Ordered Liberty: The Guardian of Justice

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A.W. Tozer once wrote in his *The Knowledge of the Holy* one of the greatest timeless truths which must dictate the proper discussion of natural law. He wrote, "What comes into our minds when we think about God is the most important thing about us."[1] Natural law theory, or simply, "natural law," is deeply intertwined with views of God. This is because natural law theory is a commentary on the nature of Man.[2] Questions not only about justice, but about the world itself, how it came to be, how humans came to be, and how then should humans live, routinely show themselves. Natural law categorizes God, as recognized in the Judeo-Christian understanding, as Creator, and humanity as His creation. Because human beings know their Creator, any and all truth is His truth, and that truth can be known.

Thus. natural law is more than an old concept, it is a framework with which to view both the world, and the legal systems within that world. The truth within natural law is the ideal way that justice fits within the world. However, natural law theory is not merely visionary. It is both the vision and the goal, just as a compass leads an adventurer in the right direction and tells the adventurer where he is going. The genius of natural law theory is not in its ancient roots or perceived rigid lines, but rather in its timeless truth that is both the goal and the guide towards true justice on earth as the pilgrim looks heavenward.

Pre-Christianity, both Plato and Aristotle were integral to the beginnings of this theory. Plato wrote that the human soul had written upon it the capability to pursue the good, the true, and the beautiful.[3] Plato was one of the first to write of the duality when discussing human

[1] A.W. Tozer, *The Knowledge of the Holy* (New York: HarperCollins, 1961), 1.

[2] John Wild, *Plato's Modern Enemies and the Theory of Natural Law* (Chicago: The University of Chicago Press, 1953), 96.

[3] A.W. Price, *Virtue and Reason in Plato and Aristotle* (Oxford: Oxford University Press, 2011), 85.

nature. Virtue was implied in natural law, for Platonic virtue centered around acting in accordance with nature.[4] The chief Platonic virtue was justice, and thus, "to do injustice [would be] worse than to suffer it."[5]Aristotle built upon this idea. He wrote in *Nichomachean Ethics* that happiness, or flourishing, was practiced through virtue. It was through this virtue, and sense of right reason, that one could practice happiness.[6] This happiness was not subjective, but an objective, which ultimately pointed to a "good life" which should be pursued. Aristotle wrote that political justice "includes all the virtues, part…natural, part legal—natural, that which everywhere has the same force and does not exist by people's thinking this or that; legal, that which is indifferent (by nature) but one laid down is not indifferent)."[7] However, this idea of dualistic law—natural and human—would be further developed by later thinkers.

The great Roman orator Cicero continued in the Aristotelian cadence of his predecessor and did not embrace Platonic idealism. Instead, he commented on the categorization of truth, which Aristotle had embraced. [8] In *De Legibus*, what many scholars consider his second landmark work regarding natural law (after *De Re Publica*), as well as the "first work of legal philosophy in the history of human thought," Cicero maintained the assertions of natural law and expanded them.[9] He wrote:

> For recognize that in no subject of argument are more honorable things brought into the open: what nature has granted to a human being, how many of the best things the human mind encompasses, what service we have been born for and brought into light to perform and accomplish, what is the connection among human beings, and what natural fellowship there is among them. When these things have been explained, the source of laws and right can be discovered.[10]

Cicero further explained that the nature of law is found within human nature itself; and further, there are two types of laws—natural and civic laws.[11] It was from this dichotomy that Cicero pointed out another dichotomy in his rhetoric. Cicero made the etymological decision to use *lex*, rather than the Greek νόμος for the word "law."[12] While νόμος is derived from the Greek which is derived from the idea of retribution, *lex* comes from the Latin imperative *legere*, which means to choose.[13] Thus, people must choose which *lex* to follow—and Cicero was hopeful that most would choose the higher, natural law rather than the lower civic ones.[14] This concept that people had the capacity within themselves to exercise their autonomy for the good, and further, that this was the natural order of things, was a landmark phenomenon in the philosophical plain. Indeed, this idea of natural law and proceeding autonomy would later transcend even the polity

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[4] Wild, *Plato's Modern Enemies*, 148-9.

[5] *Ibid*., 149.

[6] Frances J. Ranney, *Aristotle's Ethics and Legal Rhetoric* (Chippenham, Wiltshire: Ashgate, 2005), 35.

