THE AUTONOMY OF LAW

Essays on Legal Positivism

EDITED BY

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CLARENDON PRESS · OXFORD
1996

Oxford University Press, Walton Street, Oxford OX2 6DP
Oxford New York
Athens Auckland Bangkok Bombay
Calcutta Cape Town Dar es Salaam Delih
Florence Hong Kong Istanbul Karachi
Kuala Lumpur Madras Madrid Melbourne
Mexico City Niarobi Paris Singapore
Taipei Tokyo Toronto
and associated companies in
Berlin Ibadan

Oxford is a trade mark of Oxford University Press

Published in the United States
by Oxford University Press Inc., New York

British Library Cataloguing in Publication Data
Data available

Library of Congress Cataloging in Publication Data
The autonomy of law: essays on legal positivism
edited by Robert P. George.
p. cm.
Includes index.
1. Legal positivism. 2. Law—philosophy. I. George, Robert P.
K331.A95 1995
340'.112—dc20 95–46077
ISBN 0–19–825786–4

1 3 5 7 9 10 8 6 4 2

Typeset by Vera A. Keep & Theresa M. Murphy, Cheltenham
Printed in Great Britain
on acid-free paper by
Bookcraft Ltd., Midsomer Norton, Avon

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Natural Law and Positive Law

ROBERT P. GEORGE

1. NATURAL LAW

As I understand the natural law,[1] it consists of three sets of principles: first, and most fundamentally, a set of principles directing human choice and action toward intelligible purposes, i.e. basic human goods which, as intrinsic aspects of human well-being and fulfilment, constitute reasons for action whose intelligibility as reasons does not depend on any more fundamental reasons (or on sub-rational motives such as the desire for emotional satisfactions) to which they are mere means; second, a set of 'intermediate' moral principles which specify the most basic principle of morality by directing choice and action toward possibilities that may be chosen consistently with a will toward integral human fulfilment and away from possibilities the choosing of which is inconsistent with such a will;[2] and third, fully specific moral norms which require or forbid (sometimes with, sometimes without exceptions) certain specific possible choices.[3]

2. BASIC PRACTICAL PRINCIPLES

The first, and, as I say, most fundamental, principles of natural law are not, strictly speaking, moral norms. They do not resolve questions of which option(s) may uprightly be chosen in situations of morally significant choice. Indeed, the multiplicity of these most basic practical principles *creates* situations of morally significant choice, and makes it necessary for us to identify norms of morality in order to choose uprightly in such situations.

The most basic practical principles refer to ends or purposes which provide non-instrumental reasons for acting. These

principles identify intrinsic human goods (such as knowledge, friendship, and health) as ends to be pursued, promoted, and protected, and their opposites (ignorance, animosity, illness) as evils to be avoided or overcome.

Of course, not all ends to which action may be directed are provided by reasons, much less non-instrumental reasons. All of us sometimes want things we have no reason to want. Such desires, though not rationally grounded, are perfectly capable of motivating us to act. One may, for example, experience thirst and desire a drink of water. It may well be that no intelligible good is to be advanced or protected by one's having a drink. One desires a drink not for the sake of health, or friendship, or any other intelligible good which would provide a *reason* for going to the water fountain. Still, one has a motive, albeit a sub-rational motive, to have a drink. One's acting on this motive is perfectly explicable and may, depending on other factors, be perfectly reasonable.[4]

In addition to the distinction between reasons and (non-rationally grounded) desires (and other sub-rational motives), there is the distinction between instrumental and non-instrumental reasons for action. Instrumental goods provide reasons for acting only in so far as they are means to other ends. Money, for example, is a purely instrumental good. It is of value only in so far as one can buy or do things with it. Intrinsic goods, on the other hand, though they may, to be sure, also have considerable instrumental value, are worthwhile for their own sakes. As ends-in-themselves, intrinsic goods provide reasons for action whose intelligibility as reasons does not depend on more fundamental reasons (or on ends ultimately provided by sub-rational motives) to which they are mere means.

Following Germain Grisez, I (and others) refer to intrinsic goods as 'basic human goods'. We do so to stress the point that such goods are not 'platonic forms' somehow detached from the persons in and by whom they are instantiated. Rather, they are intrinsic aspects of the well-being and fulfilment of flesh and blood human beings in their manifold dimensions (that is to say, as animate beings, as rational beings, and as agents through deliberation and choice). Basic human goods provide reasons for action precisely in so far as they are constitutive aspects of human flourishing.

