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# THE NATURE IN NATURAL LAW

Donald R. McConnell<sup>†</sup>

## *Abstract*

*In the Tolkien classic and recent motion picture epic The Lord of the Rings there is a compelling portrayal of the struggle between good and evil as it is manifested between empires, cultures, peoples, and in the hearts of individuals. It is a portrayal that resonates deeply in the human heart. It reveals something of what we know at a deep level. One could say it speaks indirectly of the Natural Law. Why do we call Natural Law “Natural”? If Natural Law is natural because it comes from the nature of human beings, as Finnis, and many other contemporary Natural Law advocates appear to say, then why are there not different rules for different natures? No one partaking of the mythic struggle for Middle Earth would say that murder, torture and oppression of others are right for Sauron and the orcs because they flow from their nature. Indeed, if as Francis Fukuyama fears human nature can be changed, just as the dark powers turned captive elves into orcs in Tolkien’s past of legend, why would there not be some other morality flowing from that new nature. The Natural Law must have something to do with a more fixed and transcendent nature. Looking at the ancient stoics we can see that at the dawning of systematic thought about Natural Law they had an insight into why they called this objective law above human law “natural.” When the stoic’s aberrant pantheism is sorted out, we can see that the real nature of Natural Law is God’s nature. An examination of the other historical views of what is meant by nature in regard to Natural Law discloses that all of the theories borrow one or more of the strands unifying view of Natural Law held by the stoics. No one of the views, except perhaps Augustine of Hippo, directly links the nature of God with the use of nature in the descriptive phrase “Natural Law.” But many of the historic views are not far from, or incompatible with focusing on God’s nature and primary. There are some disadvantages to the historic natures used in various theories. There are practical and Biblical reasons why it makes sense to re-adopt the view that the relevant nature of Natural Law is the nature of God himself.*

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<sup>†</sup> Academic Dean of Trinity Law School and assistant professor of Law. J.D., University of Southern California, Los Angeles; B.A. (magna cum laude) Westmont College.

## I. INTRODUCTION

One of the great works of contemporary English literature is J.R.R. Tolkien's *The Lord of the Rings*.<sup>1</sup> Director Peter Jackson renewed interest in Tolkien's work with his epic adaptation of the three books that make up *The Lord of the Rings* into three gigantic motion pictures with breathtaking locations and special effects. Jackson's films effectively captured much of the spirit and substance of Tolkien's mythic history. One of the key ideas depicted in both films and books is the nature of the struggle between good and evil. The works recognize the existence of good and evil. They also recognize that there is a constant struggle between good and evil in every person as well as between nations and peoples. The story depicts both the complexity and reality of sin without relativism. All of Tolkien's characters are flawed. All are damaged by the temptation of power.<sup>2</sup> All must choose sides, not between the perfect and the imperfect, but between those who are sinful and those who are genuinely committed to a purer evil. By Providence, not all are destroyed by their trials. Some become heroes: genuinely participating in a triumph of good over evil. Others fall but experience some sort of redemption. And some fall, never to recover.<sup>3</sup>

A curious aspect of the Tolkien fantasy world is the coexistence of different kinds of intelligent beings. There are not only human beings like ourselves, but hobbits, elves, dwarves, orcs, and trolls, to name only the major groups. Each has their own set of defining characteristics. If you read Tolkien's *Silmarillion*<sup>4</sup>, or the appendices to his books, you can learn more about the

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1. J.R.R. TOLKIEN, *THE LORD OF THE RINGS* (Houghton Mifflin Co. 1994) (Published in the first edition as three volumes, *The Fellowship of the Ring* 1954, *The Two Towers* 1954, and *The Return of the King* 1955) [hereinafter TOLKIEN, *LORD OF THE RINGS*].

2. For example, Gimli the dwarf struggles with his culture's prejudice against men and somewhat unjustified antipathy with elves – in the end he forms a bond with all the members of the band chosen to protect Frodo, the ring bearer; including an elf and two men. Once centered on Dwarvish interests, Gimli loses the lust for gold endemic to his kind and to appreciate the beauty of the elf Galadriel. Pipin the hobbit is basically a good fellow. But he cannot resist curiosity in the bad sense. He cannot resist forbidden knowledge. His exploration of a well and a crystal ball both have damaging results that cause him pain and loss. In the end Pipin's loyalty and courage are put to the test and he is found a hero who saves the life of a Prince, the life of a Princess, and the life of a kingdom. Boromir the man swears to protect the Frodo ring bearer. But his desire for the power of the ring overcomes him and he tries to take it by force. Repentant of his crime, he gives his life to save the companions of the ring bearer and to buy time for Frodo to escape.

3. TOLKIEN, *LORD OF THE RINGS*, *supra* note 1, *im passim*.

4. A pre-history of the fantastic realm of Tolkein's stories from before creation to the age in which the Lord of the Rings occurs. J.R.R. TOLKIEN, *THE SILMARILLION* (1977) [hereinafter TOLKIEN, *THE SILMARILLION*].

origins of the different peoples and their respective places in the created order.<sup>5</sup> You could say each group has their own “nature.” Orcs are odd in this regard however. Their ancestors were once elves,<sup>6</sup> bright beautiful beings capable of great art, creativity, and culture, but also susceptible to hubris, pride, despair, and other sins common to human beings.<sup>7</sup> Nonetheless, despite some major instances of elvish misconduct, you could say that as a whole the elves are “on the side of the angels.” At one point, however, the “dark powers” of Middle Earth<sup>8</sup> captured some elves in the distant past and altered them, through some occult science, to produce the orcs.<sup>9</sup> The orcs are a race of vicious implacable evil doers. They exhibit cruelty, lust of all kinds, hate, brutality, and recklessness. Physically and spiritually ugly, the orcs live only to destroy and subjugate. They do not even act honorably to each other, engaging in betrayal, cannibalism, and abuse of self and other orcs.<sup>10</sup>

Why is all of this about *The Lord of the Rings* relevant to a serious discussion of human law? Because it illustrates the problem of the use of the term “Nature” in the phrase “Natural Law.” If the nature in Natural Law is seen as “human nature” how do we deal with the fact that humans have a sin nature? How do we sort out what is normative from what is broken and twisted? Biotechnology threatens to re-make human nature genetically. Marxism, Islam, and utopian postmoderns expect to mould human nature by command or environmental change or by altering economic structures, and so they disregard any current human nature as normative. Is there a nature behind Natural Law that is neither fallen nor supposedly malleable? Yes. The Nature of God himself is arguably the real nature behind Natural Law. But can such a definition be squared with Natural Law tradition or with the modern revival of Natural Law thinking?

Today there is a revival in Natural Law theory—but Natural Law means many things to many people. To many, Natural Law means simply the principles of conduct implied by the application of reason to observable traits in human beings. In such a theory, Natural Law is “natural” because it looks to the list of traits that define the nature of human beings. For example, Finnis and Germain Grisez look to what activities cause human flourishing.<sup>11</sup> Ralph

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5. TOLKIEN, LORD OF THE RINGS, *supra* note 1, at 1009-1112.

6. TOLKIEN, THE SILMARILLION, *supra* note 4, at 50.

7. *Id.*, *im passim*.

8. The site of Tolkien’s tale.

9. *Id.* at 50.

10. TOLKIEN, LORD OF THE RINGS, *supra* note 1, *im passim*.

11. For a simplified summary of their approach see J. BUDZISZEWSKI, WRITTEN ON THE HEART: THE CASE FOR NATURAL LAW 196-202 (1997) [hereinafter WRITTEN ON THE HEART].

McInerney and Henry Veatch seek to ground Natural Law in “*human nature and the place of man in nature.*”<sup>12</sup> Others might focus on the autonomous nature of the human ego, or the fact that humans are creatures that have the power of moral reasoning.<sup>13</sup>

Such understandings are not without difficulty. First, though their adherents battle the inference valiantly, they face the old naturalistic fallacy argument. Just because something is a certain way does not mean that is how it “ought” to be.<sup>14</sup> Existence is not inherently indicative of normativeness. Second, as Francis Fukuyama has recently pointed out, genetic engineering may put us in a position where human beings can change their hereditary traits: there may no longer be a fixed human nature if we can change our heritable traits and characteristics.<sup>15</sup> Third, Hegelians and other “Evolutionists” have always believed human traits are already in a state of flux<sup>16</sup>—so how do we argue with them about human nature? And fourth, there are, or may be human traits that nearly everyone agrees should not be normative. For a general example: sinfulness. For a specific example, there are, and always will be until Christ returns, human beings who derive pleasure from causing pain to others. In a sense they think they “flourish” when this dark hunger is fed. But we almost universally deny that such a trait is or could be normative, even for the group who experienced it in a compelling way.

This problem of non-normative traits and changeable “natures” brings us back to Tolkien’s orcs. The orcs are designed for what nearly everyone would concede to be evil. They find no pleasure in kindness, love, generosity,

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Robert George describes, though, how a number of critics attack Grisez’s theory as being “deontological” and avoiding a philosophy of nature as normative. But George argues that Grisez’s approach is grounded in human nature. ROBERT P. GEORGE, IN DEFENSE OF NATURAL LAW 83-85 (1999) [*hereinafter* IN DEFENSE OF NATURAL LAW].

12. GEORGE, IN DEFENSE OF NATURAL LAW, *supra* note 11, at 84.

13. For example, Hadley Arkes argues for human reasoning power as giving rise to rights in HADLEY ARKES, NATURAL RIGHTS AND THE RIGHT TO CHOOSE (2002). Arkes also states: “If there is no ‘nature,’ there can be no ‘human’ rights springing from that nature. But in that case—as I will try to argue more fully later—there would be no ‘rights’ at all, in the hardest and strictest sense.” *Id.* at 32.

14. This argument is summarized several different ways in SURYA PRAKASH SINHA, JURISPRUDENCE: LEGAL PHILOSOPHY IN A NUT SHELL 95-113 (1993).

15. FRANCIS FUKUYAMA, OUR HUMAN FUTURE: CONSEQUENCES OF THE BIOTECHNOLOGY REVOLUTION 1-10 (2002). Fukuyama recognizes this situation as threatening “natural rights” ideas. *Id.* at 12-13, 101-02. It has the same potential impact for views of natural law based on describing humans as they are.