[7] Aristotle, *Nichomachean Ethics*, Chapter 7, Book V, http://www.perseus.tufts.edu/hopper/text?doc=Perseus:text:1999.01.0054:book=5:chapter=7.

[8] Hammer Dean, *Roman Political Thought: From Cicero to Augustine* (Cambridge: Cambridge University Press, 2014),32.

[9] Josè Contreras Fransisco, ed., *The Threads of Natural Law: Unravelling a Philosophical Tradition* (New York: Springer, 2013), 29.

[10] Marcus Tullius Cicero, *De Legibus*, trans., David Fott (Ithaca, New York: Cornell University Press, 2014), Book I, Section XVI.

[11] Cicero, *De Legibus*, Book I, Section XVII.

[12] Jill Harries, "The Law in Cicero's Writings," in *The Cambridge Companion to Cicero*, edited by Catherine Steel, 107-121 (Cambridge: Cambridge University Press, 2013), 116.

[13] *Ibid*.

[14] *Ibid*.

of Rome or the Empire but find its way in arguments of human dignity in the hundreds of years to come.

Cicero influenced several Christian thinkers that came after him. Most notably, Augustine mentioned that it was Cicero's *Hortensius* that led him back to the Christian faith.[15] Augustine focused largely on "Christianizing" many of the pagan philosophies. For example, Augustine was talked not only of the Platonic virtues, but also wrote extensively about the Christian virtues found in 1 Corinthians 13—faith, hope, and love.[16] Augustine's political theory, articulated most plainly in his *Civitas Dei*, focused on orientation of loves. It was from his notion of love that Augustine perceived justice itself, and naturally how law flowed from that. His idea was to direct one's love towards a life which embodies the life of Christ. That life alone could lead to justice, and therefore show in full force the metes and bounds of natural law itself. It is Jesus, Augustine argued, that points one toward true justice.[17] For Augustine, natural law was best discovered within right relationship with Christ.

Aquinas built upon the idea that natural law was based in a relationship with God. In his famous "Question 90," he wrote in response to the objection that natural law need not be promulgated [18]because it was not essential that, "The natural law is promulgated by the very fact that God instilled it into man's mind so as to be known by him naturally." Aquinas believed that law divided into a fivefold classification: eternal, natural, human and divine law, and the law of sin.[19] Thus, Aquinas' natural law within these categories was the "appropriation by rational creates oof the divine exemplar….an inner apprehension of right an in-born habit of judgment and persistent impulse to specific conduct."[20] Natural law, in Aquinas' opinion, was of the divine, and all positive human law therefore derived from its heavenly counterpart, natural law.[21]

Natural law, developed by the ancients, was a theory that laid the groundwork for later governments of the modern era. It is to an examination of modern thinkers including John Locke, James Madison, Thomas Jefferson, Edmund Burke, James Wilson, William Blackstone and John Witherspoon, and their insights on natural law theory, that this paper now turns.

Former Attorney General Ashcroft reminded us of the importance of ordered liberty. Ashcroft said, "George Washington called "ordered liberty." British statesman Edmund Burke explained it as, "liberty connected with order; [liberty] that not only exists along with order and virtue, but which cannot exist at all without them.""[22] Ashcroft further said:

> Perhaps order and liberty are best understood not as competing concepts but as complimentary values. Each contributes to the stability and legitimacy of a constitutional

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[15] Augustine, *Confessions*, ed., E. B. Pusey. *Project Gutenberg Press*, http://www.gutenberg.org/files/3296/3296-h/3296-h.htm, Book III.

[16] Augustine, Handbook on Faith, Hope, and Love, trans., Albert C. Outler, Christian Classics Ethereal Library, http://www.ccel.org/ccel/augustine/enchiridion.html, 5.

[17] Alasdair MacIntyre, *Whose Justice? Which Rationality?* (Notre Dame, Indiana: University of Notre Dame Press, 1988), 153-4.

[18] Aquinas, *Summa Theologica* "Question 90. The Essence of Law," https://www.newadvent.org/summa/2090.htm.

[19] Oliver O'Donovan and Joan Lockwood O'Donovan, Eds., *From Irenaeus to Grotius: A Sourcebook in Christian Political Thought* (Grand Rapids, Michigan: William B. Eerdmans Publishing Company, 1999), 324.

[20] *Ibid*.

[21] *Ibid*., 324-5.