3. MORAL PRINCIPLES

Taken together, the first principles of practical reason that direct action to the basic human goods outline the (vast) range of possible rationally motivated actions, and point to an ideal of 'integral human fulfilment'. This is the ideal of the complete fulfilment of all human persons (and their communities) in all possible respects. The first principle of morality, which is no mere ideal, directs that our choosing be compatible with a will toward integral fulfilment. The specifications of this principle, in, for example, the Golden Rule of fairness or the Pauline Principle that evil may not be done even that good might come of it, take into account the (necessarily sub-rational) motives people may have for choosing or otherwise willing incompatibility with such a will.

Moral principles—whether the most basic and general principle prior to its specification, or those specifications which are intermediate between the most basic principle and fully specific moral norms, or the fully specific norms themselves—are intelligible as principles of action and relevant to practical thinking only because, at the most basic level of practical reflection, rational human beings are capable of grasping a multiplicity of intelligible ends or purposes that provide reasons for action. Paradigmatically, moral principles govern choice by providing conclusive second-order reasons to choose one rather than another, or some rather than other, possibilities in cases in which one has competing first-order reasons, i.e., where competing possibilities each offer some true human benefit and, thus, hold some genuine rational appeal.[5] Paradigmatically, moral norms exclude the choosing of those possibilities which, though rationally grounded, fall short of all that reason requires.

This conception of the role of moral norms in practical reasoning is captured in the tradition of natural law theorizing by the notion of *recta ratio*—'right reason'. Right reason is reason unfettered by emotional or other impediments to choosing consistently with what reason fully requires. Often enough, a possibility for choice may be rationally grounded (i.e., for a (first-order) *reason* provided by the possibility of realising or participating in some true human benefit, some basic human good) yet, at the same time, be contrary to *right* reason (i.e., contrary to at least one conclusive (second-order) reason provided by a

moral norm which excludes the choosing of that possibility).

Of course, most of our choices are not between right and wrong options, but rather between incompatible right options. Where a choice is between or among morally acceptable possibilities, one has a reason to do X and a reason to do Y, the doing of which is incompatible here and now with doing X, yet no conclusive reason provided by a moral norm to do X or not to do X for the sake of doing Y. In situations of this sort, one is considering possibilities made available by the practical intellect's grasp of the most basic principles of practical reason and precepts of natural law. These pertain to the first set of principles of natural law I identified at the beginning of this chapter. Yet practical reason is unable to identify principles in the second and third sets (i.e., second order principles or norms) to determine one's choice. One's choice, then, though rationally grounded, is in a significant sense rationally underdetermined.[6] Doing X or not doing X in order to do Y are both fully reasonable, are both fully compatible with *recta ratio*.

4. NATURAL LAW, PRACTICAL REASON, AND MORALITY

As choosing subjects, or 'acting persons', we make the natural law effective by bringing the principles of natural law into our practical deliberation and judgement in situations of morally significant choice. This task is not merely a job for the natural law theorist or for believers in natural law. It is something that every rational agent does to some extent, and every responsible agent does to a large extent.

Even in the most mundane aspects of our lives, in matters of no great moral moment, we regularly and effortlessly identify and act upon the first-order reasons that constitute the most basic principles of natural law. In fact, countless choices in which these principles centrally figure are so commonplace that ordinary people would be shocked to learn that they were acting on principles at all. They would characterize their choices as merely 'doing what comes naturally', or even 'doing what I like'. And, in a sense, they would be absolutely right. They are choosing and acting, with minimal reflection or deliberation, for the sake of

reasons (and, thus, on principles) that are so patently obvious, that are grasped so effortlessly, that fit into the established patterns of their lives so easily, that they require hardly any thought at all.

Beyond this, everyone who deliberates among competing possibilities each or all of which have at least some rational appeal, and who, upon reflection, identifies a principle of rectitude in choosing which will enable him to judge correctly that one of those options is, uniquely, right (and should therefore be chosen) and others are wrong (and therefore, despite their elements of rational appeal, should not be chosen) makes the second and third sets of principles of natural law effective in his own willing and choosing. In cases of this sort, one is acting not only on the *prima principii*, the most basic precepts of natural law that are, as it were, the foundations of any sort of rational action (whether morally upright or defective), but also on the basis of moral norms that distinguish fully reasonable from practically unreasonable, morally upright from immoral, choosing.

