9811031 park june sung

natural law

in philosophy, system of right or justice held to be common to all humankind and derived from nature rather than from the rules of society, or positive law. Throughout the history of the concept, there have been disagreements over the meaning of natural law and over its relation to positive law.

Aristotle held that what was "just by nature" was not always the same as what was "just by law"; that there was a natural justice valid everywhere with the same force and "not existing by people's thinking this or that"; and that appeal could be made to it from the positive law. He drew his instances of the natural law, however, chiefly from his observation of the Greeks in their city-states, with their subordination of women to men, of slaves to citizens, and of barbarians to Hellenes. The Stoics, on the other hand, conceived an entirely egalitarian law of nature in conformity with the "right reason," or Logos, inherent in the human mind. The Roman jurists paid lip service to this notion, and St. Paul seems to reflect it when he writes of a law "written in the hearts" of the Gentiles (Romans 2:14-15).

St. Augustine of Hippo took up the Pauline mention and developed the idea of man having lived freely under the natural law before his fall and his subsequent bondage under sin and the positive law. Gratian in the Ilth century simply equated the natural law with the divine law, that is, with the revealed law of the Old and the New Testament, in particular the Christian version of the Golden Rule.

St. Thomas Aquinas propounded an influential systematization. The eternal law of the divine reason, he maintained, though it is unknowable to us in its perfection as it is in God's mind, is yet known to us in part not only by revelation but also by the operations of our reason. The law of nature, which is "nothing else than the participation of the eternal law in the rational creature," thus comprises those precepts that humankind is able to formulate, namely, the preservation of one's own good, the fulfillment of "those inclinations which nature has taught to all animals," and the pursuit of the knowledge of God. Human law must be the particular application of the natural law.

Other scholastic philosophers, for instance John Duns Scotus, William of Ockham, and, especially, Francisco Suarez, emphasized the divine will instead of the divine reason as the source of law. This "voluntarism" influenced the Roman Catholic jurisprudence of the Counter-Reformation, but the Thomistic doctrine was later revived and reinforced to become

the main philosophical ground for the papal exposition of natural right in the social teaching of Leo XIII and his successors.

The epoch-making appeal of Hugo Grotius to the natural law belongs to the history of jurisprudence. But whereas his fellow Calvinist Johannes Althusius (1557-1638) had proceeded from theological doctrines of predestination to elaborate his theory of law binding on all peoples, Grotius insisted on the validity of the natural law "even if we were to suppose . . . that God does not exist or is not concerned with human affairs." A few years later Thomas Hobbes was arguing not from the "state of innocence" in which man had lived in the biblical Eden but from a savage "state of nature" in which men, free and equal in rights, were each one at solitary war with every other. After discerning the right of nature (jus naturale) to be "the liberty each man hath to use his own power for the preservation of his own nature, that is to say, of life," Hobbes defines a law of nature (lex naturalis) as "a precept of general rule found out by reason, by which a man is forbidden to do that which is destructive of his life" and then

enumerates the elementary rules on which peace and society can be established. Grotius and Hobbes thus stand together at the head of that "school of natural law" which, in accordance with the tendencies of the Enlightenment, tried to construct a whole edifice of law by rational deduction from a fictitious "state of nature" followed by a social contract. In England, John Locke departed from Hobbesian pessimism to the extent of describing the state of nature as a state of society, with free and equal men already observing the natural law. In France, where Montesquieu had argued that natural laws were presocial and were superior to those of religion and of the state, jean-Jacques Rousseau postulated a savage who was virtuous in isolation and actuated by two principles "prior to reason," self-preservation and compassion (innate repugnance against the sufferings of others).

The Declaration of Independence of the United States refers only briefly to "the Laws of Nature" before citing equality and other "unalienable" rights as "self-evident." The French Declaration of the Rights of Man and of the Citizen asserts liberty, property, security, and resistance to oppression as "imprescriptible natural rights." The philosophy of Immanuel Kant renounced the attempt to know nature as it really is, yet allowed the practical or moral reason to deduce a valid system of right with its own purely fon-nal framework; and Kantian formalism contributed to the 20th-century revival of naturalistic jurisprudence.

On the level of international politics in the 20th century, the assertion of human rights was the product rather of an empirical search for common values than of any explicit doctrine about a natural law.

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common law

also called ANGLO-AMERICAN LAW, the body of customary law, based upon judicial decisions and embodied in reports of decided cases, which has been administered **by** the

common-law courts of England since the Middle Ages. From this has evolved the type of legal system now found also in the United States and in most of the member states of the Commonwealth of Nations. Common law stands in contrast to rules developed **by** the separate acts of equity (q.v.), to statute law (i.e., the acts of legislative bodies), and to the legal system derived from civil law (q.v.) now widespread in continental Europe and elsewhere.

common law

Contracts

Contract law is basically similar in the common-law countries. The most interesting difference relates to the question of enforcement of contracts by third parties who are not actually parties to the contract but who are persons for whose benefit the contract was made. English law excludes such rights, except in an occasional statute. The Indian Contract Code of 1872 generally allows it, as does U.S. state law.

English law still requires the use of a seal on a gratuitous contract (such as one agreeing to make a gift) but has largely repealed the laws requiring written evidence of ordinary contracts. Written evidence is often called for in the United States.