16. FRANCIS FUKUYAMA, THE END OF HISTORY AND THE LAST MAN 146 (1993); FRANCIS FUKUYAMA, OUR HUMAN FUTURE: CONSEQUENCES OF THE BIOTECHNOLOGY REVOLUTION 6 (2002).

temperance, or any other true virtue. They have been genetically engineered for killing, abusing, oppressing, dominating, and pillaging. They are not “happy” in any other condition. Does their “nature” in the sense of a set of traits or tendencies or design goals make their behavior in accord with that “nature” normative for them? If in the future we cloned a race of humanoids that only had pleasure in the pain of others would sadism be “right” or “good” for such creatures? Some cultural relativists might be so bold as to say sadism is OK for sadists with sadistic natures. But, most people will admit something is wrong with sadism even if it is “by design.” People everywhere, when they read or see *The Lord of the Rings* have no difficulty identifying the orcs and their conduct as evil. No one really says, “Oh, I feel so sorry for the poor orcs. The repressive puritanical elves and men and hobbits are spoiling their fun. Why can’t they all just get along? Why can’t they let the orcs do what is right for them?” In fact, it is precisely because the orcs are very evil by nature that we feel comfortable with their utter defeat. When men and hobbits go bad, by contrast, we feel a pang of sympathy. Not because they succumbed to their inherited traits, but because we really expect better things of them. We judge all by a standard other than average or typical human behavior. We judge conduct, both human and orc, by the Natural Law.

But, if Natural Law is not natural because it is based on human nature, understood as the way humans are, what is the “nature” of Natural Law?

The Natural Law view dominated Western legal theory for seven hundred years or more. In the classic version of that theory, articulated by minds as diverse as Aquinas and Calvin, human positive law finds its exclusive justification, force, and meaning by virtue of God and his general and special revelation.<sup>17</sup>

In March of 1996 the Ethics and Public Policy Center’s Evangelical Studies Project held a conference on Natural Law with both protestant and Catholic scholars. Michael Cromerty preserved the core proceedings in the book he edited *A Preserving Grace; Protestants, Catholics, and Natural Law*. In the discussion, while the scholars show their awareness of the classical Natural Law approaches of Aquinas and Augustine, they run afoul many of the shallows that have stranded the vessel of Natural Law throughout the years. Among these is the confusion over why “Natural Law” is called *Natural*. Just what does this appellation mean? Paul Marshall, Senior Fellow at the Hudson Institute’s Center for Religious Freedom summed up the confusion:

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17. See, e.g., J. Rufus Fears, *Natural Law: The Legacy of Greece and Rome*, in COMMON TRUTHS: NEW PERSPECTIVES ON NATURAL LAW 34, 44, 50 (Edward McLean ed., 2000); WRITTEN ON THE HEART, *supra* note 11, at 109, 179-86.

I'd like to go back to a basic point: that we don't know what "natural" law means, or rather, it means a lot of quite different things. I still think that the use of the term "natural" continues to provoke the sorts of problems we're dealing with. As an adverb it's better, but there's still a problem of importing into the discussion a concept that doesn't seem to have any Hebrew cognate. Are we distinguishing *nature* from *divine*, which seems to be the modern Catholic idea? Or is it *natural v. human*, which a lot of modern natural law talk seems to be emphasizing? This would emphasize that there are rules which we don't make up, which are given to us. That sense of natural law is, I think, a fairly good sense. One of the ones we are struggling with now is *natural v. revelatory*. Then you get epistemological questions. Depending on what is being emphasized as "natural," very different sets of questions and answers come up.<sup>18</sup>

Marshall's questions went unanswered as the discussion moved in another direction. Why do we call Natural Law natural? If people have answered that question differently, is there any common core behind their answers? Do the differences matter?

## II. GREEK AND ROMAN THOUGHT

A. P. d'Entreves has pointed out that users of the term "Natural Law" have not all agreed on why this "law" was "natural." Understandings of "nature" or "natural" have varied. He noted even within a single approach there has been flexibility and intended ambiguity at times. One of the ideas behind the use of "natural" for law has been to contrast Natural Law with "convention." Some people say that there are two kinds of things: things that are established by human contrivance—the conventional, and things that are not established by human contrivance—the natural. As d'Entreves says, this was connected to a deeper purpose: "What matters is the constant endeavor to place certain principles beyond discussion, by raising them to a different plane altogether. The nature-metaphor was admirably fitted to express the notion of finality and inevitability."<sup>19</sup> In most theories of the Natural Law, an objective standard was recognized or at least sought. Natural Law was a set of fixed constellations that allowed navigation of the shifting bars of human experience and government. Such a fixed standard was the whole point of the discussion. In our time, there

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18. A PRESERVING GRACE: PROTESTANTS, CATHOLICS, AND NATURAL LAW 92-93 (Michael Cromarty ed., 1997).

19. A.P. D'ENTREVES, NATURAL LAW 16-18 (Hutchinson & Co. 1979) (1951).

are those who seek to co-opt the phrase “Natural Law” for subjective human phenomena because they believe human phenomena are all that exist. Yet even these subjectivists seek normativity and argumentative force in their appeal to “nature.”<sup>20</sup>

### A. Greek Inclinations

There is in Pre-Socratic Greek religion a faint glimmer of some notion of a Natural Law. The goddess of justice, *Themis* was thought the daughter of heaven and earth.<sup>21</sup> Demosthenes contrasting accidental and intentional crimes says that such a difference is not only in law “but nature herself has decreed it in the unwritten laws and in the hearts of men.”<sup>22</sup>

Hippias of Elis, a Sophist of Greece in the time of Socrates, may have been the first person in recorded history to use the phrase “Natural Law” or “Law[s] of Nature.”<sup>23</sup> In a Socratic dialogue from Xenophon, Hippias mentions the idea of unwritten laws given to humans by the gods. Hippias includes the ideas of honoring parents and worshipping the gods among such laws.<sup>24</sup> In Xenophon’s account, however, it is Socrates who notes, with Hippias in agreement, that the penalties for violating the laws of the gods are intertwined with what we would call the expected or “natural” consequences of such acts. Socrates sees the consequence as a punishment proscribed by the gods, and thereby connecting the “lawful” and the “just”—virtuous conduct having what we might call a natural reward, and vice a natural penalty.<sup>25</sup>

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20. See, e.g., Michael Smith’s Subjective Naturalism as discussed in Stephen Finlay’s *Four Faces of Moral Realism*, 2 PHIL. COMPASS 620, 630 (2007), available at <http://www.blackwell-synergy.com/doi/pdf/10.1111/j.1747-9991.2007.00100.x?cookieSet=1>. Finlay says Smith proposes a “realist” or “natural” moral realism that is based on the subjective opinion of an ideal decision maker. Thomas Hobbs does much the same thing by grounding his very subjective view of what is normative in a supposed theory of the “state of nature.” John Rawls, with his “original position” likewise seeks to say we should agree with a set of hypothetical ideal decision makers. Ronald Dworkin’s hypothetical judge Hercules also comes to what we might call “natural”—or right answers—based on an ideal or enlightened, but non-metaphysically objective point of view. Arguments that “if you were enlightened enough you would agree with my subjective opinion” tend to be of this sort. An excellent historical example of this sort of argument is Justice Thurgood Marshall’s concurring opinion in *Furman v. Georgia*, 408 U.S. 238, 314-71 (1972); see especially *id.* at 362-63 (Marshall, J., concurring).

21. 1 RICHARD HOOKER, OF THE LAWS OF ECCLESIASTICAL POLITY 178-79 (1969).

22. W.K.C. GUTHRIE, THE SOPHISTS 118 (1977).

23. THE FIRST PHILOSOPHER: THE PRESOCRATICS AND SOPHISTS 251 (Robin Waterfield trans., 2000).

24. *Id.* at 255, (quoting XENOPHON, MEMOIRS OF SOCRATES 4.4.19-21).

25. XENOPHON, THE MEMORABILIA bk. 4, IV (H.G. Dakyns trans., Project Gutenberg 1998).



Other Sophists were very much opposed to the idea of venerating a Natural Law<sup>26</sup> unless one meant by it the dominance of the strongest.<sup>27</sup> The Sophists have been associated with relativism and nihilism,<sup>28</sup> with opinion and worldly success without concern for the soul,<sup>29</sup> and with instrumentalism<sup>30</sup> and skeptical naturalism.<sup>31</sup> The Sophists are said to have considered “Nature” and what we might translate as “cultural norms, customs and positive laws” in opposition to one another.<sup>32</sup> Yet this distinction made it possible to see that slavery and aristocracy were creations of man rather than nature, even if most Sophists preferred the ways of man to the ways of nature.<sup>33</sup> They preferred the manmade to the natural because they saw “man as the measure of all things.”<sup>34</sup> In a sense, the Stoics elevated the status quo of human society as normative—as a law.<sup>35</sup> The Sophists argued that what was natural, in the sense of being what happens typically in the worlds of men and animals, is that might makes “right”—the strongest survive. In this argument, they sought to justify their own livelihood. For the Sophists taught men the use of rhetoric for personal benefit. For a price they could equip a gifted pupil to become a demagogue.<sup>36</sup> Perhaps the Sophists felt comfortable with this because they recognized no objective moral order passing judgment against them. If man was the Sophists’ yardstick to measure man, then what is accounted “right” among humans is simply what is “normal” in the behavioral/statistical sense. This is not the same thing as saying there is a normative teleological order behind the natural world. It is merely saying the way things are is the way they are. Nevertheless, this meaningless sense of “Natural Law”—what we observe in the behavior of animals or humans, has

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26. Anton-Hermann Chroust, *On the Nature of Natural Law*, in INTERPRETATION OF MODERN LEGAL PHILOSOPHIES: ESSAYS IN HONOR OF ROSCOE POUND 81 n. 5 (Roscoe Pound & Paul Lombard Sayre eds., 1981).

27. Edwin McCarthy Lemert, *Jurisprudence, Law and Sociology*, in CRIME AND DEVIANCE: ESSAYS AND INNOVATIONS OF EDWIN M. LEMERT 249 (Charles C. Lemert & Michael F. Winter eds., 2000). Lemert specifically sees the Sophists as attacking the idea of law from a divine source.

28. MICHAEL BERTRAM CROWE, THE CHANGING PROFILE OF NATURAL LAW 11 (1977).

29. RUSSELL KIRK, THE ROOTS OF THE AMERICAN ORDER 78 (1991).

30. GORDON H. CLARK, A CHRISTIAN VIEW OF MEN AND THINGS: AN INTRODUCTION TO PHILOSOPHY 105 (1991).

31. 1 LEE CAMERON McDONALD, WESTERN POLITICAL THEORY 74 (1968).