Now, here it is worth pausing to avert a misunderstanding. By saying that the choosing subject 'makes the natural law effective' I do not mean to imply that the subject creates the natural law or confers upon it its morally binding nature or its force. No one should infer from my willingness to put the choosing subject in an active role with respect to the natural law ('making it effective') that the natural law, as I understand it, is somehow subjective. On the contrary, the reasons constitutive of each of the three sets of principles of natural law are, in a stringent sense, *objective*. They are grasped (only) by *sound* practical judgment and missed (only) when enquiry and judgment miscarry. They correspond to aspects of the genuine fulfilment of human persons, as such, and to the real (and strictly non-optional) requirements of reasonableness in human willing and choosing (i.e., the norms of morality) that obtain for human beings, as such, and which do not depend upon, or vary with, people's beliefs, wishes, desires, or subjective interests or goals. The principles of natural law possess and retain their normative and prescriptive force independently of anyone's decision to adopt or refuse to adopt them in making the practical choices to which they apply.[7]

That being said, it remains true that we make the natural law effective in our lives precisely by grasping and acting on these

principles. In doing so, we exercise the human capacity for free choice. A free choice is a choice between open practical possibilities (to do X or not to do X, perhaps for the sake of doing Y) such that nothing but the choosing itself settles the matter.[8] The existence of basic reasons for action (and, thus, of the primary principles of natural law) are conditions of free choice. If there were no such reasons, then all of our actions would be determined—determined either by external causes or by internal (sub-rational) factors such as feeling, emotion, desire, etc.[9] The denial of free choice, which is central to the various modern reductionisms in philosophy, psychology, and the social sciences, is, then, closely connected to the denial of the possibility of rationally motivated action. To deny free choice and the existence of the basic goods, reasons, and principles that are its conditions, is to suppose that people are nothing more than animals with a well-developed capacity for theoretical and instrumentally practical rationality. If people were nothing more than that, then natural law could never be effective for them and would, indeed, hardly be intelligible conceptually.

Because persons can make free choices, they are self-constituting beings. In freely choosing—that is, in choosing for or against goods that provide non-instrumental reasons—one integrates the goods (or the damaging and consequent privation of the goods, i.e., the evils) one intends into one's will. Thus, one effects a sort of synthesis between oneself as an acting person and the object of one's choices (i.e., the goods and evils one intends—either as ends-in-themselves or as means to other ends). One's choices perdure in one's character and personality as a choosing subject unless or until, for better or worse, one reverses one's previous choice by choosing incompatibly with it or, at least, resolves to choose differently should one face the same or relevantly similar choices in the future.[10]

Of course, ethical theory is a complicated business in part because different types of willing bear on human goods and evils in interestingly and importantly different ways. Thus it is necessary to distinguish, as the tradition of natural law theorizing does, as distinct modes of voluntariness, 'intending' a good or evil (as an end or as a means to some other end) from 'accepting as a side-effect' a good or evil that one foresees as a consequence of one's action but does not intend. Although one is

morally responsible for the bad side-effects one knowingly brings about, one is not responsible for them in the same way one is responsible for what one intends. Often, one will have an obligation in justice or fairness to others (and thus a conclusive moral reason) not to bring about a certain evil that one knows or believes would likely result, albeit as an unintended side-effect, from one's action. Sometimes, though, one will have no obligation to avoid bringing about a certain foreseen bad side-effect of an action one has a reason (perhaps even a conclusive reason) to perform.

5. NATURAL LAW, POSITIVE LAW, AND THE COMMON GOOD

Communities, like individual persons, make choices. Their choices have to do with the ordering of the common lives of members of communities. Sometimes, especially in small communities, many of these choices or decisions are made by consensus, by achieving unanimity about what to do. It is the rare community, however, that can rely exclusively on unanimity. Most communities must rely on authority to co-ordinate the action of individuals and sub-communities within the larger community for the sake of the common good. This is obviously true of political communities. Although there are many different forms of government, all political communities must create and rely upon authority of some sort.[11]

Political authorities serve the common good in large measure by creating, implementing, and enforcing laws. Where the laws are just (and expedient), authorities serve their communities well; where they are unjust (or inexpedient), they serve their communities badly. The moral purpose of a system of laws is to make it possible for individuals and sub-communities to realize for themselves important human goods that would not be realizable (or would not be realizable fully) in the absence of the laws. Hence, according to Aquinas, 'the end of the law is the common good'.[12]

It is tempting to think of authority and law as necessary only because of human selfishness, inconstancy, weakness or intransigence. The truth, however, is that the law would be necessary to

co-ordinate the behaviour of members of the community for the sake of the common good even in a society of angels. Of course, in such a society legal sanctions—the threat of punishment for law-breaking—would be unnecessary; but laws themselves would still be needed. Given that no earthly society is a society of angels, legal sanctions are—quite reasonably—universal features of legal systems. They are not, however, essential to the very concept of law.