[22] Attorney General John Ashcroft, *Remarks of Attorney General John Ashcroft*, https://www.justice.gov/archive/ag/speeches/2002/080702eighthcircuitjudgesagremarks.htm#:~:text=This%20tension%20has%20often%20been,exist%20at%20all%20without%20them.%22.

> democracy. To put it another, more colloquial way, order and liberty go together like love and marriage - you can't have one without the other.

Ordered liberty does indeed undergird the foundation of America as Ashcroft wisely reminds us. What is so helpful about the idea of Ordered liberty is the structure that, by guiding and restricting the actions of individuals, still allows some level of freedom to be able to reach the potential each of us have.[23] It is important to recognize ordered liberty exists within the common-law tradition which includes Blackstone. Ordered liberty influences important concepts of freedom in the US such as religious freedom, freedom of speech and association as well as freedoms relating to the economic realm.[24]

Natural law has been so important in the modern philosophical world and impacted our US Constitution as well as checks and balances. For Blackstone, the overall concept of liberty proceeds from natural law, it also contains individual free will and the three absolute rights of life, liberty and property as well as the subordinate rights. The Fifth Amendment of the Constitution contains the right that protects people from being compelled to testify against themselves. The absolute rights are important to know and are (a) life (which can mean personal security), (b) liberty, and (c) property. These three rights are likely discussed as a result of the guidance of Blackstone, in the Fifth and Fourteenth Amendments of the U.S. Constitution. According to Blackstone these absolute rights of every Englishman, … are based on both nature and reason. Blackstone criticizes slavery in the section of the Commentaries on the Laws of England which discusses liberty. Blackstone's anti-slavery position was not made part of the U.S. Constitution. It was not until nearly a century after the U.S. Constitution was ratified, after the Civil War, that the Thirteenth Amendment made slavery unlawful, and the Fourteenth Amendment conferred full citizenship on the newly freed slaves. The Constitutional Preamble begins, "We the People of the United States….," and includes as one of the purposes of the U.S. Constitution, to "secure the Blessings of Liberty to ourselves and our Posterity." This is reminiscent of Blackstone's natural law idea of liberty as a blessing from God, and he offers the ending words in the last lines of his Commentaries. Blackstone writes, "The protection of THE LIBERTY OF BRITAIN [*sic*] is a duty which they owe to themselves who enjoy it, their ancestors who transmitted it down, and to their posterity." Blackstone believed that the independent position of the courts as the most important guardian of constitutional liberty.[25]

James Wilson was one of America's "founding fathers" and a signer of the Declaration of Independence who supported natural law. Wilson's "Considerations on the Nature and Extent of the Legislative Authority of the British Parliament" had an impact on Jefferson in his work on the Declaration of Independence which emphasized life, liberty, and the pursuit of happiness. Jefferson wrote a Commonplace Book in which he cited passages from James Wilson's *Considerations,* yet not the passage that develops the idea that human happiness is an object of lawful government.[26] Wilson was influenced by important Scottish enlightenment thinkers such as Thomas Reid and John Witherspoon. Witherspoon was Madison's mentor.

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[23] *Ibid*.

[24] Faulkner University, *Thomas Goode Jones School of Law,* https://www.lsac.org/choosing-law-school/find-law-school/jd-programs/faulkner.

[25] Albert S. Miles, David L. Dagley and Christina H. Yau. *Blackstone and His American Legacy,* https://www.anzela.edu.au/assets/anzjle_5.2_-_4_albert_s_miles,_david_l_dagley__christina_h_yau.pdf.

[26] Daniel N. Robinson, *James Wilson and Natural Rights Constitutionalism: The Influence of the Scottish Enlightenment,* http://www.nlnrac.org/american/scottish-enlightenment.

James Madison sat under Witherspoon's tutelage at Princeton, and Madison later became the Father of the Constitution. Others who sat under Witherspoon's teachings included: one vice-president (Aaron Burr), also ten cabinet ministers, and in addition sixty members of congress, twelve governors, fifty-six state legislators, and a large number of judges numbering 37 judges, including three supreme court justices. [27] Witherspoon of Princeton University had an enormous influence through his students. Indeed, Witherspoon was a formative guide to James Madison, particularly regarding the necessity of checks and balances in government. Witherspoon's other students included judges — including several members of the Pennsylvania Supreme Court and 12 members of the Continental Congress.[28] It is interesting to note that because Witherspoon shaped so many who impacted the early years of the American Republic, some people argue that Witherspoon was perhaps the most important of all of the founders in America.

