Ethical Decision Making: Establishing Common Ground

> Some of us (and perhaps all of us sometimes) believe that we already know what constitutes the best resolution of a moral conflict without deliberating with our fellow citizens. Assuming that we know the right resolution before we hear from others who will also be affected by our decisions is not only arrogant but also unjustified in light of the complexity of issues and interests at stake. If we refuse to give deliberation a chance, we forsake not only the possibility of arriving at a genuine moral compromise but we also give up the most defensible ground for maintaining an uncompromising position: that we have tested our views against those of others. (Bruce Jennings, "Possibilities of Consensus: Toward Democratic Moral Discourse", *Journal of Medicine and Philosophy* 16, no. 4:447-63, p. 458)

Definition

Ethics is about moral choices. Technically, ethics is the philosophical study of moral choices, yet it is often used interchangeably with the word morality. It is, however, distinct from moral theology, which views morality within a theistic context. In its broadest conception, ethics focuses on the rational investigation of the nature of "the good" and the process of making moral choices to achieve the good that will enhance the well-being of human individuals, the entire human community and the world which they inhabit. In the human arena, the reference criterion for making moral choices is sometimes referred to as "authentic humanity".

For our purposes, the term "authentic humanity" attempts to express an ideal of human fulfillment: when an individual is in right relationship with self, others and the world. For the Greeks this was the notion of individual happiness or flourishing (*eudaimonia*), for the Hebrews this was a general state of peace (*shalom*). Given this context, those human acts that enhance authentic humanity are judged to be moral (good) and those that diminish authentic humanity are judged to be immoral (evil). Therefore, ethics must address all areas of human life -- war and peace, economics and politics, love and marriage, government and business and a host of other areas. In a word, ethics is about life.

Our Ethical Climate

We make ethical decisions every day and usually we are pretty good at it. We carry a large arsenal of ethical norms and values, which we have received from our family, religion, friends and the general political and social culture. While many citizens sense an ethical or moral decay in modern American society, there is still a significant foundation of Judeo-Christian/humanist values embedded in our secular culture - the Constitution, the Bill of Rights, the legal system and our broadly accepted cultural values.

However, as we enter the 21st century, we are all aware of a myriad of unsolved ethical issues that confront us. With great rapidity the ethical issues in the areas of bioethics, social ethics, medical ethics, business ethics, global ethics, etc., unfold before our eyes. We are well aware that these ethical issues have serious implications for our individual welfare and the welfare of our human community.

The manner in which these ethical issues are presented to the general public in the mass media is not always helpful. In five minute sections of the nightly news and in a variety of group talk shows, we see a parade of "experts" exchanging set ideas (often in loud voices speaking simultaneously) on such complicated and technical subjects as cloning, policies of preemptive armed invasion, abortion, living wage legislation, gay rights, physician assisted suicide, human genetic engineering, stem cell research, etc. There is generally no hint of an ongoing, cooperative effort to seek the truth.

Many voices from the religious right, left and the middle are heard, but each of these typically presents a faith perspective whose values do not coincide perfectly and whose diversity cannot be resolved on the common ground of faith, because no absolutely homogenous faith perspective exists. Furthermore, while faith may be judged to be "reasonable", again, by definition, faith is not ultimately verifiable by reason.

The Need for Ethical Discussion

Since ethics is about life, the urgency that should accrue to the study of ethics emanates from this fact: that our lives and our culture hang in the balance. When we make moral choices something happens or, in other words, human choices have consequences and for good or ill we will be deeply affected by them.

In general, the consequences of human acts are of two kinds - objective and subjective or external and internal.

1. Objective (external) Moral Consequences

For example, suppose someone chooses to steal fifty dollars from the next door neighbor. First, there is the objective fact that the neighbor is out fifty dollars. Objectively or externally this neighbor has been harmed and in a lesser, but real sense, the human community has also been injured. Because of this act of stealing, the human community is a little less perfect. We all know that human communities work best when citizens can trust that other citizens will respect their property. Stealing breeds fear and mistrust thereby weakening the ties that enable communities to live in peace and security - arguably an ideal condition for the development of authentic humanity.

Admittedly, it is difficult to get a feel for the fact that the human community could be injured by one act of theft. In the same way it is difficult see how one vote makes any difference in a national election. However, elections are in fact determined one vote at a

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time. Similarly, every act of kindness makes the world a better place and every act of cruelty or injustice diminishes the entire human community. It has been rightly observed that when the human rights of a single individual are violated by unjust laws, the rights of all individuals are put in jeopardy.

In our example above, it is also true that the objective damage done to individuals and the human community is significant and cannot be healed simply by restoring the fifty dollars which was stolen. It takes time to restore trust. Furthermore, good and evil ripple out into the human community and individuals lose the ability to control their effects.

2. Subjective (internal) Moral Consequences

In the above example, when someone steals fifty dollars, in addition to the objective, external consequences noted above, there is also a major subjective consequence: that person becomes a thief. This is a serious, often overlooked subjective consequence.

We are all in the process of becoming - becoming someone. Our actions reflect our moral choices and our moral choices play a significant role in determining what kind of a person we will become. In the first act of theft a person is on their way to becoming a thief. If you have ever stolen something you may remember that this "first time" was somewhat traumatic - what if I get caught, etc. Through repeated acts of theft, however, one can become fairly nonchalant about the matter. For some high school students ripping off the convenience store is more of an art form than a vice. Finally, some people reach the stage where they have no remorse and we can truly say that a person has lost his or her conscience.

The obvious point is that through our ethical choices we either become more or less authentically human. To repeat, it is not simply that someone committed an act of theft - that is important - but it is equally important that by that act of theft *a person has become a thief.* A strong case can certainly be made that we are not at our best (not authentically human) when thievery has become our way of life. Indeed, we become what we do.