The various areas of special contracts, such as those applying to employment, sale of land, and agency, are broadly similar everywhere but are regulated **by** local legislation and **by** a wealth of labour legislation.

Criminal law and procedure

As regards criminal law and procedure, the substance of the law is much the same throughout the common-law countries. More important differences appear in the rules of criminal procedure. This rests in England on modern legislation, whereas the old procedure bore heavily on the accused. Accused persons may now testify at the trial or not, as they wish; they are entitled to legal counsel; and they are assisted out of public funds when they are accused of serious crimes and are unable to afford to pay the costs themselves.

Canada has a Dominion Criminal Code, which covers major crimes. It also has a Canadian Bill of Rights and provincial laws such as the Ontario Human Rights Code. India has an overriding Bill of Rights.

Developments in the United States are the most interesting. Criminal procedure has become a constitutional matter, with a kind of federal common law of criminal procedure overriding state law in many instances. Thus, "due process of law" under the Fourteenth Amendment to the federal Constitution and the Federal Rules of Criminal Procedure confer wide protection on accused persons--too wide, some think, for public safety.

English courts are reluctant to admit tape recordings unless supported by direct evidence of persons present, and this is generally the position taken in the United States, although,
with the permission of a court, emergency wiretapping is permitted. English and U.S. law

exclude confessions unless they are made freely and spontaneously. If evidence is found

by unlawful means, such as by searching a house without a warrant, English law permits

such evidence to be used, but U.S. law does not.

The main difference between English and U.S. safeguards is that English protections rest on statute or case law and may be changed by ordinary statute, whereas U.S. safeguards are constitutional and cannot be relaxed unless the Supreme Court later reverses its interpretation or the Constitution is amended.

Decide the case morally, not legally. Ignore the law. Did these men do anything wrong? Or decide the case under the law as it ought to be, not under the law as it is.
Variation. Once you know the morality of the case, how can we make the law reflect this morality better? How should we change the law to make clear that this sort of act is murder (or not murder)?
Decide the case under the law of the Commonwealth of Newgarth. This includes at least the murder statute and the precedents. Does "the law" include anything else? That's for you to decide.
Assume that you are a Newgarth Supreme Court Justice who has taken an oath to uphold and apply the laws of the Commonwealth of Newgarth.
If you feel a tension between your personal morality and the laws of Newgarth, then don't put the law aside in order to give effect to your moral convictions unless you think a good judge would do so.
Focus on supporting your verdict with strong arguments, not on undermining the arguments for the opposite verdict (although that comes in another variation below). Decide the case under the law, support your verdict with arguments, and show the weaknesses in the arguments for the other verdict.
There are many arguments on both sides, so there will be much work to do no matter which verdict you chose. However, if time is tight, simplify as follows. If you vote guilty, then how do you answer the necessity defense? If you vote not guilty, how do you interpret the statute?
If you acquit, can you rebut the arguments of each judge who voted to convict? If you convict, can you rebut the arguments of each judge who voted to acquit? Decide the case under the law of the state where you live.
At first consult the murder statute where you live and forget the cases interpreting it. The statute probably contains degrees of murder and homicide, standard defenses (excuses and justifications), and some sentencing discretion for the judge. All these departures from the Newgarth situation give you room to explore issues you didn't have to explore when you used Newgarth law.
It you have time and ambition, also use the case law of your jurisdiction. This version of the assignment is difficult insofar as it requires legal research outside

Fuller's essay. But it is easier than some of the variations above because it doesn't force you to pick from a narrow range of options and justify your difficult selection.
If you have read other cases on necessity, self-defense, or murder, assume that they are binding precedents in Newgarth. Take the force of those that are most applicable, distinguish those that are least applicable.

Variations on the facts

Decide the case under the real facts, as described **by** Chief Justice Truepenny, or decide it under one of the what-if scenarios below.

What if the men had not used a lottery but killed Whetmore because he was the only one with no family, or the only one who believed in an afterlife? (This variation was suggested **by** Justice Foster.)

What if Whetmore had not said the dice throw made on his behalf was a fair one?

What if Whetmore had tried to defend himself but the survivors had succeeded in killing him anyway?

What if Whetmore had defended himself **by** killing (say) Smith? As a result, the party ate Smith instead of Whetmore. (For this to work, we must suppose that Whetmore, at least, was prosecuted for murdering Smith.)
What if a Newgarth judge had been on the scene at the rescue camp and had told the spelunkers **by** radio that the act they were contemplating would be considered murder under Newgarth law?

What if the judge on the scene had said that the killing would not be considered murder? What if a priest instead of a judge had given an opinion **by** radio? (You decide what the priest would have said.)
What if Whetmore was clearly the one who would have died first of natural causes? What if he clearly was not?

What if the men were rescued earlier than the engineers predicted? What if later? (Fuller doesn't give us the facts to decide this question; see the timeline above.)
What if Newgarth did not trace the authority of its laws to a social contract?
What if Newgarth had no history of civil war inspired **by** judicial usurpation of the legislative functions?

What if the exception for self-defense were not an ancient judicial invention, but an express part of the murder statute as written **by** the legislature?
What if the men were not trapped in a cave, but in a collapsed building after an earthquake? They were not spelunkers pursuing a risky sport, but workers at work.
What if at the time of the killing the batteries in the spelunkers' radio were actually dead? (See Justice Bond's opinion for the possible relevance of this fact.)