Thomas Jefferson was one of the most essential founders. Locke's ideas about natural rights are important too and influenced Jefferson. Locke's position in his *Second Treatise of Government* is that individuals have a duty to respect the rights of others, even in the state of nature. The source of this duty is natural law. Locke says in the *First Treatise of Government* and elsewhere that God is the source of natural law. Locke's version of natural law is quite different from that of natural law thinkers, such as Aquinas. The belief that Locke promoted was that natural law sanctions the basic right of individuals to pursue their own self-interest which could involve the accumulation of wealth. Even Locke as a natural law thinker believed in a much more individualistic view of natural law closer to Hobbes than previous examples like views of Aquinas.[29]

Locke believed that government existed to promote the public good, and also in order to protect people's life, liberty, and property. Yet, more important to this concept of natural rights was described by James McClellan in his classic *Liberty, Order, and Justice: An Introduction of the Constitutional Principles of American Government* was the suggestion that the social contract between man and government was based on the foundational idea that subjects (citizens) agreed to obey the government and the government would in return agree to protect the natural rights of each individual which to Locke were life, liberty and property and to Jefferson were life, liberty and pursuit of happiness which because they were given by God could not be taken by the government. Liberty for all was so essential that Locke even spoke about how slavery was vile and miserable in his *Second Treatise*. Quakers too believed that slaveholding was a sin against God, and many leaders of the American revolution and abolitionist movement were members of the Clergy. Abolitionists acknowledged that the Declaration of Independence, of which Jefferson was a chief architect, promoted liberty for all.[30] Though the vocabulary has been altered, question of liberty, and natural law has remained a topic of great discussion in the modern era.

Despite its rich historical and philosophical background, natural law has largely disappeared from modern, practical legal discourse. Rather, legal positivism is the dominant

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[27] Roger Kimball, "The Forgotten Founder: John Witherspoon," https://newcriterion.com/issues/2006/6/the-forgotten-founder-john-witherspoon.

[28] John Stonestreet and Glenn Sunshine, "Should John Witherspoon's Statue Remain at Princeton?" https://www.christianpost.com/voices/should-john-witherspoons-statue-remain-at-princeton.html.

[29] Steven Forde, "John Locke and the Natural Law and Natural Rights Tradition," http://www.nlnrac.org/earlymodern/locke.

[30] James McClellan, *Liberty, Order, and Justice: An Introduction of the Constitutional Principles of American Government* (Indianapolis, Indiana: Liberty Fund, 2000), 124-137.

school of thought, especially in the international sphere. That is not to say positive law is inherently opposed to natural law principles. Far from it, natural law proponents seek for there to be a causal connection between natural law principles and a nation's express laws. The real objection is not to positive law itself, but to legal positivism, which seeks to find primary (and in some cases, exclusively) authority in express legal instruments.[31] Granted, there is a reason positivism is the prevailing school of interpretation, and the reasoning is not entirely devoid of merit: positive law provides clarity as, by its nature, its terms are express. Even where the language may be ambiguous, there is usually some interpretive authority. This greater clarity helps with enforcement as its subsequently easier to convince a fact finder of any violation when the legal standard being violated can be expressly stated.

This deference to positivism has led, at least in the West, to open hostility to the idea of any practical application of natural law. In 2019, when Secretary of State Michael Pompeo announced a new human rights panel focused on "natural law & natural rights", the move was met with strong resistance from Democratic members of congress and secular liberal human rights advocates.[32] Given the predominance of legal positivism today, does natural law have no place or weight in the modern legal and policy landscape?[33] The answer to that question is a firm "no" and has been so since 1945 at history's most infamous (and debatably most important) criminal case. The Nuremberg Trials were a military tribunal set up shortly after World War II to prosecute Nazi officials for various crimes connected to the Holocaust. The three primary charges laid against the Nazis at Nuremberg were war crimes, crimes against peace and crimes against humanity. War crimes were violations against well-established rules of war committed by Germany in foreign countries, while crimes against peace were acts German officials took in plotting and instigating the war in Europe. The legitimacy of these two charges were never seriously in doubt as both concerns acts by a sovereign nation against other sovereign nations, putting is safely within the traditional bounds of international law.