Granting all the above, we have a great need to know what is ethical and what is not, what is good and what is evil, because our individual lives and our society depend upon that knowledge. As we will argue later, in a natural law approach to ethics when we choose evil we destroy ourselves, others and the world - we destroy our authentic humanity. Likewise when we choose the good we make progress in becoming authentically human and also make it possible for others to become authentically human.

Given the urgency for making good ethical decisions and the number and importance of the major ethical issues facing us, what is it that restricts us from reaching consensus concerning which ethical decisions will promote and which will diminish our authentic humanity as individuals and as a society? The fact is that from the time of the ancient Greeks, western culture has been searching for an ethical system that will produce *objective universal norms of human conduct* that all can agree on and ones that do indeed

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promote authentic humanity. So far this search has failed to produce a consensus on an ethical system that will produce such norms or whether such norms are possible. However, much has been done and much has been helpful, but there are many intellectual and emotional obstacles to be overcome.

The Need for Common Ground

It seems clear, that in order to make real progress on the ethical issues that confront us, we desperately need an ethical approach or method that will enable us to establish some type of common ground.

Without common ground, the prospect of reaching consensus or a workable compromise on pressing ethical issues is unlikely, if not impossible. Without some form of common ground we are left with the spectacle of advocates of diverse ethical positions exchanging set ideas in an intellectual atmosphere that, to say the least, is non-conducive to learning.

Lack of common ground also causes a great deal of wasted time and talent. Good, talented people on each side of a controversial ethical issue spend most of their time defending their position and attacking the position of others who disagree, rather than joining with others in a common search for truth. Without a common ground - common focus, common method, common goals - true communication (*cum* -with, *unio*-union) is most difficult, because participants are often speaking in a foreign intellectual language.

Some Obstacles to Establishing a Common Ground for Ethical Discourse

Throughout the history of ethics, philosophers have searched for some common ground that would enable them to establish a set of objective, universally valid norms for human conduct. A number of ethical theories have been proposed which claim to do just that. However, a wide variety of other scholars including, philosophers, anthropologists, psychologists, biologists, etc., object that the search for common ground is in vain.

In various ways, they make three important claims: 1) no satisfactory common ground has ever been or can be established (religious and cultural pluralism), 2) while ethics may be a valid field of study, the search for a set of objective, universally valid norms for human conduct is doomed to failure (relativism) and 3) the very idea of ethics and thus ethical dialogue is an impossibility (evolutionism, determinism).

We will take a brief look at some of these scholarly claims and the obstacles they present:

1. Religious Pluralism - Most people ground their ethical positions in some sort of religious perspective. In our world of widely varying religious perspectives we daily encounter people with quite different ethical views. As we mentioned earlier, since religions are based on faith and thus not ultimately subject to rational analysis, one person's reading of the "divine will" may well be different from another's and who is to say who is right. While it may be argued by some that logically not all contrasting ethical

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views can be correct, each person from within their own unique religious perspective believes their views to be correct and the differing views of others false or at least defective.

It is obvious that religious pluralism is a serious obstacle to the establishment of objective, universally valid religious norms. Again, in the context of religious pluralism the common ground for an ethical discussion which would lead to objective, universally valid ethical norms based on religious ethical perspectives is most difficult, if not impossible, to establish.

2. Relativism -- Largely as a result of religious pluralism and of our modern awareness of cultural pluralism, the possibility of a universal ethic based on a common ground has been severely challenged. Relativism creates a fundamental uncertainty about knowing the truth about anything and thus undermines the establishment of objectively valid universal ethical norms.

Relativism holds on one level (the cognitive) that there are no universal truths about the world only different ways of interpreting it. Each of us has our own point of view and we do the best we can to explain what we experience in our world. (As we shall see later, if this is so, then any natural law approach is impossible.)

On another level (the ethical) relativism holds that there are no universally valid moral principles. Moral principles are valid relative to culture and/or individual choice. As we discover and observe other cultures we see a wide variety of ethical standards. These cultures seem to "work" so we may well conclude that while one ethical system may be held up as "true" for this particular culture, it need not be necessarily true for any other culture.

Sociologists argue that all cultures are "constructed" by human beings within a specific human history and that certain "plausibility structures" - religion, customs, laws - keep the culture acceptable and believable to its members. Thus, various cultures simply "agree" upon what ethics will be supportive of their culture. This is a form of relativism or subjectivism because it posits that ethics consists of judgments that are not true or false independently of what we think of them, but only expressions of our beliefs, wants, emotions or hopes within a specific culture.

If relativists are correct, then we are unable to justify judgments that some things are good or evil, right or wrong, for everyone or from every point of view. In other words there are no objective, universally valid norms for human conduct. Ethical norms are the products of a variety of points of view, none of which can be said to be any better that any other. Ethics is a matter of cultural and/or individual preference, e.g., one culture's torture is another culture's method of getting at the truth, without any judgment being possible about whether torture is ethical regardless of its adoption or rejection by any culture.

Later critics of relativism will grant that there is some legitimate cultural relativity, e.g.,

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sexual mores and the regulation of property. However, they argue that there is an ethical core that is or ought to be universally valid in all cultures, e.g., prohibitions against killing the innocent, torture, child abuse, stealing, lying. For example, it seems difficult to dismiss Hitler's system of ethical values as simply a matter of taste.

3. <u>Evolutionism</u> - This term is used here to describe a nontheistic evolutionary perspective in which there is no real meaning or purpose to the world, including human life. The world is indeed evolving, but it is not necessarily going anywhere. There is process, but no particular end product or goal. In this perspective there is only the interplay of chance and the struggle of individuals and groups to adapt and survive.

Important studies by socio-biologists seek to show how such traits as selfishness and altruism are both adaptive for the human species (individuals and groups) and how both are sufficiently explainable by a study of genetics. In this scenario ethics becomes part of the adaptive process and thus is relative to the situations of survival in which humans find themselves. In this view, there can be no objective, universal norms for human conduct.