32. ERNST BLOCH, NATURAL LAW AND HUMAN DIGNITY 13 (Dennis J. Schmidt trans., 1986).

33. GUTHRIE, *supra* note 22, at 118.

34. KIRK, *supra* note 29, at 80-81. Plato’s well known quote of the Sophist Protagoras appears at PLATO, THE LAWS 175 (T.J. Saunders trans., 1970) (at bk. IV, § 6).

35. THE ENCYCLOPEDIA OF CHRISTIANITY 703 (Erwin Fahlbusch, Geoffrey William Bromiley & David B. Barrett *et al.* eds., 1999).

36. KIRK, *supra* note 29, at 78-81.

been confused with a normative order, off and on, up to the present hour. At times, this confusion has been due to respect for the authority of confused predecessor philosophers. At other times, it has been what it probably was for the Sophists: an attempt to cloak evil in terms that make it sound acceptable. Based on the discussions of the early Greek philosophers and the Sophists, Leo Strauss concluded by “natural” they meant not the total of everything in the material world, but rather, the essence of what is knowable without the influence of culture.<sup>37</sup>

The Sophists’ view of Natural Law is problematic both because it seems to result in immoral “rules” and because while the Biblical doctrine of the fall seems to indicate that while the natural world does proclaim information about God, it is none-the-less affected by sin.<sup>38</sup> People and animals do not die and suffer because death and suffering are intrinsic goods, but rather because of the systemic devastation caused by sin.<sup>39</sup> So it is not appropriate to look at the world of animals and say in reference to people “it is good for the fittest to survive at the expense of the weak because that is what we observe in the order of nature” as a Sophist might say.

This confusion of Natural Law with the conduct of animals has also caused some Christians to reject Natural Law because they mistakenly associate it with the created world more than with the creator. Gary North, a Christian reconstructionist says: “Natural Law is a dead mule; it was always a sterile hybrid, and Darwinianism has long-since killed the last known living specimens.”<sup>40</sup>

Darwinianism would only undermine Natural Law, however, if Darwinianism were true and if Natural Law were based in the world of plants and animals rather than in the world of revelation. If Natural Law is real because it is a revelation of God, no scientific inquiry can confirm or undermine it because it is spiritual and metaphysical, and not a physical phenomenon.

The Sophists’ view was rejected by Socrates and his followers. Socrates believed objective knowledge outside of what was done or held as opinion by individual humans was to be sought over and above mere self-interest and prejudice.<sup>41</sup> Life should be examined.<sup>42</sup> Examination implied a search for truth, an evaluation, not a mere ratification or rationalization of the common

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37. McDONALD, *supra* note 31, at 73, (citing LEO STRAUSS, NATURAL RIGHT AND HISTORY (1965)).

38. *See Romans* 1:19-20; 8:18-22.

39. *Id.*

40. GARY NORTH, TOOLS OF DOMINION 35 (1990).

41. KIRK, *supra* note 29, at 78-81.

42. McDONALD, *supra* note 31, at 19.

state.

Plato, like his teacher Socrates, would insist there are objective standards. While he did not refer precisely to Natural Law, belief in objective forms of justice and goodness implies an objective normative standard flowing from those forms. Plato believed that God was the measure of all things, not men or their will.<sup>43</sup> Plato held to one of the classical corollaries of Natural Law theories of jurisprudence; that laws which did not fall within the limits of an objective standard (in Plato's case, the "good of the whole state") were not really laws at all.<sup>44</sup> If Plato were to call this idea a Natural Law, he would not have meant the observable world, but the "nature" of the forms. Indeed, for Plato, it would be the world of the forms or God who ultimately gives meaning, not the shadow world of physical existence. Plato's work does contain one brief mention of a Natural Law. In *Gorgias* one speaker in the dialogue says "They do these things according to the [nature] of justice and, by heaven, according to the law of [nature,] though perhaps not according to the law we men lay down."<sup>45</sup> In his use of the Greek word φυσικῶς (*phusis*), commonly translated as natural, Plato seems to mean the real or reality. The law of nature, therefore, would be the real law<sup>46</sup> as opposed to what human beings might suppose law to be. In this sense Platonic Natural Law would be law in accord with the forms of justice as opposed to the shadows on the wall human beings often mistake for justice. Natural Law would be law in accord with the forms. If the forms are Plato's real ultimate, then Plato was in effect making the nature of Natural Law the nature of God in the sense that the forms are the real.

Plato's idea of the "natural" differs from what is common today. When we speak of the natural we do not often mean the "real." Nor do we mean another common Greek usage: i.e. kind.<sup>47</sup> When we speak of something's nature we usually mean "what are its empirically verifiable characteristics" not what kind of thing is it. Like Plato, Aristotle does not use our definition, but rather the definition of "kind."

When Aristotle speaks of the natural he probably means the kinds of things

43. PLATO, *THE LAWS* 175 (T.J. Saunders trans., 1970) (at bk. IV, § 6).

44. *Id.* at 173.

45. C.S. Lewis translation with "natural" substituted for Lewis' transliteration "*phusis*" as it appears in C. S. Lewis' work *Studies in Words*. C.S. LEWIS, *STUDIES IN WORDS* 60 (2d ed. 1967) [hereinafter *STUDIES IN WORDS*].

46. *Id.* at 60.

47. "Greek *phusis* and the Latin *natura*, both of which signify the kind of being that an individual is. They are thus equivalent to *substantia* in the sense of *sustantia secunda*, or, if they do refer to *substantia prima* it is at most in the sense of the nature as it is realized . . ." ERIC LIONEL MASCALL, *CHRIST, THE CHRISTIAN, AND THE CHURCH: A STUDY OF THE INCARNATION* 6 (1946).

that things are. A thing's nature is its substance: the kind of thing it is. The kind of thing it is linked to its purpose—what it does excellently. So by this definition Natural Law might be law flowing from the way things are or from the nature of things—notably the nature of man—the sort of thing people are. This interpretation is evidenced by the writings of contemporary neo-Aristotelians such as Hadley Arkes who emphasize that Natural Rights flow from the kind of thing human beings are. Arkes recognizes this sort of Natural Rights discourse as Natural Law.<sup>48</sup>

Aristotle himself does not make Natural Law one of his primary topics for discussion by name. But, his ideas about ethics and justice are compatible with a Natural Law system.<sup>49</sup> Aristotle did mention a “Natural Justice”:<sup>50</sup> a standard for law, but one which is difficult to sort out from human law. This difficulty was not so much a theoretical one, but a methodological difficulty. Because Aristotle's arguments about law and politics start by observing what people do and then reasoning dialectically about it, he is not looking primarily for standards beyond human behavior or belief, except as they are known to mankind. Aristotle is the ancestor of those Natural Law theories that seek to find out about an objective standard for law by looking at human nature. This approach has been considered vulnerable to the so-called naturalistic fallacy, the idea that what *ought* to be cannot be logically derived purely from observation of what *is* done. The escape from the fallacy requires belief in a God who has revealed information about what *ought* to be done in nature, human or otherwise. Advocates of neo-Aristotelian approaches however, often miss the realization that in such a case human nature is only a means of communication, and not the nature which determines the rules at all. Instead it is God who is the source of the goods, virtues etc. Undoubtedly Aristotle failed to come to grips with this due to his weak notion of the divine. But even his ideas about human nature as a source of data run into some puzzles when we think critically about our human experience.

Aristotle took it for granted that the nature of the virtuous man is such that he naturally *prefers* to do what is virtuous; temptation being no issue to him, and obedience to the higher law no struggle.<sup>51</sup> Aristotle did make a distinction between human desires which were proper and improper. He did not assume that because a human being had a desire that it was, in fact, appropriate or

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48. ARKES, *supra* note 13, at 1-77.

49. Certainly the use of Aristotelian thought by Thomas Aquinas in his system justifies such a claim.

50. ARISTOTLE, ETHICS 158 (J.A.K. Thompson trans., 1970) (at bk. V, ch. 7).

51. C.S. LEWIS, THE ALLEGORY OF LOVE: A STUDY IN MEDIEVAL TRADITION 58 (1936) [*hereinafter* ALLEGORY OF LOVE].

“natural.” Instead, he explained that human beings did sometimes have desires that were “not natural” because of illness, habit, or “a bad nature.”<sup>52</sup>

C.S. Lewis, a devout lover of the classics, deals with this question in the context of his science fiction novel *Out of the Silent Planet*. In the discussions between the man Ransom and the Martian Hrossa, Lewis explores the relationship between what is right and our desires. The Hrossa are unfallen beings. As such, they desire precisely what is right for them and others. They have no desire to have too many young, to eat too much, to live a life devoid of danger, or to fight one another. Their desires are in perfect agreement and harmony with what is good. By contrast one wonders what is wrong with humans that what we desire, and what we classically recognize as good, are so at variance.<sup>53</sup> This reflects a problem. God has designed the universe in such a way that, in general, virtue is profitable and vice is unhealthy. This design-harmony of divine law and creation is discoverable to those who “have eyes to see.”<sup>54</sup> But, because of sin in the world, the characteristics of nature and of our own desires are often at odds with the divine law. The mystery for Plato and Aristotle is why men are not better behaved than they are. If virtue is always the reasonable thing to do (Plato) or if virtue is the perfection of the very sort of thing a human being is (Aristotle), why do people not do what is right more often? From a Christian view Aristotle and Plato underestimated sin. They did not fully reckon the damage done to human beings by rebellion against God and his order of creation. It is remarkable to Christians, however, how much Plato and Aristotle saw without the benefit of special revelation. The mere possibility of such insights supports the Christians who believe in Natural Law as opposed to those who do not.

### *B. Nature and Rome*

In Natural Law theory the meaning of “Natural” has created confusion for some writers, especially among the Romans. One jurist who has wrought confusion in this area is the Roman, Ulpian, whose works formed a major part of Justinian’s collection and unification of Roman law. Ulpian said, “The law of nature is that which nature teaches all animals. For that law is not proper to the human race, but it is common to all animals which are born on the earth and in the sea, and to the birds also.”<sup>55</sup> Justinian’s work was the core of university

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52. Joan Cadden, *Trouble in the Earthly Paradise*, in LORRAINE DASTON & FERNANDO VIDAL, *THE MORAL AUTHORITY OF NATURE* 225 (2004) (citing ARISTOTLE, *ETHICS*).

53. C.S. LEWIS, *OUT OF THE SILENT PLANET* 72-76 (1965).

54. *Cf. Ezekiel* 12:2.