However, the third and most novel indictment at Nuremberg, crimes against humanity, was less certain. Here, the tribunal wanted to try German officials for acts in Germany against German citizens for acts that were technically legal under controlling German law. The Nazi defendants objected to this charge, as such acts fell beyond the bounds of international law, and thus outside the jurisdiction of the Nuremberg tribunal; unless a crime involved some non-domestic interest or party, criminal jurisdiction of a domestic crime would reside in a domestic court. And given the Holocaust was committed in accordance with German law, how could the Nazis be found guilty of the greatest crime of the modern era? This is the Nuremberg Problem and a key weakness of legal positivism. What happens when a wrong has clearly been committed but no relevant applicable law exists? This arises most explicitly with criminal novelty, where changing circumstances allow for the creation of new harms unanticipated by lawmakers. Under legal positivism, the legality or illegality of a thing usually rests in the express language of applicable law. Should the failure of legislative foresight to predict unimaginable harms be a bar to criminal prosecution, even when plain reason makes it obvious a grave harm has been caused?

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[31] Hurst Hannum, Dinah L. Shelton, S. James Anaya, and Rosa Celorio, *International Human Rights: Problems of Law, Policy, and Practice*, (Wolters Kluwer: 2018).

[32] Nahal Toosi, "Trump's 'natural law' human rights panel readies for launch." *Politico*, 3 July 2019, https://www.politico.com/story/2019/07/03/human-rights-panel-1398636.

[33] Kenneth Roth, "Pompeo's Commission on Unalienable Rights Will Endanger Everyone's Human Rights," *Human Rights Watch*, 27 August 2020, https://www.hrw.org/news/2020/08/27/pompeos-commission-unalienable-rights-will-endanger-everyones-human-rights.

Regarding the charge of crimes against humanity, the prosecution knew this was the ultimate question they had to answer. Supreme Court Justice Robert Jackson, acting as the United States' lead prosecutor, said in his opening statement to the Nuremberg tribunal,

> When I say that we do not ask for convictions unless we prove crime, I do not mean mere technical or incidental transgression of international conventions. We charge guilt on planned and intended conduct that involves moral as well as legal wrong… It is not because they yielded to the normal frailties of human beings that we accuse them. It is their abnormal and inhuman conduct which brings them to this bar.[34]

But why? In a court of modern law, why does Justice Jackson invoke an explicit moral basis for the prosecution's case? Because he realized the only way to effectively solve the problem raised at Nuremberg was to build the argument on a violation of natural law.

> The real complaining party at your bar is Civilization… …it points to the dreadful sequence of [the Holocaust and World War II], it points to the weariness of flesh, the exhaustion of resources, and the destruction of all that was beautiful or useful in so much of the world, and to greater potentialities for destruction in the days to come… **The refuge of the [Nazi] defendants can be only their hope that international law will lag so far behind the moral sense of mankind that conduct which is crime in the moral sense must be regarded as innocent in law.** Civilization asks whether law is so laggard as to be utterly helpless to deal with crimes of this magnitude by criminals of this order of importance.[35.]

Justice Jackson and the prosecution knew 20th Century positive international law alone was insufficient to condemn the criminal ingenuity of the Nazi leadership, as positive law had "lagged behind" compared to the scope of the Holocaust. But the insufficiency of legal language should not be used as a scapegoat for what plain reason told the whole world in 1945 (and us today) was abhorrently and undeniably wrong.

Natural law is not a "brooding omnipresence in the sky" that supplants the autonomy of nations to write their own laws in accordance with the will of their people and their own customs. Rather, natural law is the ultimately guardian of justice when human depravity's creativity out paces the limits of human foresight. And this role is of increasing importance in light of human rights abuses enabled by ever evolving technological advancement. Nations like Russia, China, Iran, and other totalitarian states are being enabled in their assault on basic human rights by software and computer code, limited by technological thresholds that may be surpassed tomorrow. Natural law theory is a valuable theory that has the potential to fill the gap between ancient wisdom, modern law, and future evils.

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[34] "Second Day, Wednesday, 11/21/1945, Part 04", in Trial of the Major War Criminals before the International Military Tribunal. Volume II. Proceedings: 11/14/1945-11/30/1945. [Official text in the English language.] Nuremberg: IMT, 1947. pp. 98-102. https://www.roberthjackson.org/speech-and-writing/opening-statement-before-the-international-military-tribunal/

[35] *Ibid.*

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