Here ethics is more of an observational science than an exploration of what ethical norms best contribute to the development of authentic humanity. For in this particular evolutionary view there is no model of authentic humanity - human nature is evolving - and ethics is simply an adaptive tool for survival.

There is, however, a theistic evolutionary perspective which accepts all that science discovers about the evolving universe, but does not accept the two philosophical premises of many scientists, namely that only matter and energy exist and that the scientific method is the only method of arriving at truth. Furthermore, for theistic evolutionists the world and humans do have meaning. Meaning lies at the root of their beginnings and also shapes their ultimate end. They agree with the Greeks that all beings have a natural end and would add that they also have a supernatural end.

4. <u>Determinism</u> -- In answer to the question whether humans are free and thus responsible for what they do, determinists generally answer that whatever happens is determined by antecedent conditions. This implies that at any time in history the future is already fixed and unique, with no possibility of alternative outcomes -- thus no real freedom. This position is defended by some philosophers, psychologists and lately some geneticists. If humans are truly thus determined, a discussion of ethics and human responsibility seems fruitless. In this scenario the search for common ground is irrelevant - there is nothing to discuss.

However, proving determinism is difficult, for it is impossible to know all possible antecedent causes. For most of us, determinism is dismissed as counter-intuitive. While admitting that we humans are not totally free agents, that we have psychological and genetic determinates of which we are unaware and that sometimes we are forced to do this or that, nevertheless we do experience some real ability to make free choices. So if you borrow a hundred dollars from your friend and refuse to pay it back, it is not an

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adequate defense to point out that if your friend had been present at the moment of the Big Bang, and was able to understand all subsequent causes and effects, he would have understood that non-payment was inevitable given all the intermediate causes.

Some Attempts to Establish a Common Ground to Work Toward an Objective, Universal Human Ethic

While we can admit some valid insights contained in the "doctrines" of relativism, evolutionism and determinism, most of us are instinctively or intuitively repelled by some of the implications of their conclusions: e.g., the notion that Hitler had no choice and/or that, in any event, his choice was merely a matter of taste and could be endorsed by his culture without comment from the rest of humanity.

We feel the need for some universal norms of human conduct and see our objection to the Holocaust as a valid objection springing from a universal norm, i.e., it is ethically wrong to kill innocent human beings. But how do we establish such a universal norm? How do we rise above all the individual ethical perspectives to establish the validity of some universal values and discover what these values might be?

We have seen that because of religious pluralism we cannot use religion to obtain consensus on moral norms. And certainly, for the atheists in our midst religious traditions have zero value anyway. Thus we must look elsewhere. Here are some relatively modern options:

> The sentimentalist option - An appeal to common human moral feelings or sentiments. (David Hume)
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> The rationalist option - An appeal to human reason to derive ethical principles that all humans can accept despite cultural differences. (Immanuel Kant)
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> The utilitarian option - An attempt to base ethics on utility or "the greatest happiness of the greatest number" defined in terms of pleasures and pain common to all human beings. (Jeremy Bentham and John Stuart Mill)
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> The contractarian option - An appeal made to a social contract that all reasonable persons, despite their differing values, could agree upon. (Thomas Hobbs and John Rawls)

Finally, we shall consider the natural law option with ancient, medieval and modern proponents.

1) The Sentimentalist Option: This option is identified with the Scottish philosopher David Hume (1711-76). In his consideration of ethics he held that reason alone could not give guidance to the discovery of universal ethical norms. Rather we must consider

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human feelings, desires and sentiments - thus the term "sentimentalist".

Judgments about moral good and evil are expressions of feelings or sentiments of a kind which he termed "calm passions". It might be suggested that this is merely another form of subjectivism or relativism, but Hume would argue that sentiments such as benevolence and sympathy are common to all humans and these can therefore be the basis for a universal ethic. The function of reason is to discern the means-ends relationships necessary to attain our moral objectives and thus for Hume reason is the "slave" of the passions.

He talks about common virtues such as friendliness, kindness, integrity, honesty, gentleness and cheerfulness. He then asserts that all right-thinking persons would prefer these virtues to such vices as cruelty, treachery and dishonesty, because the virtues are socially beneficial and the vices harmful. He admits that education is necessary for people to have correct sentiments.

Critics pointed out that what counts for virtue and vice may well differ from person to person, culture to culture for one historical period to another. And who is it that defines "right-thinking" persons? Furthermore, if sentiments and passions do sometimes incline humans to sympathy and benevolence, humans also have equally powerful sentiments and passions inclining then toward vice, e.g., selfishness, vanity, greed and envy. And lastly, if education is so important to correct sentiments we are back to relativism since education differs from culture to culture.

In the final analysis, Hume is judged to have failed to resolve the relativist challenge to the establishment of an objective set of universal ethical norms.

2) The Rationalist Option: The 18th century appeal to reason in establishing ethical norms is often identified with another philosopher Immanuel Kant (1724-1804). Kant's basic ethical considerations are found in his notion of the "categorical imperative". Kant contrasted this to a hypothetical imperative which takes the form: "If you want to achieve X then you ought to do Y." But Kant felt that we must get beyond our personal desires and purposes (doing Y to get what you want X), because human desires differ and thus cannot be a foundation for a universal ethic.

And so for Kant, ethics must have the character of an unconditional "ought" that goes beyond personal desires and purposes and be exclusive of inclinations and consequences. Such unconditioned "oughts" Kant called "categorical" - *what we have a duty to do without qualification.* For example, a hypothetical imperative might be "don't lie if you want to be trusted", but a categorical imperative would be "don't lie, period" no matter what your wants and desires or no matter the consequences. Thus certain human acts are right or wrong in themselves, regardless of consequences. This puts ethics beyond relativism.

Within the "categorical imperative" there were two main themes:

> 1) Act only on that maxim (or principle) which you can - at the same time will to become a universal law.