55. Opinion quoted in JEAN PORTER, *NATURAL AND DIVINE LAW: RECLAIMING THE TRADITION FOR CHRISTIAN ETHICS* 70 (1999).

study of law from the twelfth to the eighteenth centuries. So, while failing to be incorporated in the best theories, Ulpian's confusion has worked its mischief. Ulpian defined "Natural Law" or *jus naturale* as being a set of rules that govern animals as well as humans.<sup>56</sup> This confusion of the animal kingdom and ethics for humans can lead either to animal rights or social Darwinianism. Along this line in this century, "natural" might commonly be associated with survival of the fittest or the alpha-wolf-like behaviors of some popular politicians. But, our desires should not be what was meant by "natural" in Natural Law theory or surely the whole idea of the theory, understanding the basis of common moral insights is completely defeated. Man's common drives are to take all he can, have power over all he can and procreate all he can. Such "natural" desires hardly provide a basis for objective moral laws.

By contrast to the Roman jurists, the Stoics had a more idealized view of Natural Law. While the ancients deified various aspects of the world of physical and animal phenomena, it was not until the time of the Stoics that there was an understanding of the natural realm as a single divine god or being.<sup>57</sup> C.S. Lewis refers to *natura* as "the youngest of deities."<sup>58</sup> The pre-Socratic philosophers of Greece developed the concept of nature.<sup>59</sup> It was the Stoics, however, who made the idea of Nature as a god popular. The Stoics equated right conduct, virtue, and Natural Law with reason.<sup>60</sup> But then they believed that "god" was a sort of universal fire pervading everything. Reason was the primary characteristic of that "god."<sup>61</sup> Like later Christians, the Stoics referred to the universal fire of their reasonable pantheistic god as the *Logos*.<sup>62</sup> The Stoics believed all humans had a spark of the divine nature that gave them reason, and that bits of reason were implanted in all things to direct them.<sup>63</sup>

The Stoics believed in this universal *logos* or divine reason as the source of a Natural Law which was universal and provided a standard for all positive laws to conform to.<sup>64</sup> From a mere Christian perspective, because mankind is made in the image of God, our reason does tell us something about what God and his

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56. Fears, *supra* note 17, at 40-42.

57. C.S. LEWIS, *THE DISCARDED IMAGE: AN INTRODUCTION TO MEDIEVAL AND RENAISSANCE LITERATURE* 37 (1964).

58. *Id.*

59. *Id.*

60. McDONALD, *supra* note 31, at 73-78.

61. DIOGENES LAERTIUS, *LIVES AND OPINIONS OF THE EMINENT PHILOSOPHERS* 308-14 (C.D. Yonge trans., 1853).

62. RONALD NASH, *THE GOSPEL AND THE GREEKS: DID THE NEW TESTAMENT BORROW FROM PAGAN THOUGHT?* 58-59 (2003).

63. *Id.*

64. *Id.* at 59 (citing A.H. Armstrong).

law are like. Nevertheless, we must look beyond ourselves to complete and calibrate this information. Human reason is a very inadequate deity. Because human reason is affected by sin, it does not tell the whole truth about God and his laws without error. Nevertheless, the Stoic synthesis provides a unity from which future versions of Natural Law departed in various directions.

Political philosophy professor Lee Cameron McDonald saw this connection between the Stoics' notions of reason and nature with the divine. He points out what ought to be clear from the Stoics' other presuppositions:

We must not, however, think of the stoic concept of reason as that of a limited cognitive function, nor a skill at logical manipulation, nor even the power of 'reasoning' as we are apt to use the term, but as the Greek *logos*-the word of life, the structure of reality, a divine essence (*daimon*) found in the center of things. The term is perhaps more religious than philosophical, though perhaps philosophy itself was more of a religion than we can easily recognize.<sup>65</sup>

Diogenes Laertius tells us much of what we know about the early Stoics, their own original writings having been lost. He attributes to the early Stoics, Zeno and his disciples, the idea that the chief good of humans is to live according to their nature.

For our individual natures are all parts of the universal nature: on which account the chief good is to live in a manner corresponding to nature, and that means corresponding to one's own nature and the universal nature; doing none of those things which the common law of mankind is in the habit of forbidding, and that common law is identical with that right reason which pervades everything, being the same with Jupiter, who is the regulator and chief manager of all existing things. "Again, this very thing is the virtue of the happy man and the perfect happiness of life when everything is done according to a harmony with the genius of each individual with reference to the will of the universal governor and manager of all things."<sup>66</sup>

Note the wonderfully all-encompassing view offered in this passage. Every variant theory that calls itself a Natural Law theory can find an ancestor here: the physical world as nature, man's nature as nature, right reason, a universal nature, and a high god, all rolled into one and seen as a unity. Ever after the

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65. MCDONALD, *supra* note 31, at 74.

66. LAERTIUS, *supra* note 61, at 291. Diogenes is thought to have written in the late second century. See *id.* at Introduction.

Stoics, many Natural Law theories have shattered this unity and taken one shard or another for their master principle of nature. Human nature, reason, and the physical world being the most common pieces of the Stoic view of the nature of Natural Law to be chosen by different writers as *the* meaning of the nature in Natural Law.<sup>67</sup> For the Stoics, good pantheists all (though in a sense materialist pantheists) God is the unifying whole: “. . . for the Stoics *physis* [nature] also names that which is holy, and even divine.”<sup>68</sup>

C. S. Lewis confirms this in his own reading of the Stoics. He confirms that for the Stoics, nature was “deified Mother Nature . . . inscribing her laws . . . on the human heart.”<sup>69</sup> Likewise “[w]hen Marcus Aurelius, or any sound Stoic, calls *Phusis* ‘the eldest of deities’ (IX, I), I think this is the language of actual religion. . . .”<sup>70</sup> And, the Stoic Cleanthes is said by Cicero to have given the name of God to “the mind and spirit of all *natura*.”<sup>71</sup> So when the Stoic speaks of Natural Law he means not only law in accord with reason, but the law of “God”. The Stoic is mistaken in who God is and what he is like. But the Stoic may have been onto something if we substitute the real God for the pantheistic deity of the Stoics.

Here then is the unifying source: God’s nature as the relevant nature of Natural Law. Oddly, Christians such as Aquinas and the neo-Thomists have not emphasized the strand of the divine as the key “nature” though this fits best with orthodox Christian theology. For even though God has made man in his image, the image is damaged. This damage leading to a hint of moral truth in the nature of man, but not the correct model.<sup>72</sup> God has created the universe in accord with his ways.<sup>73</sup> So, its patterns reveal some truth, punishing evil and rewarding virtue.<sup>74</sup> Nevertheless, because of human sin the creation suffers futility.<sup>75</sup> In this world the more virtuous people sometimes suffer and the more evil people sometimes prosper.<sup>76</sup> So, while in the order of the cosmos we still see the fingerprints of God,<sup>77</sup> the story is hard to decipher without some clearer

67. STUDIES IN WORDS, *supra* note 45, at 41.

68. BLOCH, *supra* note 32, at 13.

69. STUDIES IN WORDS, *supra* note 45, at 61.

70. *Id.*

71. *Id.* at 41.

72. WAYNE GRUDEM, SYSTEMATIC THEOLOGY 442-50 (1994).

73. JOHN CALVIN, INSTITUTES OF THE CHRISTIAN RELIGION bk. I, ch. XIV, § 21 (1559); GRUDEM, *supra* note 72, at 158-59.

74. See generally the biblical books of *Proverbs* and *Ecclesiastes*. See also *Romans*, chapters 1 and 2.

75. *Romans* 8:18-23.

76. See generally the biblical book of *Job*. See also *Psalms* 37, 73, and 94.

77. *Psalms* 19.



guide.<sup>78</sup> It is the revelation of God himself which gives us truth through the corrupted vessels of man and the world, and is yet without error.<sup>79</sup>

The confused “naturalist” who equates the order of animals with Natural Law deifies the biosphere. The Stoic deifies reason. Both the Pantheist and the ardent Evolutionist make either man or the order of the natural world their god.<sup>80</sup> But in doing so they conform to the thesis that the “nature” in “Natural Law” is really the nature of God—in the case of the Stoic or Pantheist it is not the Christian God, but it is still an absolute being of the divine sort. From the Christian view, as nature is imprinted with some information by virtue of its creation by the One True God of the Bible; it can tell us something about God and his laws. Nonetheless, because nature is fallen and damaged by sin, what it tells us is incomplete and imperfect. Study of the fallen world in isolation from God gives rise to such pernicious notions as social Darwinianism and the view that “might makes right.” Similarly, our own fallen human nature needs the corrective of God’s calibrating special revelation.

We must be on our guard against deifying fallen nature in place of the God who created all. Natural Law is not a matter of instinct or of invention. Its basic tenets are either innate or self-evident as part of general revelation.

Cicero’s comments on Natural Law appear to draw from the Stoics’ ideas. Cicero finds that “. . . law in the proper sense is right reason in harmony with nature.”<sup>81</sup> From the remainder of this section of Cicero’s *Republic* it becomes clear that he means this of the Natural Law as well as believing the Natural Law should be the font of the law of the state. Cicero identifies the source of this law as God.

[L]aw was not thought up by the intelligence of human beings, nor is it some kind of resolution passed by communities, but rather an eternal force . . . which rules the world by the wisdom of its commands and prohibitions. In their judgment, that original and final law is the intelligence of God, who ordains or forbids everything by reason. Hence that law which the gods have given to the human race is rightly praised, for it represents the reason and intelligence of a wise man directed to issuing commands and

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78. GRUDEM, *supra* note 72, at 122-24.

79. *Id.* at 73-100.

80. This is also part of the problem with modern legal philosophies. It is simply in the nature of what law is and how it functions that it involves a god of some sort. If we reject the real God through nominalism, relativism, materialism, etc. and we still try to have law of some sort, we end up deifying whatever is central to the false systems—we end up worshipping ourselves.