But, someone might object, certain familiar laws would not be necessary in a society of angels—laws against murder, rape, theft, etc. The actions forbidden by such laws are plainly immoral—contrary to natural law—and would never be performed by perfectly morally upright beings. True. And since the moral point of law is to serve the good of people as they are—with all their (perhaps I should say our) faults—laws against these evils are necessary and proper. The natural law itself requires that someone (or some group of persons or some institution) exercise authority in political communities and the authority fulfils his (or their or its) moral function by translating certain principles of natural law into positive law and reinforcing and backing up these principles with the threat of punishment for law-breaking. Thus, a morally valid authority, in a sense, derives the positive law from the natural law; or, as I have said, translates natural principles of justice and political morality into rules and principles of positive law.

Aquinas, following up a lead from Aristotle, observed that the positive law is derived from the natural law in two different ways. In the case of certain principles, the legislator translates the natural law into the positive law more or less directly. So, for example, a conscientious legislator will prohibit grave injustices such as murder, rape, and theft by moving by a process akin to deduction[13] from the moral proposition that, say, the killing of innocent persons is intrinsically unjust to the conclusion that the positive law must prohibit (and punish) such killing.

In a great many cases, however, the movement from the natural law to the positive law in the practical thinking of the conscientious legislator cannot be so direct. For example, it is easy to understand the basic principle of natural law that identifies human health as a good and the preservation and protection of human health as important purposes. A modern legislator will

therefore easily see, for example, the need for a scheme of co-ordination of traffic that protects the safety of drivers and pedestrians. The common good, which it is his responsibility to foster and serve in this respect, requires it. Ordinarily, however, he cannot identify a uniquely correct scheme of traffic regulation which can be translated from the natural law to the positive law. Unlike the case of murder, the natural law does not determine once and for all the perfect scheme of traffic regulation. A number of different schemes—bearing different and often incommensurable costs and benefits, risks and advantages—are consistent with the natural law. So the legislator must exercise a kind of creativity in choosing a scheme. He must move, not by deduction, but rather by an activity of the practical intellect that Aquinas called *determinatio*.[14]

Unfortunately, no single word in English captures the meaning of *determinatio*. 'Determination' captures some of the flavour of it; but so does 'implementation', 'specification', 'concretization'. The key thing to understand is that in making *determinationes*, the legislator enjoys a kind of creative freedom that may be analogous to that of the architect. An architect must design a building that is sound and sensible for the purposes to which it will be put. He cannot, however, identify an ideal form of a building that is uniquely correct. Ordinarily, at least, a range of possible buildings differing in a variety of respects will satisfy the criteria of soundness and usability. Obviously, a building whose 'doors' are no more than 3′ high ordinarily fails to meet an important requirement for a usable building. No principle of architecture, however, sets the proper height of a door as such at 6′ 2″ as opposed to 6′ 8″, In designing any particular building, the conscientious architect will strive to make the height of the doors make sense in light of a variety of other factors, some of which are themselves the fruit of something akin to a *determinatio* (e.g. the height of the ceilings); but even here he will typically face a variety of acceptable but incompatible design options.

It is meaningful and correct to say that the legislator (including the judge to the extent that the judge in the jurisdiction in question exercises a measure of law-creating power) makes the natural law effective for his community by deriving the positive law from the natural law. The natural law itself requires that such a derivation be accomplished and that someone (or a group or

institution) be authorized to accomplish it. Because no human individual (or group or institution) is perfect in moral knowledge or virtue, it is inevitable that even conscientious efforts to translate the natural law into positive law, whether directly or by *determinationes*, will sometimes miscarry. None the less, the natural law itself sets this as the task of the legislator and it is only through his efforts that the natural law can become effective for the common good of his community.