> 2) Act in such a way as to treat people as ends and never as means.

In the first major theme, Kant is telling us that we should only allow ourselves to act in a certain way if we are prepared to allow everyone else to act in this way too. Thus, if I permit myself to lie, I must thereby permit all people to lie. If I make a promise, which I do not intend to keep, I must expect or allow others to do likewise. In other words, we must be willing to allow our moral choices to become a universal law.

According to the second theme, if people are an end in themselves, then it is never permitted to use them simply as means, even if good will come from it. We must respect the desires and purposes of others. To treat them as a means is to subordinate their purposes to one's own, to use them for one's own purposes. For example, human medical experimentation that can help cure major diseases cannot be permitted if the human subjects of this experimentation are exposed to or inflicted with great harm.

Critics have pointed out that Kant's categorical imperative not to lie, no matter what, is not sensitive to circumstances. If the Nazis came to your house asking if you are hiding Jews and you were hiding Jews in the basement, most would argue that you can and even should tell a lie in these circumstances. Furthermore, some relativists may say that they are willing to lie if it will benefit them and run the risk of getting caught and they would gladly grant that option to others. Thus, a universal ground has not been established.

The Utilitarian Option: While Hume and especially Kant did not include consequences as determinates of the morality of human acts, Jeremy Bentham (1748-1832) and John Stuart Mill (1806-1873) made consequences the focus of their ethical system. They argued that every human act ought to be judged by the results it achieves.

In its simplest form, utilitarianism states that in any situation where here is a moral choice to make, *the right thing to do is that which is likely to produce the greatest happiness for the greatest number of people.* This has been called the "Principle of Utility" or the "Principle of the Greatest Happiness of the Greatest Number". Happiness was defined in terms of pleasure and pain.

These principles, associated with the greatest happiness for the greatest number, were often associated with social policies and the reform of public institutions, especially the legal system. Bentham's utilitarian principles were clearly presented in his approach to the question of punishment for crime. He held that legal practices of punishment, including capital punishment, were justified in terms of their social consequences, e.g. deterring convicted criminals from further crime or others from committing crime. Kant would have said that the punishment must fit the crime and that people should not be

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used as means (discouraging others from crime), but as ends in themselves.

Bentham had his critics who challenged him to explain how to compute the greatest number. Marx referred to utilitarianism as a philosophy for "accountants" or "bean counters". Furthermore, it is often difficult to predict beforehand the consequences (happiness) of an act and it was not clear how happiness was to be defined or whether short range or long range consequences were the final criteria. Bentham's brand of utilitarianism was called "act utilitarianism" because it judged each act as to its utility and did not accept any general rules, e.g., always tell the truth.

John Stuart Mill modified Bentham's thought by giving preference to intellectual pleasures over physical pleasures and called for an assessment of the quality of the pleasure as well as the quantity. Mill also allowed for the acceptance of rules that were formed for the benefit of the whole of society, e.g., not to take innocent human life. These rules were justified on utilitarian grounds by taking a long view of the good of society. Thus, the short range benefits of taking innocent life must be viewed within the context of the long range effects on society. Mill's version was dubbed "rule utilitarianism".

Bentham and Mill were in search of an objective criterion (pleasure, pain, purpose) by which to gauge whether an action is right or wrong, however, many critics felt that they fell short of their objective. In addition to the criticisms mentioned above, critics point out that a utilitarian ethic ignores individual rights and that the rights of the individual could be subordinated to the majority. There is no built-in protection for the rights of the minority.

In any event, when most moral choices are made there is no time or method to calculate benefits and such calculations do not rule our moral lives. For example, if you had the choice of saving one of your children or ten strangers, what would be your choice? Thus in everyday life ethical choices are in fact most often made on convictions or emotions rather than calculations. The question remains: On what criteria do we base our convictions? Mill and Bentham provided no answers and thus were judged to have failed in establishing a viable common ground for universal ethical norms.

The Contractarian Option: Our final example in the philosophical search for a common ground for an objective, universal ethic is based on various theories of the Social Contract. Among others, the major proponents of there theories are Thomas Hobbes (1588-1679), John Locke (1632-1704), Jean-Jacques Rousseau (1712-1778) and, in modern times, John Rawls (1921-).

In general, they are divided into two groups: "Hobbesian theories" and "ideal theories". These theories are important for us as studies in themselves, but also because of the great influence they have had on the American and French Revolutions.

1) *Hobbesian Theory* - Since the Reformation and the modern awareness of the plurality

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of religions and cultures, there has been a urgency to find a common ground for ethics and politics. Hobbes began by positing the idea of an original "state of nature" populated by warring tribes in which life was "poor, nasty, brutish and short". Given this deplorable state, humans would be motivated out of self-interest to make agreements or contracts with their rivals to live in peace. These contracts would provide a common ground for ethics.

Since social contracts would have to be enforced, Hobbes maintained that it would require contractors to agree to submit themselves to a ruler with almost absolute power. In the issue of ethics, Hobbes held that there was no right or wrong in the state of nature, only self-interest. Rules of right and wrong are created by the contract and defined by its mutual promises and commitments.

Later critics would call for the substitution of constitutional democracy for an absolute ruler. They would also point out that in this ethical theory there is no motivation for the strong to help the weak and that a social contract that made provisions for slavery would have no higher ethical standard to judge slavery as unjust or wrong.

2) *Ideal Theories* -   John Locke took a somewhat different view than Hobbes. He agreed that the social contract provided the common ground, but he held that while people are required to surrender some of their individual rights to the community, nobody, not even the ruler, should be above the law. In the place of a ruler, he argued for the organization of a state with institutions chosen by the majority of the people. Authority would reside within these institutions. Individuals would have rights - free speech, private property, freedom of worship - upheld by the institutions of the state.

