality in wealth and status that benefits some at the expense of others. Moreover, no individual deserves his wealth or status. These privileged conditions are not earned, rather, they derive from undeserved advantages of genetic endowment and social-class origin. This Rawlsian notion of undeserved rewards stemming from native endowment and social-class privilege has drawn spirited rebuke from critics, especially conservatives.85

Nonetheless, Rawls maintains that the accidents of original endowment and social circumstances cannot justify inequalities of wealth and status. A just society must nullify these "undeserved advantages" in order to serve those less advantaged.86 Unless the welfare of all is provided for in society, these advantages are unjust and unacceptable.87

According to Rawls, then, in the original position, it follows that rational, moral human beings will choose the principles of justice as fairness to all, and will eliminate the arbitrary inequalities based upon native endowment and social circumstance.88 Rawls considers this vision of a just society the most reasonable with respect to fairness and equality.89 Notably, the original position is hypothetical in nature; it is an intuitive notion much like Kant's faith in the categorical imperative.

Rawls adopts Kant's priority of right as crucial to a just society: "This priority of the right over the good in justice as fairness turns out to be a central feature of the conception."90 Good for the Utilitarian, for example, might be maximum net

85 See, e.g., Rex Martin, *Rawls's New Theory of Justice*, 69 CHI.-KENT L. REV. 737, 737 (1994) ("Rawls's theory ... is not, on its own terms, an acceptable or accredited theory of critical moral justification. For that procedure does not satisfy its own goal: of wielding a set of objectively based considerations for fairly assessing rival principles of justice.").


88 See Nickel, supra note 84, at 764 (discussing original position).


90 RAWLS, supra note 81, at 28.
pleasure, which in a Rawlsian society is unacceptable. Rawls views natural rights as embedded deep into ethical theory, even deeper than any utilitarian cost/benefit analysis:

Each member of society is thought to have an inviolability founded on justice or, as some say, on natural right, which even the welfare of every one else cannot override. Justice denies that the loss of freedom for some is made right by a greater good shared by others.92

Rawlsian expansion of Kant's categorical imperative, however, presents some troubling aspects. If rewards are the function of genetics and circumstances and therefore undeserved, it undermines Kant's imperatives of morality, to wit, individual free will in choosing a life. Individual free will for Kant is an exercise of rationality.93 Individual reward, then, might well be the result of moral, rational choices. And the reward thereby would be deserved.

Kantian ethics respects individual self-development as a consequence of rational decision-making.94 Individuals are responsible for their own actions because they possess an inner will that freely makes choices about which way they will conduct their lives. By contrast, Rawls, by making reward a function of native endowment and circumstance, robs individuals of Kantian moral autonomy and personal responsibility.

III. EDUCATION AS A NATURAL RIGHT: MARY WOLLSTONECRAFT AND HORACE MANN

Among voices implementing Enlightenment to promote women's natural rights, none is more boldly eloquent than that of

92 Id. at 28.
Mary Wollstonecraft (1759–1797). As the daughter of an abusive, alcoholic father, she tried to shield her mother and sister from mistreatment. Consequently, she was personally exposed to the injustice inflicted upon women.

In her landmark feminist manifesto, *Vindication of the Rights of Woman* (1792), Wollstonecraft demands equality for women in a male dominated world. She rejects the prevailing notion that women live merely to please men and that they lack the capacity of reason necessary for learning. Yet, Wollstonecraft argued women, when afforded the same opportunity of education as men, have the same capacity to reason as men. Moreover, she affirmed education is a birthright for women just as it is for men. According to Wollstonecraft, both boys and girls should attend national day schools, as girl’s neglectful education is a “grand source of misery.”

Wollstonecraft attributed the grim condition of women stems from a “false system of education . . . gathered from the books written on this subject by men who, considering females rather as women than human creatures, have been more anxious to make them alluring mistresses . . . .”

According to Wollstonecraft, apart from greater physical strength, men are in no way superior to women. Male domination of governmental institutions, along with a false system of education, has rendered women weak and submissive. False refinement has made them artificial and pitiful, in a state of “perpetual childhood.” Rather, women

96 See id. (noting Mary’s parental role over her siblings).
98 Id. at 73 (declaring men consider “females rather as women than human creatures”).
99 Id. at 76 (claiming image of female delicacy, created by pretty words, has deprived women of education necessary to spur them onto greater action).
100 Id. at 73 (denouncing lack of educational opportunities for women).
101 Id. at 73.
102 Id. at 76 (stating “education of women has, of late, been more attended to than formerly; yet they are still reckoned a frivolous sex, and ridiculed or pitied by the writers who endeavor by satire or instruction to improve them”).
103 Id. at 75 (expressing wish to treat women as “rational creatures” rather than children).
should “endeavour to acquire strength, both of mind and body.” Further:

[T]o convince them that the soft phrases, susceptibility of heart, delicacy of sentiment, and refinement of taste, are almost synonymous with epithets of weakness, and that those beings who are only the objects of pity and that kind of love, which has been termed its sister, will soon become objects of contempt.