Of course, the body of law created by the legislator is not itself the natural law. The natural law is in no sense a human creation. The positive law (of any community), however, *is* a human creation. It is an object—a vast cultural object composed of sometimes very complicated rules and principles, but an object none the less. Metaphysically, the positive law belongs to the order Aristotle identified as the order of 'making' rather than of 'doing'. For perfectly good reasons, it is made to be subject to technical application and to be analyzed by a kind of technical reasoning—hence the existence of law schools that teach students not (or not just) moral philosophy, but the distinctive techniques of legal analysis, e.g., how to identify and understand legal sources, how to work with statutes, precedents, and with the (often necessarily) artificial definitions that characterize any complex system of law.

At the same time, the creation of law (and a system of law) has a moral purpose. It is in the order of 'doing', (the order, not of technique, but rather of free choice, practical reasoning, and morality—the order studied in ethics and political philosophy) that we identify the need to create law for the sake of the common good. The lawmaker creates an object—the law—deliberately and reasonably subject to technical analysis—for a purpose that is moral, and not itself merely technical. To fail to create this object (or to create unjust laws) would be inconsistent with the requirements of the natural law, it would be a failure of legislative duty precisely in the moral order.

6. NATURAL LAW, POSITIVE LAW, AND THE JUDICIAL ROLE

The fact that the law is a cultural object that is created for a moral purpose generates a great deal of the confusion one encounters

today in debates about the role of moral philosophy in legal reasoning. The vexed question of American constitutional interpretation is the scope and limits of the power of judges to invalidate legislation under certain allegedly vague or abstract constitutional provisions. Some constitutional theorists, such as Professor Ronald Dworkin, who wish to defend an expansive role for the judge, argue that the conscientious judge must bring judgments of moral and political philosophy to bear in deciding hard cases.[15] Others, such as Judge Robert Bork, who fear such a role for the judge, and hold, in any event, that the Constitution of the United States does not give the judge such a role, maintain that moral philosophy has little or no place in judging, at least in the American system.[16]

Some people who are loyal to the tradition of natural law theorizing are tempted to suppose that Professor Dworkin's position, whatever its faults in other respects, is the one more faithful to the tradition. This temptation should, however, be resisted. While the role of the judge as a law-creator reasonably varies from jurisdiction to jurisdiction[17] according to each jurisdiction's own authoritative *determinationes*—that is to say, each jurisdiction's positive law—Judge Bork's idea of a body of law that is properly and fully (or almost fully) analyzable in technical terms is fully compatible with classical understandings of natural law theory.

Natural law theory treats the role of the judge as itself fundamentally a matter for *determinatio*, not for direct translation from the natural law. It does not imagine that the judge enjoys (or should enjoy) as a matter of natural law a plenary authority to substitute his own understanding of the requirements of the natural law for the contrary understanding of the legislator or constitution maker in deciding cases at law. On the contrary, for the sake of the Rule or Law, understood as ordinarily a necessary (albeit not a sufficient) condition for a just system of government, the judge (like any other actor in the system) is morally required (that is, obligated as a matter of natural law) to respect the limits of his own authority as it has been allocated to him by way of an authoritative *determinatio*. If the law of his system constrains his law-creating power in the way that Judge Bork believes American fundamental law does, then, for the sake of the Rule of Law, he must respect these constraints, even where his own

understanding of natural justice deviates from that of the legislators or constitution makers and ratifiers whose laws he must interpret and apply. None of this means that Judge Bork is more nearly correct than Professor Dworkin on the question of what degree of law-creating power *our* law places in the hands of the judge; it merely means that the question whether Dworkin or Bork is more nearly correct is properly conceived as itself a question of positive law—not natural law.

Bork, who is understood by some of his critics as denying the existence of natural law or any type of objective moral order, has recently clarified his position: 'I am far from denying that there is a natural law, but I do deny both that we have given judges the authority to enforce it and that judges have greater access to that law than do the rest of us.'[18]

If Bork's view is sound (and subject, perhaps, to one or two minor qualifications I am prepared to believe that it is sound), that leaves us with the question whether the natural law itself—quite independently of what the Constitution may say—confers upon the judge a sort of plenary power to enforce it. One of my central aims in this essay has been to argue that the correct answer to this question is 'no'. To the extent that judges are not given power under the Constitution to translate principles of natural justice into positive law, that power is not one they enjoy; nor is it one they may justly exercise. For judges to arrogate such power to themselves in defiance of the Constitution is not merely for them to exceed their authority under the positive law; it is to violate the very natural law in whose name they purport to act.