Rousseau thought much like Locke, but was concerned that private property could create social inequalities. In his social contract he held that individuals would have to surrender some of their natural liberties in order to establish civil liberty.

A modern version of this social contract theory is that of John Rawls. Rawls introduced the notion of "fairness" into social ethics and equated fairness with justice. His two principles of justice were: 1) Each person has an equal right to the most extensive amount of liberty compatible with similar liberty for others. 2) Inequalities are to be allowed only if there is reason to think that such inequalities will benefit the least well-off in society. For example, doctors might be paid more if it would improve the medical care for everyone or businessmen would be rewarded for providing jobs. Also, these special social positions (doctors, businessmen) would have to be open to all, under conditions of fair opportunity - education, lack of prejudice.

For Rawls the common ground for the social contract and it ethical provisions could be established by a unique method. He imagined a group of individuals (contractors) gathering together to design a set of principles to establish a just society that all could agree upon. His method was to place these contractors in an "original position" behind a "veil of ignorance".

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Because of the "veil", each contractor making the rules for society would be unaware of their position in society after the veil was lifted. They could be black or white, rich or poor, talented or not, farmer or merchant and so on. Thus, in their uncertainty about their place in society, they would be most likely to design a society that would be fair or just for everyone.

Critics say that Rawls is too idealistic and that in theory a contractor could take the risk that they would be one of the advantaged class and not feel the need to make provisions for the less advantaged. Furthermore, Rawls has asked the contractors behind the veil to abstract themselves from all their cultural bonds and religious beliefs. However, they would have to share some basic values in order to structure a just society. The question of who decides on the nature of these basic values and who establishes the basis on which these decisions are made is an important question. Rawls states that the contractors would have to posses an "overlapping consensus" on liberty, fairness and reasonableness in order to reach agreement. Such agreement is not guaranteed by his theory.

An Ancient Option: Natural Law

Finally, we come to the natural law option. Natural law theory is based on the presumption that human nature is in some sense normative for human action. Natural law is understood as knowable to the unassisted human mind, that is, to the human mind which does not reference divine revelation as its source of moral wisdom. Thus in a religiously pluralistic society it offers two secular components which can serve as a basis to establish a common ground for discussion in the search for an objective, universal human ethic. These components are: 1) human nature and 2) human reason.

Those committed to a natural law tradition assume the possibility that reasonable people can discover together what it means to be human and what ethical principles need to be adopted and what civil laws need to be enacted in a society so that human life can flourish. This assumes that we share a common human nature and that through a rational process we can discover what constitutes our nature and what are some of the necessary social circumstances, (ethical consensus and laws), that will enable our natures to grow and flower.

The natural law is not envisioned as some kind of ethical code existing above and beyond human experience and imposed on humans and their societies from the outside. It is not an extrinsic set of laws or ethical principles.

> Natural law is not a theoretical knowledge of propositions; ...Our discovery of the natural law occurs by way of reflection upon our natures and then by discovery of the necessary means for achieving or constituting the goods of our natures. (*Narrative of the Natural Law* - Pamela Hall p.37)

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That the natural law must be discovered implies that the employment of the natural law in moral discourse is a *rational process*. *Rational* establishes that the ground for discussion is human reason, something human beings share in common. *Process* means that there is an element of discovery in understanding the natural law. *It is not simply a process of referencing a set of immutable principles, but a discovery of "what works" for human beings in the particular circumstances of their individual and social lives.*

The classic Greek statement is from the play *Antigone* by Sophocles. Antigone defies the order of the king not to bury her brother killed in a civil war opposing the king. She says:

> For me, it was not Zeus who made (your) order, nor did that justice who
> lives with the gods below mark out such laws to hold among mankind.
> Nor did I think your orders were so strong that you, a mortal man, could
> overrun the gods' unwritten and unfailing laws. Not now, not yesterday;
> They always live, and no one knows their origins in time. (Lines 446-457,
> *The Complete Greek Tragedies,* Green and Lattimore, eds.)

Even for the Greeks, natural law was not viewed as a monolithic philosophical system with a set, immutable code of ethical conduct. They started with the observation that all human beings desire happiness and self-realization. Based on a rational view of reality, it was assumed that through observation and rational investigation certain "natural laws" could be discovered that, when observed, would aid in the attainment of mankind's final end: happiness and self-realization (flourishing).

The Romans also adopted a concept of natural law. Building on the tradition of the Greeks -- from Aristotle and the Stoics -- Cicero (d. 43 BC) defined natural law in his book *On the Republic,* (written in 55-51 B.C.) in this way:

> True law is right reason in agreement with nature, universal, consistent,
> everlasting, whose nature is to advocate duty by prescription and to deter
> wrongdoing by prohibition. Good men obey its prescriptions and
> prohibitions, but evil men disobey them. It is forbidden by God to alter this
> law, nor is it permissible to repeal any part of it and it is impossible to
> abolish the whole of it. Neither the Senate nor the People can absolve us
> from obeying this law and we do not need to look outside ourselves for an
> expounder or interpreter of this law.
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> There will not be one law at Rome and another law at Athens. There is
> now and will be forever one law, valid for all peoples and all times. And
> there will be one master and ruler for all of us in common, God, who is the
> author of this law, its promulgator, and enforcing judge. Whoever does
> not obey this law is trying to escape himself and to deny his nature as a
> human being. By this very fact, he will suffer the greatest penalties, even
> if he should somehow escape conventional punishments.

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For Cicero this natural law reflects the mind of God and is therefore reasonable. All men receive the gift of reason from God and thus natural law accords with the common sense possessed by all reasonable people.

The Roman jurist Gaius (d. 180 AD) distinguished two major types of law: *ius civile* (law of the nation), that which is proper to each country and *ius gentium* (law of the nations)*,* the common heritage of all humanity, which is known through natural reason (the natural law). Reason establishes the *ius gentium* by conforming to the natural order of things through human instinct, which is common to all when it comes to providing for the necessities of human existence. Later, Ulpian (d.228 AD) added a third notion termed *ius naturale*, which emphasized that which is common to humans and animals. It focused on the physical structure of human beings as normative for morality. Each of these approaches used reason as the analytical tool to determine what is moral.