Mary Wollstonecraft’s Vindication of the Rights of Woman represents a milestone in feminist assertion of intellectual equality with man. It is a woman’s birthright to be educated, not for submission to male domination, but for equal opportunity of rational development. As an enlightened advocate for equal rights for men and women, and as an opponent of political constraints on women, Wollstonecraft stands head and shoulders above such luminaries as Rousseau and Jefferson. Her only male counterpart is the architect of the common school movement, Horace Mann (1796–1859).

Mann’s vision of free public schools, became the foundation of the modern American system of universal education, and is considered his greatest achievement. His passionate belief in the common school movement rested upon natural law, which compels the state to provide schools that prepare individuals to perform all the duties essential to citizenship.

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104 Id. (urging women to reject their societal placement as inferior to men, and instead, to use education to advance their placement in society).

105 Id.

106 Id. at 76 (explaining need to “educate a rational and immortal being for a nobler field of action,” and declaring women’s’ education should prepare them for life, and not simply for marriage).


109 See id. (maintaining public education or “a public commitment to provide each child with a free education at public expense,” was adopted to promote public purpose of civic involvement).
Mann views education as an absolute or a natural right, as it rescues individuals from ignorance, poverty, and vice.\textsuperscript{110} Natural right demands the creation of free, public schools, which pass on knowledge of earlier generations. The fundamental law of the state establishes public schools to serve as instruments of civic enlightenment.\textsuperscript{111}

Mann's twelve annual reports to the Massachusetts Board of Education are classics in the history of education. His Tenth Annual Report\textsuperscript{112} is possibly the clearest most forceful expression of education as a natural right ever written:

I believe in the existence of a great, immutable principle of natural law, or natural ethics,—a principle antecedent to all human institutions and incapable of being abrogated by any ordinances of man,—a principle of divine origin, clearly legible in the ways of Providence as those ways are manifested in the order of nature and in the history of the race,—which proves the absolute right of every human being that comes into the world to an education; and which, of course, proves the correlative duty of every government to see that the means of that education are provided for all.\textsuperscript{113}

Every child has a natural right to education that will enable him to perform all domestic, social, civil, and moral duties. Education is as natural to the child as breathing and seeing: "a child without education is poorer and more wretched than a man without bread."\textsuperscript{114}

Mann's vehemence on behalf of education as a natural right is again expressed in his opposition to slavery, as he states slavery is "against natural right."\textsuperscript{115} "There is no justification 'for it in the eternal principles of justice and equity . . . All the noblest

\textsuperscript{110} See The Republic and the School: Horace Mann on the Education of Free Men 62 (Lawrence A. Cremin ed., Teachers College Press 1957) (arguing knowledge and abundance are inextricable, and that knowledge teaches wealth and virtue).
\textsuperscript{111} Id. at 62–63 (expounding education as absolute right, thus demanding government's funding such education).
\textsuperscript{112} Id. at 59–78 (quoting Mann's Tenth Annual Report).
\textsuperscript{113} Id. at 63.
\textsuperscript{114} Id. at 103 (justifying taxation to support schools).
\textsuperscript{115} Robert B. Downs, Horace Mann: Champion of Public Schools 130 (Twayne Publishers 1974) (examining the morality of slavery).
instincts of human nature rebel against it.”\textsuperscript{116} Further, slavery is the “most compact, and concentrated, and condensed system of wrong which the depravity of man ever invented.”\textsuperscript{117}

Though Mann lacks the philosophical stature of Kant, he possesses comparable devotion to moral law, in that they both believe such moral law is innate. Every individual acts freely from conscience, and by so doing, he respects his own and others’ moral freedom and personal dignity. Kant’s categorical moral imperative cannot be proven. It belongs to the realm of moral freedom, outside the world of phenomena, in time and space: “In contrast to laws of nature, these laws of freedom are called \textit{moral} laws . . . . But it is different with moral laws. They hold as laws only insofar as they can be \textit{seen} to have an a priori basis and to be necessary.”\textsuperscript{118}

Kant believes that human beings possess an innate sense of conscience, a categorical moral imperative to act freely and to treat others with respect.\textsuperscript{119} Human beings are autonomous and should never be used as means to another’s ends. Individuals must act as if to comply with a universal moral standard.\textsuperscript{120} Kantian ethics are based upon an unassailable principle: the absolute worth of every human being.

\section*{Conclusion}

The theory of education as a natural right has a storied history, and can be traced from the rejection of slavery in the Enlightenment to a greater understanding and promotion of individual autonomy. The idea of education as a form of a natural right developed more recently from those principles, taking the form of physical systems of education as in the writings of Horace Mann. However, it also takes on theoretical manifestations, as in the writings of John Rawls. Society as it exists today is, of course, a far cry from Rawls’s original position. However, being what it is, education is a right and a goal founded

\begin{enumerate}
\item \textsuperscript{116} \textit{Id}.
\item \textsuperscript{117} \textit{Id}. (expressing Mann’s contempt for slavery).
\item \textsuperscript{118} \textit{KANT, supra} note 74, at 42–43 (differentiating moral law from laws of nature).
\item \textsuperscript{119} \textit{See supra} text accompanying notes 74–76 (discussing why all forms of human exploitation are unconditionally wrong).
\item \textsuperscript{120} \textit{See id}. (explaining foundations for modern theory of individual freedom).
\end{enumerate}
on refuting servitude, and evidences itself as an institution available to all persons as an immutable, freely given choice.