NOTES

1. For a fuller account of the understanding of natural law set forth in this paragraph, see Joseph M. Boyle, Jr., Germain Grisez, and John Finnis, 'Practical Principles, Moral Truth and Ultimate Ends', *American Journal of Jurisprudence* 32 (1987) 99–151. I have defended this understanding against various criticisms in 'Recent Criticism of Natural Law Theory', *University of Chicago Law Review* 55 (1988) 1371–1492; 'Human Flourishing as a Criterion of Morality: A Critique of Perry's Naturalism', *Tulane Law Review* 63 (1989) 1455–1474; 'Does the Incommensurability Thesis Imperil Common Sense Moral Judgments?' *American Journal of Jurisprudence* 37 (1992) 185–195; and

'Natural Law and Human Nature' in Robert P. George (ed.) *Natural Law Theory: Contemporary Essays* (Oxford: Clarendon Press, 1992), 31–41.

2. Examples of moral principles in this category are the 'Golden Rule' of fairness and the 'Pauline Principle' which forbids the doing of evil even as a means of bringing about good consequences.
3. Examples of norms in this category are those forbidding such specific possible choices as wilfully refusing to return borrowed property to its owner upon his request (which is a good example of a moral norm which admits of exceptions) and directly killing an innocent person (which is a good example of an exceptionless moral norm). Note that 'direct' killing refers to the intending of death—one's own or someone else's—as an end in itself (as in killing for revenge) or as a means to another end (as in terror bombing the civilian population of an unjust aggressor nation). It is sometimes, though not always, morally permissible to accept the bringing about of death—one's own or someone else's—as the foreseen and accepted side effect of a choice in which one does not intend death (either as end or means).
4. To act on one's sub-rational motive is not necessarily unreasonable or morally wrong. Moral questions arise only when one has a reason not to do something which one has a non-rationally grounded desire to do. So, to stay with the example, where one is thirsty and has no reason not to slake one's thirst, then there is nothing wrong with having a drink. Visiting the water fountain, in these circumstances, is an innocent pleasure.
5. I defend this conception of the role of moral principles in 'Does the Incommensurability Thesis Imperil Common Sense Moral Judgments?'.
6. See Joseph Raz, *The Morality of Freedom* (Oxford: Clarendon Press, 1986), 388–9.
7. On the objectivity of the principles of natural law, see John Finnis, *Natural Law and Natural Rights* (Oxford: Clarendon Press, 1980), 69–75; and *Fundamentals of Ethics* (Oxford: Oxford University Press, 1983), 56–79.
8. For a thorough explanation and defence of this conception of free choice, see Joseph M. Boyle, Jr., Germain Grisez, and Olaf Tollefsen, *Free Choice: A Self-Referential Argument* (Notre Dame, Indiana: University of Notre Dame Press, 1976).
9. I explain this point at length in 'Free Choice, Practical Reason, and Fitness for the Rule of Law', in *Social Discourse and Moral Judgment*, Daniel N. Robinson (ed.), (New York: Academic Press, 1992).
10. On the lastingness and character-forming consequences of free choices, see J. Finnis, *Fundamentals of Ethics*.

11. See Finnis, *Natural Law and Natural Rights*, 231–59.
12. *Summa theologiae*, I–II, q. 96, a. 1.
13. *Summa theologiae*, I–II, q. 95. a. 2.
14. Ibid. For a sound exposition and valuable development of Aquinas's understanding of *determinatio*, see Finnis, *Natural Law and Natural Rights*, 285–90. Also see Finnis, 'On "The Critical Legal Studies Movement"', *American Journal of Jurisprudence*, 30 (1985), 21–42.
15. For the most fully developed articulation of Dworkin's position, see his *Law's Empire* (Cambridge, Massachusetts: Harvard University Press, 1986).
16. See Robert H. Bork, *The Tempting of America: The Political Seduction of the Law* (New York: The Free Press, 1990), esp. 251–9.
17. I am concerned here with the role and duty of judges in basically just legal systems, i.e., systems which do not deserve to be subverted and which judges and others would do wrong to subvert. Different considerations apply in sorting out the obligations of judges in fundamentally unjust legal systems. I do not take up these considerations in this essay.
18. Bork, *The Tempting of America*, 66.