Based in part on the Greek and Roman concepts of natural law, Thomas Aquinas in the 13th century taught that the natural law participates in the divine law and that all human law is derived from the natural law. *Ius gentium* (common to all) is human law derived from the natural law by way of deductions; whereas *ius civile* (for a certain country) is a further specification and determination of the natural law for specific national purposes.

Indeed, it is one of the foundational convictions of Western civilization that there is an objective and universal justice which transcends any particular expression of justice found in civil law. This is known as the *natural law tradition* which, based on a rational investigation of human nature, establishes the standard of justice for those making civil law.

Even a noted secular humanist like John Kekes, (*Facing Evil, 1990),* believes that he and other secular humanists are capable of judging some things as objectively evil without reference to a divine order. He states that some human acts militate against what he calls "the fundamental goal of morality: promoting human welfare". Such human acts are thus viewed as immoral.

That some human laws have been judged to be unjust when measured by this "higher" order of universal justice is historically clear. The history of nations is replete with instances when citizens rose up against unjust laws. What was the basis of their protest? How were these laws judged to be unjust? They were "instinctively" or "intuitively" understood to be contrary to the nature of human beings and thus militated against their ability to grow and flourish.

In his "Letter from a Birmingham Jail", Martin Luther King justified civil disobedience by citing the natural law as higher than unjust civil laws. In the words of the Nuremberg Trials, Hitler's unjust laws concerning Jews were judged to result in "crimes against humanity". Such reasoned judgments, that some civil laws are unjust, are based on the reality of a common human nature and its fundamental need to flourish- the basis for natural law.

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Based upon these judgments, unjust laws were often repealed and just laws were instituted. These new laws were considered just because they were deemed to aid in the process of human growth and maturity, for individuals and society. This is basically what we mean by an appeal to the natural law. It is a *rational*, nonsectarian *process* based on a historical reflection on human nature and a determination of what moral choices and what civil laws either militate for or against the good of individuals and society.

And so to go against the natural law is to act against the universal human good or to diminish authentic human existence. Good is defined as that which contributes to human flourishing. It is important to note again that this type of morality is thus viewed as intrinsic, not extrinsic. It pertains to internal laws of our nature and not to laws imposed from the outside by either divine or human authority. So it is considered possible that through a rational examination of human nature, we can come to understand what is good for us, what works for us, so that we can in turn determine what ethical principles and social structures will help us attain our individual and collective common good.

Pamela Hall, gives her concise outline of the basis and the process of a natural law approach which she believes can provide a common ground for moral discourse:

> Our discovery of the natural law occurs by way of reflection upon our natures and then by discovery of the necessary means for achieving or constituting the good of our natures. These means include the formation of rules to help secure and constitute the good for us. We both give the law to ourselves and discover it.
>
> This discovery, I stress, takes place within a life, within the narrative context of experiences that engage a person's intellect and will in the making of concrete choices. In attention to what makes up one's experience and in the making of choices, both good and bad, a human being augments understanding of his or her own nature and of what most promotes the flourishing of that nature. This process of inquiry is, then, one of practical reasoning, practical reasoning which must be carried on individually and communally. *(Narrative of the Natural Law,* Pamela M. Hall p. 37)

Anglican theologian John Macquarrie wrote:

> ...Natural law is foundational to morality. It is the inner drive toward authentic personhood and is presupposed in all particular ethical traditions, including the Christian one. (*Three Issues in Ethics* p. 91)
>
> Natural law is, as it were, the pointer within us that orients us to the goal of (authentic) human existence. Actual rules, laws, and prohibitions are

judged by this "unwritten law" in accordance with whether they promote or impede the movement toward fuller (human) existence. (*Three Issues in Ethics* p. 106)

Macquarrie's appeal to the "unwritten law of human existence" supports what we indicated above, that ordinary people have an intuitive awareness of what scholars call the *natural law*. Human experience has led us to an awareness that our humanity is not a blank slate on which anything at all can be written; certain kinds of behavior lead to human flourishing while others lead to human frustration.

It was Thomas Aquinas in the 13th century who held that there are four basic goods or needs that are required for our fulfillment as human persons -- "life, truth, society, and reproduction ". Accepting these basic human goods (and others) the natural law approach would then reason to certain universal prohibitions such as murder, lying, and offenses against others in society and universal duties such as caring for one's offspring.

Finally, people, regardless of their religious affiliation or lack thereof, seek to live in a society and a state where they can fulfill their human desire for order, peace, justice, kindness, love and any other values that most of us can agree are desirable apart from any specific religious base or context. This is what natural law theory strives to accomplish and thus provide the necessary common ground.

Civil Law and the Natural Law

When people react to civil laws that seem to them unjust (eg Martin Luther King), they "sense" that the law is wrong because it is an offense against the common good, it attacks certain basic, shared human values and certain basic human rights. While these laws in question may have been created and enacted by lawful authority (as in the case of Hitler), people object that they are unjust by referring to something beyond or more basic than simple authority -- i.e., human nature. Just laws must correspond *intrinsically* to the good of individuals and communities. When they do not, people rightly object. *Here the common ground for moral reflection and political action is human nature. The rational process involved in determining the means for achieving the goods of our natures, we call the discovery of the natural law.*

A powerful example of people from various religions and no religion objecting to existing civil law and coming to agreement on a moral issue was experienced in the civil rights struggle, which we noted briefly above. This was viewed as a moral issue, based on common human dignity. Of course there were legal issues, but the vast majority of marchers who took to the streets were not lawyers or jurists. They were ordinary people - theists, agnostics and atheists - who "knew in their hearts" that discrimination was a mortal offense against human nature and human community. As accepted under law it was a threat to their individual freedom and it was a destructive force within society.