81. CICERO, *THE REPUBLIC AND THE LAWS* 68 (Nial Rudd trans., 1998).

prohibitions.<sup>82</sup>

Not only Romans, but also moderns tend to be a bit muddled about “nature” and the “natural.”<sup>83</sup>

### III. BIBLICAL CHRISTIANITY<sup>84</sup>

What Christianity brings to Natural Law theory is then not a new source for the Natural Law, or a new class of referent for the term “Natural,” but rather a more specific understanding of God as the personal God revealed in scripture,<sup>85</sup> and an awareness of human sinfulness and imperfection, even in the area of human reason.<sup>86</sup> Christianity says that there is an objective standard available to all human beings, in all cultures, at all times.<sup>87</sup> The failure of the agreement to this standard when objective standards are denied is not then a failure of access or knowledge, but of will. According to the Bible, the human will is sinful and rebels against the objective standard, demanding in effect, to be one’s own god.<sup>88</sup>

One argument on why Natural Law is natural comes from the biblical text *Romans* chapter two, verse fourteen: “Indeed, when Gentiles, who do not have the law, do by nature things required by the law, they are a law for themselves, even though they do not have the law. . . .”<sup>89</sup> This passage is part of Paul’s argument on the content of the gospel. Paul is in the midst of arguing that God is justified in condemning all human beings under the covenant of the law, first made with Adam, and applying to all of Adam’s kin. Man was told to obey God or face judgment. All humans have subsequently chosen to disobey God. Consequently they can only be saved by grace through the work of Christ. People cannot be saved by being “good people” or having Jewish or non-Jewish ancestry. As part of this argument, Paul seeks to demonstrate that all humans are under God’s covenant of law and in need of the covenant of grace. The

82. *Id.* at 124.

83. THE ALLEGORY OF LOVE, *supra* note 51, at 49.

84. In this entire section I am influenced by the Biblical arguments on Romans made by J. Budziszewski in J. BUDZISZEWSKI, WHAT WE CAN’T NOT KNOW: A GUIDE 227-34 (2003). All Biblical quotes are from The Holy Bible, New International Version.

85. LOTUS BERKHOF, SYSTEMATIC THEOLOGY 64-65 (4th ed. 1996)

86. MILLARD J. ERICKSON, CHRISTIAN THEOLOGY 579-674 (2d ed. 1983); *see especially id.* at 643-48.

87. C.S. LEWIS, MERE CHRISTIANITY 17-43 (Macmillan 1960) (1943); C.S. LEWIS, THE ABOLITION OF MAN 39-63, 95-121 (Macmillan 1955) (1947).

88. ERICKSON, *supra* note 86, at 579-674; *see especially id.* at 590-592, 598.

89. *Romans* 2:14. This text is accepted by many as a biblical proof for the existence of Natural Law. Others adamantly reject this notion for reasons we will discuss.

problem is, Gentiles deny knowledge of the Judeo-Christian God's standards. They did not receive the commandments given to Israel through Moses ("the law"), so how can God hold them accountable for breaking his rules? Paul solves this problem by pointing out that the Gentiles DO have enough awareness of the requirements of God's law to be held accountable for breaking it. They demonstrate this awareness in their own actions, feelings, conscience, and judgments:

All who sin apart from the law will also perish apart from the law, and all who sin under the law will be judged by the law. For it is not those who hear the law who are righteous in God's sight, but it is those who obey the law who will be declared righteous. (Indeed when the Gentiles, who do not have the law, do *by nature* things required by the law, they are a law unto themselves, even though they do not have the law, since they show that the requirements of the law are written on their hearts, their consciences bearing witness, and their thoughts now accusing, now even defending them.<sup>90</sup>

Note the emphasized phrase "by nature"; *naturaliter* in the Latin Vulgate,<sup>91</sup> *physis* in transliteration of the Greek.<sup>92</sup> Some have concluded that this law written on the heart is the Natural Law. This also is the focus of the controversy over the passage. Many theologians believe that unregenerate humans, those who have not had their basically evil human natures changed by God's sanctifying work, are incapable of doing anything good "by nature." These theologians fear that to believe otherwise would open the door to the Pelagian heresy that man is still basically good and capable of moral goodness and even righteousness without God's help. They conclude that the passage must refer to Christian Gentiles, who, because of God's work in their lives have a new nature. Thomas Aquinas is among those who insist on this interpretation.<sup>93</sup> To bolster their view, one would expect those who say the passage refers to Christian Gentiles also would cite the Old Testament passages that refer to writing on the heart. In the book of *Deuteronomy*, God says to Israel "these commandments that I give to you today are to be upon your

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90. *Romans* 2:12-15 (emphasis added).

91. RUSSELL HITTINGER, *THE FIRST GRACE: REDISCOVERING THE NATURAL LAW IN A POST-CHRISTIAN WORLD* 54 (2003).

92. ZONDERVAN NIV EXHAUSTIVE CONCORDANCE 785, 1602 (Edward Goodrick & John Kohlenberger III eds., 2d ed. 1999) [hereinafter ZONDERVAN].

93. Thomas insists the passage refers only to those whose nature has been transformed by grace. HITTINGER, *supra* note 91, at 54. However, Thomas seems to rely on the passage having the broader meaning in the Reply to Objection 1 in the third article of Question 90 in the Treatise on Law in the *Suma*.

hearts.”<sup>94</sup> In the *Psalms*, David says “I desire to do your will, O my God; your law is within my heart.”<sup>95</sup> And, most direct, God spoke to Jeremiah saying:

This is the covenant I will make with the house of Israel after that time, declares the Lord. I will put my law in their minds and write it on their hearts. I will be their God and they will be my people. No longer will a man teach his neighbor, or a man his brother, saying know the Lord, because they will all know me, from the least of them to the greatest, declares the Lord. For I will forgive their wickedness and will remember their sins no more.<sup>96</sup>

But there is no need to believe that the “heart writing” in *Romans* and that in the quoted Old Testament passages represent the same thing. The metaphor can be used to describe more than one phenomenon. It makes little sense to say that the Gentiles in *Romans* chapter two, verse fourteen are Christians when Paul’s whole point is to prove that *all humans*, both Jews and Gentiles are morally accountable to God and have fallen under judgment.<sup>97</sup> If the Gentiles cited were Christians, then the argument fails for non-Christians. Then the non-Christian Gentiles could say, “how can God hold me to standards I was unaware of?” Paul’s whole point, however, is to foreclose just such an argument. The Gentiles in question must be all Gentiles, including nonbelievers.

Furthermore the passage, even interpreted as applying to classic Natural Law, does not go so far as advancing Pelagianism or natural theology. Paul is not saying that it is the nature of people to do well or to be righteous. He is only saying that because of the damaged remnant of the image of God in human beings, humans still occasionally feel prompted to do something that we could think of as good in some sense. They likewise feel good about doing good and feel bad about doing bad. The nature here is not sinful nature, but human characteristics—the remnant of the image of God. In a sense, then, we could say that the real nature behind man’s conscience is not man’s fallen nature, but

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94. *Deuteronomy* 6:6.

95. *Psalms* 40:8.

96. *Jeremiah* 31:33-34.

97. For support of the idea that Paul is arguing for moral knowledge leading to moral accountability for all humans, see, e.g., John Calvin, *Commentaries on the Epistle of Paul the Apostle to the Romans*, in CALVIN’S COMMENTARIES, at xxi-xxx, 96-98 (Henry Beveridge ed., 1998); 1 D.A. CARSON, FOR THE LOVE OF GOD: A DAILY COMPANION FOR DISCOVERING THE RICHES OF GOD’S WORD 12 (1998); CHARLES H. COGSGROVE, HAROLD WEISS & K.K. YEO, CROSS-CULTURAL PAUL: JOURNEYS TO OTHERS, JOURNEYS TO OURSELVES 126 (2005); John Piper, *There is no Partiality with God*, in PIPER’S NOTES (Dec. 27, 1998), available at <http://www.soundofgrace.com/piper98/12-27-98.htm>.

God's nature, of which man is now a distorted picture. Throughout the rest of *Romans*, when Paul does refer to the sinful nature of human beings he uses the term transliterated *sarx*—the flesh, body, or natural man. But in *Romans* chapter two, verse fourteen Paul uses the word *physis*, for natural characteristics, not the word *sarx*.<sup>98</sup> There is no contradiction then, between the idea on the one hand that no good thing dwells in our sinful nature, and the idea on the other hand that because of the remnant of the image of God we do occasionally do relatively good things and yet are aware of our overall sinfulness.

*Romans* chapter two seems to say that humans know something of good and evil “by nature.”<sup>99</sup> The propositions of that knowledge are rightly called the Natural Law. But, we should emphasize this knowledge is not based in the current descriptive nature of mankind as it is, but is based in the nature of God; which is the archetype for the damaged type.

It is also worth noting that the word *physis* appears later in the book of *Romans* at chapter eleven, verse twenty-four: “After all, if you were cut out of an olive tree that is wild by *nature*, and contrary to *nature* were grafted into a cultivated olive tree, how much more readily will these, the *natural* branches, be grafted into their own olive tree.”<sup>100</sup>

Here again, in *Romans* eleven we see nature used as “kind.” It is interesting to note that though this is an analogy God has done something “unnatural” in the passage. One might infer that though some acts contrary to nature are evil,<sup>101</sup> perhaps not all acts contrary to nature are evil.<sup>102</sup> The Natural Law must be more complicated than maintaining the design status quo.

To be sure, some Christians have rejected the understanding of what appears plain from the scripture outlined in the paragraphs above. *Romans*, contrary to the opinion of some, seems to require a more generous view of general revelation or common grace. Many Christians prefer to believe God is stingy about such things, and leaves unregenerate man totally in the dark. If this were so, humanity could not exist. We would kill off each other and ourselves in a flash. In addition, the stingy view of revelation fails to account for the providential way in which people such as Plato and Aristotle did know as much good as they did know without special revelation.

But, it should be suspected that the real reason for this rejection of Natural Law is a mistaken belief about the Nature of God. Today, many Christians who

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98. ZONDERVAN, *supra* note 92, at 785, 1590, 1602.

99. *Romans* 2:14.

100. *Romans* 11:24 (emphasis added).

101. *Romans* 1.

102. *Romans* 11.

reject the idea of Natural Law are voluntarists. They believe that the moral laws of God do not flow from his nature in a logical fashion so that what we know about God tells us what his rules are like, and what we know about God's commands tells us something about God. By contrast, if the nature of Natural Law is God's nature, then the two fit hand in glove. Knowing the natural or moral law tells us much about the nature of God, and knowing God reveals to us his law.

It is a misconception is that Natural Law is incompatible with total depravity.<sup>103</sup> Calvin did not believe the two were inconsistent. Nor are most Natural Law advocates unaware of the fallen nature of man. Aquinas,<sup>104</sup> Melanchthon,<sup>105</sup> Calvin,<sup>106</sup> and modern thinkers like J. Budziszewski,<sup>107</sup> all confirm man's sinfulness, that that sinfulness affects man's conscious contemplation and application of the Natural Law, and that we need special revelation as the standard to re-calibrate the higher conscience.<sup>108</sup> Nonetheless, all of them believed in the Natural Law—and they believed because they saw it in scripture.