A political consensus was reached that segregation was an attack on our common human

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dignity. A universal experience of what it means to be human provided the common ground (*natural law*) for social action, resulting in the enactment of anti-discrimination laws to allow greater possibilities for human beings to grow and flourish within society. A parallel case is that of slavery.

This form of the natural law tradition is, in large part, what makes our country great. The following observation by Harold McKinnon sums it up quite well:

> This, gentlemen, is our birthright...And in this matter we are in the most unyielding dilemma. For if there is no higher law, there is no basis for saying that any man-made law is unjust...; and in such case, the ultimate reason for things, as Justice Holmes himself conceded, is force. If there is no natural law, there are no natural rights, and if there are no natural rights, the Bill of Rights is a delusion, and everything which a man possesses -- his life, his liberty and his property -- are held by sufferance of government, and in that case it is inevitable that government will some day find it expedient to take away what is held by a title such as that. And if there are no eternal truths, if everything changes, everything, then we may not complain when the standard of citizenship changes from freedom to servility and when democracy relapses into tyranny. (McKinnon, <u>The Higher Law,</u> 1946)

Throughout history, citizens have rejected the absolute claims of institutionalized human authority. This is what revolutions are all about. To the old Roman adage "What has pleased the sovereign has the force of law" the response has been, "not always". Our own Declaration of Independence specifically mentions the natural right of a people to rebel when there is no other way to redress violations of the natural, inalienable rights of citizens by the government.

When an appeal is made to confront the misuse of human authority, whether it is an appeal to "humanity", the "dignity of man" or the "natural law", the *function* of the appeal is the same, i.e*., to curb human authority.* Intuitively we sense that without the ability to appeal to something higher or beyond raw human authority and power civilization is in great danger. And if such appeals are to have any validity, that to which we appeal must be real and grounded in the essence of what it means to be human. I would call this the basis of natural law.

<u>Natural Law and the Formation of Individual Conscience</u>

Our intention has been to investigate ways to provide common ground for ethical discussion in a pluralistic society. However, any investigation of ethics has an individual dimension also. In the final analysis the vast majority of ethical decisions are made by individuals. As individuals engage with others in the quest for universal ethical norms they are by that process also engaged in the formation of individual conscience.

Conscience is not some small voice telling us what to do or simply our Super Ego as Freud contented. Individual conscience is our *best judgment* about what human acts are ethical in these particular circumstances. Thus, the exercise of individual conscience is not understood as a right, but as a duty. One must always follows one's conscience. Will we always make the right ethical decisions? Probably not. Does it make a difference? You bet.

Ethical decisions make a difference because no matter how we form our conscience, how we view the goodness or badness of an act or whether we have good or bad intentions, when we make an ethical decisions there are certain consequences over which we have little or no control. As we all know, even with the best of intentions we can do harmful things. These are objective consequences, consequences that happen outside us, as noted above.

For example, say a soldier is on the battlefield and a comrade is wounded in the stomach and cries out for a drink of water. The soldier decides to share his meager supply of water even at the risk of his own life. From a subjective point of view this is a loving and perhaps heroic act, but objectively it will no doubt only cause his comrade great pain. Because, when a person has a stomach wound a drink of water usually results in great pain. Out of ignorance our good soldier caused great pain. In a way of speaking, it was an objectively evil act. Hence, we have here an act that is subjectively good, but objectively evil. Even when acting out of heroic love, when combined with ignorance the soldier failed (objectively) to do the right thing. This is why it is crucial to know right from wrong and to act on that knowledge.

The natural law tradition is based in the premise that human acts are good or evil insofar as they are constructive or destructive of authentic human existence. Acts are not objectively good or evil because of our intentions, our legal constructions or our cultural or religious biases. The objective goodness and badness of human acts are fundamentally independent of any subjective constructs.

Therefore, the process of individual formation of conscience is a crucial process. Our individual and societal lives depend on knowing what, in fact, is ethically good or bad. The lack of conscience sometimes displayed by serial murders is a poignant reminder of how important a correct conscience is to our human survival.

Objections To The Concept of Natural Law

There has been a determined attempt in this paper to make a strong argument for recourse to the natural law in the public forum when debating ethical issues. However, recourse to natural law is not without its problems. It would take us too far afield to discuss the long history of the natural law tradition, however, a few remarks are necessary.

The natural law tradition has had a history and not all of it good. The classic critique of

natural law theory involves the issue of slavery. From the time of Aristotle in the 4th century B.C. through the history of Christianity and western culture up until the 19th century, slavery was actually defended with reference to the natural law. Writing in his *Politics*, Aristotle stated: "he who is by nature not his own but another's man, is by nature a slave". Certainly slavery took on many forms, some more benign than others, nevertheless the basic flaw in the natural law approach was the failure of natural law to provide a basis for the fundamental equality of all human beings as a foundation for certain "inalienable rights".

Later, in the 19th century too much confidence was put in the ability of human reason to determine the principles of the natural law and the process degenerated into the application of a myriad of principles to every possible kind of human activity all in the name of natural law (rationalism).

Modern challenges have also come from existentialism and evolutionary theory. Existentialism holds that human nature is defined by what we make of ourselves. There is no objective, essential "nature" that can be called human. To put it another way, "the nature of mankind is not to have a nature". Thus any talk of natural law is irrelevant.

Certain evolutionary theorists, theists as well as atheists, hold that since human nature is subject to biological and cultural evolution, we can say that human nature evolves (bio-cultural evolution) and therefore any morality based on human nature must also evolve, thus eliminating the idea of absolute moral norms based on human nature. Furthermore, human nature has no natural "end" or purpose therefore there is no stable matrix available to judge what human acts enhance or diminish human existence.

Part of the answer to these objections is that while this is a changing world, in the case of humans, the subject or substance that changes remains human nature. While we can speak of the universal notion of "tree", actual trees find historical expression within a wide variety of individual trees. So too, while we recognize a common human nature, we must attend to the historical realization of individual human natures which includes development or change.

We can affirm a metaphysical human nature, but realize that such a nature is incarnated in diverse historical and cultural environments. Perhaps we can say that human nature is essentially the same but in incidentals, subject to bio-cultural evolution. Thus we can say that while lying, stealing and murder have always frustrated universal human appetites and aspirations, our modern understanding of bacteria makes new moral demands for personal hygiene which were not required in a previous cultural context. This is what we alluded to earlier when we said that we come to understand the natural law through a *process of discovering what works in a particular historical context.*

A most important challenge to natural law is an old one -- the challenge of relativism. As noted earlier, it is based on the valid observation that various individuals and cultures have a wide variety of moral codes. Plus there are also disagreements even among those

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of good will who defend the natural law. So, if it is true that we all possess a common human nature, why this lack of agreement concerning what human behavior is dictated by this fact?

There is a four-part response to this important objection:

1) We are not perfect. Human reason is fallible. We make mistakes. Plus, the discernment of the natural law and the resulting moral consciousness is a process within various human cultures. These cultures include certain "accepted" assumptions, ex. some humans are "born to be slaves" or the earth is the center of the universe. Thus any reasoning based on these assumptions will be flawed.

2) While we are defined as rational beings, we are not entirely rational. We also have an irrational side to our nature, which can at times interfere with our ability to see reality objectively. It is easily observable that we are at times more under the rule of our passions that our reason. Reason thus impaired can err in the discernment of the natural law.

3) Certain moral principles may be universal and valid, but their application is always conditioned by circumstances. Thomas calls this the exercise of prudence. For example, while it is a universal, valid general rule that you must return borrowed property, it would not be prudent to return a sword to one who has gone mad or has vowed to kill you. (ST 2-2ae, q.57, art.2)

4) The subject matter of moral judgments is changing. The issues of cloning, total warfare, stem cell research, genetic engineering and a host of other moral issues were not part of the moral landscape a hundred years ago. New insights into the natural law and its application to new circumstances is central to the changing world of moral theology and an appreciation of the natural law.

What is the upshot to these objections to the natural law? We have offered some answers, but we must admit that the use of the natural law as a tool in defining morality requires hard work with no guarantees of success. It is a difficult process of reasoning about what it means to be fully human and then sifting through human history and personal experience to determine, in this concrete historical setting, what individuals or the state can do to foster the flowering of authentic human life. To use the natural law is not a process of applying a storehouse of immutable principles to every conceivable human situation. To employ the natural law is to be committed to a quest, a searching through human experience for those ways of acting that will promote the authentic humanity of individuals and society.

We should also note that using reason, because it provides a common ground, is not as simple as it sounds. When we "reason" we do so from a particular point of view or paradigm (*a la* Kuhn). We all have our own frame of reference and who is it that enters a dialogue expecting to have their opinions changed? Not me! What each of us considers

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"reasonable" depends a great deal on our past experiences and our general approach to life. Ask any waitress the difference in what people consider a "reasonable tip".

This observation has important implications for any who advocate the natural law approach to morality. To say that we reason from a particular point of view, means that we each operate with a certain ideology. An ideology is a certain way of understanding ourselves and our world. It reflects our aspirations for self and for society. It is what we want for ourselves and society because were believe it to be "the right thing". Whether or not these aspirations are grounded in reality is where the debate rages in a society with conflicting ideologies e.g. liberal vs conservative.

We must be aware that it is almost impossible to escape the influence of our ideologies. Any dream of entering into the realm of pure reason, free of ideologies, to investigate grave moral issues is just that - a dream. Like the seldom resisted temptation to use the Bible as a source of "proof texts" to support our prejudices, we can also use reason as a tool to build a case to support prior convictions which we bring to the "table of reason", rather than a tool to explore reality in search of the truth with an openness to be surprised or to surrender our most cherished positions - to change our minds.

This is not to say the task is not worth undertaking, but to free ourselves of any delusion that it will be easy or that our conclusions will be the product of free, unprejudiced reason. It is also a signal to be patient with each other, because our ideologies are not just academic opinions of how we think the world ought to be, but they also define how we have come to understand our world and ourselves as human beings, such understandings change slowly, if ever. When someone challenges our ideology, we naturally become defensive. Therefore, consensus is elusive. That is why compromise, rather than total capitulation is the name of the game in a democratic society.

One last concern. What if all parties would accept a natural law approach and, given all the hard work and goodwill in the world, we cannot reach consensus? To what higher court do we appeal? In this process there is none. And so there are no guarantees of success. All parties may agree that there are universal truths to be discovered in the examination of our human nature, but what guarantee do we have that our imperfect abilities to reason will uncover them and how will we know for certain if we do? We may sincerely believe we have, but the fact that we are so convinced is no guarantee that our beliefs correspond to reality. At best, it is a murky business. But it is the business we need to be about if we are responsible human beings. Perhaps reason is like democracy in Churchill's view - it doesn't work very well, but it is the best system we have.

A Final Word: What have we accomplished? We do not have a bag of ready made answers for our pressing ethical issues, but if we adopt and natural law approach - the common ground of human nature and the method of human reason - we have accomplished something important. Namely, given this common ground, we are free to view each other as friends, perhaps friends with legitimate differences, but with a common concern for truth and the welfare of all human beings.

We may still disagree, but our task has shifted from seeing each other as "the enemy" to be overcome to seeing each other as fellow human beings with the same goal - the good of humanity - and using the same method - reason - in the quest for truth. In such an atmosphere it is possible to learn from each other and in the end if we still disagree we know that we have searched together in good faith. We are companions facing the mystery of human life and our role in its flourishing.