#### A. Augustine of Hippo

Plato's idea of God as the measure of all things would prove attractive to many Christians. Augustine of Hippo saw in Plato's epistemology a key truth that the meaning of things, the order of the universe is not in the things themselves, but elsewhere.<sup>109</sup> Instead of Plato's inexplicable world of the forms, Augustine saw the mind of God to be the source of all ideas, including order, law, truth, meaning, and thought.<sup>110</sup> God is the originator of the natures

103. See, e.g., JACQUES ELLUL, *THE THEOLOGICAL FOUNDATION OF THE LAW* 60-61 (Marguerite Wieser trans., 1969).

104. ST. THOMAS AQUINAS, *SUMMA THEOLOGICA* q. 94 a. 6 (Benziger Bros. ed., 1947) (1274), available at <http://www.ccel.org/a/aquinas/summa/FP.html>.

105. HAROLD J. BERMAN, *FAITH AND ORDER: THE RECONCILIATION OF LAW AND RELIGION* 151-55 (1993) [hereinafter *FAITH AND ORDER*]. In many ways Melanchthon's theory of the *notitiae* comes closer to a comprehensive and accurate theoretical basis for Natural Law and human nature than most other accounts.

106. CALVIN, *supra* note 73, at bk. IV, ch. XX, § 16.

107. WRITTEN ON THE HEART, *supra* note 11, at 180-83.

108. *Id.* at 171-86.

109. RONALD NASH, *THE LIGHT OF THE MIND: ST. AUGUSTINE'S THEORY OF KNOWLEDGE* 4-10, 69, 90 (2003) [hereinafter *LIGHT OF THE MIND*].

110. AUGUSTINE OF HIPPO, *EIGHTY-THREE DIFFERENT QUESTIONS*, reprinted in *THE ESSENTIAL AUGUSTINE: A COMPREHENSIVE INTRODUCTION TO THE LIVING WISDOM OF THE THINKER WHOSE MIND IS AMONG THE MOST PROFOUND THE WESTERN WORLD HAS EVER SEEN* 62-63 (Vernon J. Bourke ed. & trans., 1964).

of all created things.<sup>111</sup> The divine designer had in his mind the form or pattern for all things. They are what they are due to conformity to the pattern in which he created and sustains them. In addition, Augustine did not see God's creation of moral law as a mere arbitrary act of will. Instead logic, law, order, and meaning flow from the nature of God himself and are provided to man by God through the image of God in man and through the direct influence of God on the human mind—what Augustine called the divine light.<sup>112</sup> This idea was a Christian font of a Natural Law theory. It gave an epistemological basis for the knowledge of Natural Law, the existence of reason in humans, the human ability to learn language, and human understanding of universals.<sup>113</sup> Indeed, the way lawyers think and argue about law was synthesized while Augustine's views in this regard were dominant.<sup>114</sup>

In many ways Augustine, except for his Christian understanding of God, is close to the Stoics and Cicero. Augustine is not a mere borrower from clever pantheists however. He would argue the idea of Natural Law is supported by the Biblical text, both in what it says and in what it takes for granted. Augustine would still call this law "natural" in much the same way as the stoics though, because the mind of the Christian God is both rational and the source of the knowledge of the Natural Law in the human mind.

Because Augustine locates the source of knowledge of universals and the moral law in the mind of God, he comes the closest to saying that the nature of Natural Law is God's nature. This is significant because Augustine is commonly regarded as one of the most widely accepted Christian theologians—being often cited by the Protestant reformers, and still being regarded as a doctor of the church by Roman Catholics.

### *B. Medieval Scholastics*

Although the Stoics heavily influenced the medieval scholastic writers, the

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111. *Id.* at 1-25, 48-57.

112. RONALD NASH, *THE WORD OF GOD AND THE MIND OF MAN: THE CRISIS OF REVEALED TRUTH IN CONTEMPORARY THEOLOGY* 79-84 (1982) [hereinafter *MIND OF MAN*].

113. *LIGHT OF THE MIND*, *supra* note 109, at 76-93. To know the forms or universals implies a knowledge of Natural Law as well because the knower who knows good, justice, love, God, etc. and can reason will also know the laws that flow from God's Natural Law and are framed by these ideas. See also HERBERT A. DEANE, *THE POLITICAL AND SOCIAL IDEAS OF ST. AUGUSTINE* 282-83 n. 48 (1963), for chapter III discussing Augustine's epistemology and moral knowledge and quoting extensively from Augustine's *De Trinitate*. ST. AUGUSTINE, *ON THE TRINITY* bks. XIV, XV.

114. For a slightly cagey, but still excellent discussion of the way lawyers act and the old versus the new epistemology, see Steven D. Smith, *Believing Like a Lawyer*, 40 B.C. L. REV. 1041 (1999).

scholastics were even more influenced by the works of Cicero and Philo. The ideas of Cicero and Philo were easier to synthesize with Christian ideas, including belief in a transcendent God. The medieval scholastics identified the order of the universe as flowing from a transcendent divine legislator who ordered nature rather than merely from the world of plants and animals itself.<sup>115</sup> The medieval writers also inherited some confusion from the Romans through the Roman law.

Medieval Scholastic writers were heavily influenced by the work of the Roman Jurists as condensed in Justinian's *Digest of Roman Law*. The Digest of Justinian was commissioned to encapsulate what his own scholars considered the best of older Roman writings on law with some new materials. The same *Digest* was chosen by the papal party as an authoritative ancient document to become the core of legal training in the Universities of Europe and the core of the new enlarged canon law of the Church. The new canon law was created to govern the Church in the wake of expansion of papal power and influence resulting from the papal revolution of the eleventh century.<sup>116</sup>

Gratian was one of the most important scholastic writers dealing with Natural Law.<sup>117</sup> In his important work on canon law, Gratian synthesized much of the thought from Roman law with ideas from Stoic philosophy and Christianity.<sup>118</sup> Gratian defines Natural Law two different ways. First, citing Isidore of Seville, Gratian wrote:

Natural Law is what is contained in the Law and the Gospel. By it, each person is commanded to do to others what he wants done to himself and prohibited from inflicting on others what he does not want done to himself. So Christ said in the Gospel: 'whatever you want men to do to you, do so to them. This indeed is the law and the Prophets.'<sup>119</sup>

This first definition associates the content of Natural Law directly with the sum of special revelation in the Bible and then uses Jesus' summary of the Bible to encapsulate the whole of the Bible in a single maxim—the golden rule. But, after much discussion back and forth in scholastic fashion, Gratian concludes that not everything in the Bible is part of the Natural Law, only the

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115. PORTER, *supra* note 55, at 69.

116. HAROLD J. BERMAN, *LAW AND REVOLUTION: THE FORMATION OF THE WESTERN LEGAL TRADITION* 85-164 (1983) [hereinafter *LAW AND REVOLUTION I*].

117. *Id.* at 143-51.

118. *Id.* at 144-48.

119. GRATIAN, *THE TREATISE ON LAW: DECRETUM WITH THE ORDINARY GLOSS 3* (Augustine Thompson & James Gordley trans., 1993).



statements of moral law.<sup>120</sup> It is also interesting that the *Ordinary Gloss*, a later composed standardized commentary appearing in the margins of the text, says by way of explanatory definition: “*natural*—that is, divine.”<sup>121</sup> The *Ordinary Gloss* continues a bit later in connection with a statement about how Natural Law is common to all nations:

Natural law—To understand this, note that the word “nature” is used in many ways. Sometimes nature means a force residing in things so that like propagates like. Second, sometimes nature means the stimulus or instinct of nature proceeding from physical desire in respect to appetite, procreation, and child-rearing . . . Third nature means an instinct of nature proceeding from reason; law proceeding from nature in this sense is called natural equity.<sup>122</sup>

In the common medieval view, the Natural Law was very much intertwined with the canon law of the Church and the laws of nations.<sup>123</sup> At times, the medieval lawyers reached odd or controversial conclusions—especially to postmodern American eyes. Modern writers have sought to take advantage of this as a sort of wedge. The use of nature in the sense of observations about people’s physiological makeup or personal inclinations is sometimes taken for the nature of Natural Law as a means of blurring, and in fact, disputing the clear teachings of the moral law. For example, Joan Cadden’s article, *Trouble in Earthly Paradise* in the anthology of essays edited by Lorraine Daston and Fernando Vidal, *The Moral Authority of Nature* revels in the medieval authors’ discussion of deviances found in the “nature” of individuals being classified as “unnatural” “against nature” based on Aristotle’s distinctions. The way the article approaches the problem, however, undermines the whole suggestion that the individual’s behavior is actually improper. Instead, it seeks to emphasize the naturalness of deviate behavior as ingrained in the makeup of the individuals in question. In fact, the whole anthology, *The Moral Authority of Nature*, is full of articles that similarly seek to confound traditional approaches to Natural Law. Cadden claims an authority for activities normally considered immoral. He claims that such activities are in a sense natural or part of the nature of humans or individual humans. Cadden questions historical arguments to the contrary by trying to make those arguments appear foolish, blurry, or in some way ill-informed. With respect to trials for immoral acts, Cadden concludes, “At the same time, the incoherence and inadequacy of those very

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120. *Id.* at 15-21.

121. *Id.* at 3 (particularly *Dicta Gratiani ante c.*).

122. *Id.* at 6.

123. See generally LAW AND REVOLUTION I, *supra* note 116.

associations may help explain why, in the context of legal practices, it carries so little weight.”<sup>124</sup>

This attempt to confuse medieval views about nature with medieval views about Natural Law is ill-founded. As Jean Porter has said:

But the connection between the scholastic concept of the natural law and Scripture is more substantive than this claim would suggest. For the scholastics, the scriptural grounding of the natural law provides a way of identifying those aspects of human nature that are normative. Hence, the scholastic concept of the natural law offers us a way of addressing the problem set for theological ethics . . . .<sup>125</sup>

And:

Understood in this way, the natural law is said to be natural in the sense of being pre-conventional, and law in the sense that it is comprised of intrinsic, normative principles by which actions should be regulated. Because it is grounded in nature comprehensively considered, the natural law is also said to be primal and supremely authoritative. At the same time, it also allows considerable room for diversity and adaptation to circumstances at the level of specific precepts.<sup>126</sup>

And again:

In sorting through the variety of traditional definitions of the natural law, the scholastics make use of the well-established distinction between the natural and the conventional to bring order to this variety. They do not interpret this distinction in a way that equates the natural with the morally good *tout court*, or the conventional with what is morally bad or suspect. Not only do they recognize that the institutions of society are largely the products of human custom and positive law, but some of them at least recognize that much sinful behavior is in some sense natural. Rather, they use the distinction between the natural and the conventional as a warrant for interpreting human action in the light of the diverse forces that ground and limit it. These pre-conventional givens include the exigencies of our biological nature as well as reason, which is seen as setting both normative and practical constraints on human

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124. Cadden, *supra* note 52, at 231.

125. PORTER, *supra* note 55, at 52.

126. *Id.* at 51-52.

freedom, and Scripture, seen as a revelation of divine wisdom and will.<sup>127</sup>

While influenced by Aristotle and all the pagan writers of the past, while happy to use allegorical poetry, and while occasionally inconsistent, it was not medieval man that gave birth to the greatest confusion about Natural Law and Nature.

### C. Thomas Aquinas

Aquinas attempts, in typical scholastic fashion but with atypical skill, a grand synthesis of all Natural Law thought. He combines the Plato/Stoic/Augustine strand of innate moral information with a metaphysical or numinous connection with the Aristotle/Roman Jurist strand that sees human observations and reflections as epistemologically sufficient for moral reasoning. While Aquinas would in principle reject the Sophist/Nominalist/Hobbesian view of Natural Law as a changing human construct with no transcendent pretensions, he does not make that rejection a major topic of his treatise on law. Nor have neo-Thomists sufficiently emphasized this distinction. The Aristotelian methodology has raised the hackles of many evangelical Protestants for years. They believe it does not adequately take into account the ravages of sin upon human reason. In this line, Carl F. H. Henry attacks Aquinas for alleged belief: “(1) that independently of divine revelation, (2) there exists a universally shared body or system of moral beliefs, (3) that human reasoning articulates despite the noetic consequences of the Adamic fall.”<sup>128</sup>

This view, however, is an over simplification of Aquinas. Because his position is a synthesis, Thomas does at times use the Aristotelian method. But, his position also includes Augustinian methodology as well. In truth, Aquinas does not consistently maintain that the Natural Law exists independently of revelation. Because Aquinas compartmentalizes and finely parses his thought, readers focusing on individual statements may be misled into disregarding his total intent. For example, in *The Summa Against the Gentiles* Aquinas appears at first to assert the truth of pure empiricism: “The Human intellect can not ever achieve the understanding of God’s substance by means of its natural capacity because in this life all knowledge that is in our intellects originates in the senses.”<sup>129</sup>

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127. PORTER, *supra* note 55, at 51.

128. Carl F.H. Henry, *Natural Law and a Nihilistic Culture*, 49 *FIRST THINGS* 55-60 (1995).

129. ST. THOMAS AQUINAS, *The Summa Against the Gentiles* bk. 1, ch. 3, in *ST. THOMAS AQUINAS ON POLITICS AND ETHICS: A NEW TRANSLATION, BACKGROUNDS, INTERPRETATIONS 3* (Paul E. Sigmund trans. & ed., 1988).

So far, enough to make Locke or Van Til resonate in agreement. But read on and one discovers Aquinas does not believe knowledge about God is impossible after all because of the divine light. That light is “both the object of our vision and the medium through which we see it.”<sup>130</sup> In other words, God himself makes knowledge of himself possible by means of himself. Such communication is clearly revelation. And so Aquinas really does maintain that we have knowledge of God through the general revelation of God by God. This fits well with the Augustinian understanding of John, chapter one: that the second person of the Trinity is not only Jesus the Messiah, but word, logic and light. He is the light that enlightens *all men*.

When using the word natural in regard to law and morality, Aquinas, like his fellow medievals, appears to use natural as distinguished from conventional. The conventional is contingent and varies. The natural is everywhere the same and the same for all.<sup>131</sup> What Aquinas does not come out and say, but what is nevertheless true of his system, is that the natural is the same for all because it is established by God and flows from his nature. In law, Aquinas notes that the Natural Law is a partaking of the eternal law by which God governs the universe.<sup>132</sup> The eternal law in turn must be an expression of God’s nature.

Aristotle and Aquinas used the same notion of human nature in large part. Both accept what Eberhard Schockenhoff calls a “psychophysical vital unity under the primacy of reason” as a description of human beings.<sup>133</sup> They look however not to the way human beings actually are in the various stages of development, but rather to the way they are supposed to be if they were to reach their highest possible goals for their existence. Schockenhoff describes it this way:

[E]very living being has a “form” appropriate to its own essence; this exists as a potential in the material substratum and is actualized by means of a teleological process of coming into existence . . . perfection of form that serves their specific function. In the case of the human person, the definition of his “nature” appropriate to his species, that is, his specific telos (end), also includes the development of his reason, which belongs to the essential definition of what it is to be a human person. This is because the “end” of an existent always denotes the development of its nature in its highest

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130. *Id.* at 8-9.

131. ST. THOMAS AQUINAS, *THE POCKET AQUINAS* 194 (Vernon J. Bourke trans. & ed., 1960).

132. AQUINAS, *supra* note 104, at pt. I-II, qq. 91, 93.

133. EBERHARD SCHOCKENHOFF, *NATURAL LAW AND HUMAN DIGNITY: UNIVERSAL ETHICS IN AN HISTORICAL WORLD* 14 (Brian McNeil trans., 2003).

possibility; for Aristotle, it is not the original state that is “in keeping with nature,” but rather the finished form, that is, the best possible condition of a thing or of a living being.<sup>134</sup>

This understanding of human nature as a basis of Natural Law is not without its problems. Aristotle himself looks at what lies men say as a way of deciding what is really an appropriate *telos* of human nature in specific terms. In doing so, he substitutes as his real standard a subjective human opinion rather than something that is actually “nature.”<sup>135</sup> Hans Welzel fears that such versions of Natural Law allow their advocates to substitute their own opinions of about whatever human beings ought to be or however they should act for any real objective *telos* opening up Natural Law theory to their culturally linked subjectivism.<sup>136</sup>

Perhaps this tendency is less pronounced in Aquinas because he would rely on Scripture ultimately for understanding of the human purpose rather than merely upon the opinions of wise Athenians. That leads us back to what I propose: that in reality the relevant nature of Natural Law is not so much man’s but God’s. For it is really our study of what God intends human beings to become that is significant rather than an actual empirical study of human beings that leads us to know what they will become. Thomas Aquinas seems to see Natural Law as natural because of human nature, since he emphasizes human *telos*. Yet, his ideas are not far from the notion that God’s nature is the relevant nature because of Thomas’ idea that the Natural Law “participates” in the eternal law, which in turn flows from who God is himself.

Neo-Thomistic Natural Law theories claim to escape the naturalistic fallacy attack because they are looking not at an empirical reality of what human beings are, but rather at a *telos* of what human beings should become.<sup>137</sup> They must also find a way to avoid Wetzel’s criticism of Aristotle that in reality humans merely substituting their own subjective values for a claimed objective *telos*.<sup>138</sup> Eberhard Schockenhoff points out that there is a basic philosophical tension between the versions of Natural Law that are ideal and those that are existential. He sees that there is a: “basic philosophical problem i.e. whether statements of the Natural Law refer to the ideal rational nature of the human person or to his empirical structure as a natural being with needs.”<sup>139</sup> Nevertheless, we have already seen that these are not the only alternatives for

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134. *Id.*

135. *Id.* at 16.

136. *Id.*

137. *Id.* at 15.

138. *Id.* at 14-17.

139. *Id.*

the role of the nature in Natural Law.

*D. Philip Melancthon*

Philip Melancthon, Martin Luther's friend and Lutheranism's first systematic theologian, believed in an Augustinian epistemology. Melancthon wrote that God has implanted in the human mind certain basic items of information and certain abilities. Melancthon called these the *notitiae*. In accord with Augustinian notions, these were implanted in the human mind through the "the divine light." The basic information included, but was not necessarily limited to the rules of logic, the knowledge that God exists, the idea that offenses against society should be punished and promises should be kept, and the basic precepts of the moral law. These precepts have a similar content to the Ten Commandments. Melancthon listed them as including: "1) worship and honor God and His law, 2) protect life, 3) testify truthfully, 4) marry and have children, 5) care for relatives, 6) harm no one, 7) obey those in authority, 8) distribute and exchange property on fair terms, 9) oppose injustice."<sup>140</sup>

Concerning Natural Law Melancthon wrote:

Many ask, what is natural law? The answer is that it is precisely the eternal unchangeable wisdom in God which he proclaimed in the Ten Commandments. However, we should understand this law, as God himself clarified it through Christ, the prophets, and the apostles. God planted the glory of this, his own unchangeable wisdom, in men in the first creation. As the numbers 1, 2, 3, . . . and 10 are in us, so also is the light that God is an eternal omnipotent, wise, true, good, just [*gerechtes*], and pure being, who created all things, . . . .

This is a legal understanding of the law, and it remains in man even after he sins. For *God wants us to know his nature*, and so in us the judgment against sin remains. External civil life is to be regulated according to this natural light, and note well that this natural light and the Ten Commandments, when truly understood, are one single wisdom, doctrine, and law.<sup>141</sup>

Here again we see God's own nature as the substance of what is revealed in Natural Law.

A number of German jurists of the sixteenth century followed the belief of

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140. FAITH AND ORDER, *supra* note 105, at 151-55.

141. PHILIP MELANCTHON, MELANCTHON ON CHRISTIAN DOCTRINE 128 (Clyde L. Manschreck trans., 1965) (1555).

Luther and Melanchthon that the Natural Law is innately instilled in human conscience, or in a slight variation, in innate reason. These jurists also maintained with Luther and Calvin that the Natural Law was at least in part perceptual in nature. Similarly, the German jurists also held that the principles or precepts of the Natural Law were basically the same as the Ten Commandments. This group of German jurists in the Melanchthon line would include Lagus<sup>142</sup> and Oldendorp.<sup>143</sup> For Oldendorp, conscience was a form of divine reason implanted in human beings by God.<sup>144</sup> Indeed Oldendorp, like the Stoics, seems to identify “natural” with God when he says, “nature is God the creator of all things.”<sup>145</sup> And “nature [stands] for God himself, who is the first cause from whom all causes flow.”<sup>146</sup> The Natural Law is infallible as a guide because God has “written it into your mind.”<sup>147</sup>

#### *E. John Calvin*

Calvin’s belief in Natural Law has been obscured by his disciples’ arguments over natural theology and Pelagianism, neither of which is logically connected to Natural Law *per se*. In an effort to gain ground on these other issues they have ignored what Calvin actually said in favor of what they think he should have believed given his views on other issues.

While no advocate of Natural Law, Carl Henry has admitted that Calvin did believe ideas similar to the Plato/Augustine strand of Natural Law thought:

[Calvin] teaches that (1) the law of nature is grounded in divine revelation and does not exist independently; (2) it is innately bestowed at man’s creation and is prephilosophical and not derived from observation and experience; (3) it does not survive in human knowledge as a shared system of truth and morality but, while maintaining man’s accountability, is fragmented due to the repellent intervention of sin.<sup>148</sup>

The degree of fragmentation is the real question. As Calvin says in the *Institutes*:

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142. HAROLD J. BERMAN, *LAW AND REVOLUTION, II: THE IMPACT OF THE PROTESTANT REFORMATIONS ON THE WESTERN LEGAL TRADITION* 124 (2003) [hereinafter *LAW AND REVOLUTION II*].

143. *Id.* at 88-89, 95-96.

144. *Id.* at 89.

145. *Id.*

146. *Id.* at 412 n. 98.

147. *Id.* at 89.

148. Henry, *supra* note 128, at 55-60.

Now, as it is evident that the law of God which we call moral, is nothing else than the testimony of natural law, and of that conscience which God has engraven on the minds of men, the whole of this equity of which we now speak is prescribed in it. Hence it alone ought to be the aim, the rule, and the end of all laws. Wherever laws are formed after this rule, directed to this aim, and restricted to this end, there is no reason why they should be disapproved by us, however much they may differ from the Jewish law, or from each other . . . .<sup>149</sup>

Calvin essentially believes that all human governments should be based on the rule of Natural Law.

The role of Natural Law in the writings of Calvin and the second generation reformers has recently been brought back into the public consciousness by Stephen J. Grabill in his very informative book *Rediscovering the Natural Law in Reformed Theological Ethics*.<sup>150</sup> Grabill makes a well-supported argument, not only for Calvin's belief in Natural Law, but in the innate rationalistic version of it, seen in Augustine and Melancthon. Calvin believes in God's natural light implanting knowledge of himself and his law that is damaged by sin and ignored by humans, but still present and usable.<sup>151</sup> As Grabill points out, the major successors of Calvin also saw Natural Law as an idea taught by scripture and not incompatible with other reformed Christian doctrines.<sup>152</sup>

To sum up, while Calvin does not always use the phrase "Natural Law," and does not ask or answer the question of why Natural Law is natural, he does believe in Natural Law, equate it with the moral law and the Ten Commandments, and he may have had an Augustinian view of epistemology. This set of views arguably puts Calvin in the Plato/Stoic/Cicero/Augustine thread of Natural Law thought that is closest to the thesis that God's nature is the nature of Natural Law.

#### F. Richard Hooker

Richard Hooker wrote:

All things that are have some operation not violent or causal. Neither doth any thing ever begin to exercise the same without some foreconceived end for which it worketh. And the end which it

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149. CALVIN, *supra* note 73, at 664 bk. IV, ch. XX, § 16.

150. STEPHEN J. GRABILL, *REDISCOVERING THE NATURAL LAW IN REFORMED THEOLOGICAL ETHICS* (2006).

151. *Id.* at 71-86.

152. *See generally id.*



worketh for is not obtained, unless the work be also fit to obtain it by. For unto every end every operation will not serve. That which doth assign unto each thing the kind, that which doth moderate the force and power, that which doth appoint the form and measure of working, the same we term a *Law*. So that no certain end could ever be attained, unless the actions whereby it is attained were regular, that is to say, made suitable fit and correspondent unto their end, by some canon, rule or law.<sup>153</sup>

In other words, every thing or person has a teleology or distinctiveness of being that is part of the design or purpose for the person or thing. This information determines what actions are appropriate or inappropriate for or with respect to the person or thing. That information is law. Hooker is confident that God is the designer who is the source of these laws. And, that God himself is a law for himself in eternally determining his own nature and how he will and will not use his infinite power. God does not act in pure will or power, but rather, tells us in scripture that he has reasons for all he does even though those reasons may often be beyond our finding out.<sup>154</sup> God's reasons for his creation are patterned after the reasons that are of God's own nature. So Hooker says of this Eternal Law: "[T]hat law which hath been the pattern to make, and is the card to guide the world by . . ."<sup>155</sup>

Hooker notes that there are matters that are generally agreed upon by "all men generally," especially in the area of morality. He concludes:

that which men have at all times learned, Nature herself must needs have taught; and God being the author of Nature, her voice is but the instrument. By her from him we receive whatsoever in such sort we learn . . . by force of the light of Reason, wherewith God illuminateth every one which cometh into the world, men being enabled to know truth from falsehood, and good from evil, do thereby learn in many things what the will of God is; which will himself not revealing by any extraordinary means unto them, but they by natural discourse attained the knowledge therof, seem the makers of those laws which indeed are his, and they but only the finders of them out.<sup>156</sup>

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153. HOOKER, *supra* note 21, at 54.

154. *Id.* at 54-58.

155. *Id.* at 57.

156. *Id.* at 176-77. As if to be confusing, Hooker also says about the laws of Natural Law: "those laws are investigable by reason, without help of Revelation supernatural and divine." *Id.* at 182. But it is evident from the earlier text that reason itself is part of general revelation. So,

For Hooker, nature is Mother Nature in the sense of, as C.S. Lewis put it, quoting an unidentified source: “the vicaire of the almightie lord.”<sup>157</sup> Nature communicates God’s will because it is designed by God to do so. It is Mother Nature in the same way the female voice in *Proverbs* is Wisdom. Neither are real beings, but rather, vehicles for expressing the general revelation of God. We see also “natural” as “natural discourse” when Hooker labels the means of general revelation. What is this “natural discourse” to Hooker? Reason, necessity, and axiom all seem to come into play in his description. He quotes Theophrastus that “they that seek a reason of all things do utterly overthrow reason.”<sup>158</sup> Hooker’s reason is not the modern reason of Descartes that demands undoubtable proof. It is the pre-modern reason of Augustine and Anselm that knows one must exercise active trust in the axiomatic knowledge given to man by God in order to understand anything. Hooker is confident that “We know things either as they are in themselves, or as they are in mutual relation one to another.” Hooker is similarly confident that this knowledge of what things are and how the divine order intends them to relate to one another is the very Natural Law itself. When we know the “nature” of something—what it is, and how it stands in relationship to other things—we effectively know *the law* for such a thing and how it relates to other things.<sup>159</sup>

When we apply our minds to understanding the nature of things in the created order, we discover through reason and discourse the principles that govern such things according to their natures. Hence, Hooker says principles are “drawn out from the bowels of heaven and earth.”<sup>160</sup>

Hooker says:

Law rational therefore, which men commonly call the Law of Nature, meaning thereby the Law which human Nature knoweth itself in reason universally bound unto, which also for that cause may be termed most fitly then Law of Reason; this Law, I say, comprehendeth all those things which men by the light of their natural understanding evidently know, or at least may know, to be beseeming or unbeseeing, virtuous or vicious, good or evil for them to do.”<sup>161</sup>

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in context, Hooker must mean that we can figure out the Natural Law with reason without the aid of special revelation.

157. *STUDIES IN WORDS*, *supra* note 45, at 61.

158. *HOOKER*, *supra* note 21, at 177.

159. *Id.* at 179.

160. *Id.* at 178.

161. *Id.* at 182.

Hooker also argues that what is true of all men must be so “naturally.” Hence, to be natural is to be something instilled in human nature, or which is innate to all humans.<sup>162</sup>

#### IV. THE COMMON LAW

Hooker and others tried to work the idea of Natural Law into the fabric of the Common Law of England. Long before them, Henry de Bracton argued for the importance of the Rule of Law and other Natural Law concepts in his thirteenth century book on the Common Law.<sup>163</sup> Nonetheless, there were difficulties faced by this project. England resisted the imposition of Roman and Canon law on English soil.<sup>164</sup> England also tended to be more practical and less concerned with theory. The Erastianism of Cranmer and others got in the way of Natural Law because it was assumed that the king’s courts would interpret the king’s law in accord with the king’s understanding of the Bible and Natural Law,<sup>165</sup> so the courts could not act contrary to Natural Law. Later, parliamentary supremacy would also tend to deny the practical application of the Natural Law as such.<sup>166</sup> Yet, the Natural Law is very much present in the Common Law. For as Coke said, the Common Law is based on the collective reason of the common law judges.<sup>167</sup> Reason and reasonableness are the very heart of the common law even today.<sup>168</sup> If reason is still to any degree the true reason of the real divine Logos, Natural Law is present in every tort case, every civil procedure problem, and every application of due process whether we recognize it or not. The whole Common Law grew out of the epistemological soil of a Christian understanding of Natural Law and right reason. But, we cannot truly tell the role played here by the word “Natural” when it has been so carefully avoided by so many.

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162. *Id.* at 204. The argument concerns the universal desire for God himself as an end in himself and worthy of infinite desire.

163. NORMAN CANTOR, *IMAGINING THE LAW: COMMON LAW AND THE FOUNDATIONS OF THE AMERICAN LEGAL SYSTEM* 141-63 (1997). Cantor seems allergic to Natural Law, but the ideas he attributes to Bracton, and that he says Bracton learned from Albert the Great, the teacher of Thomas Aquinas, are all part of Medieval Natural Law theory, not modern liberalism as Cantor supposes.

164. CHARLES GROVE HAINES, *THE REVIVAL OF NATURAL LAW CONCEPTS* 28, 40 (1930).

165. *See, e.g.*, JOAN LOCKWOOD O’DONOVAN, *THEOLOGY OF LAW AND AUTHORITY IN THE ENGLISH REFORMATION* (1991).

166. HAINES, *supra* note 164, at 32-39.

167. McDONALD, *supra* note 31, at 280-81.

168. HAINES, *supra* note 164, at 39-43.

### A. John Selden

In the writings of John Selden (1584-1654), a famous English legal antiquarian and historicist, we see an increasingly modern and nominalistic view of Natural Law. Selden agreed that all human law was founded on “Nature.” By “Nature,” Selden seems to have meant God’s creation. Selden did not reject the role of conscience, but Selden grounded the order of the Natural not in God’s nature, but in divine command. The primary source of our knowledge of the divine command being special revelation—specifically the Noahide covenant.<sup>169</sup>

The weakness of the connection between God’s nature and human law in Selden is evident in his attempt to justify the binding force of customary law not on divine order, but through consent.<sup>170</sup> Nonetheless, in emphasizing the relationship between custom, Selden’s view of law and consent was still not that far from Aquinas’ understanding that in free countries, the repeated acts of people (customs) are a sort of law, and can both create and abrogate other positive law.<sup>171</sup> Selden took this further, however, to say that all human law begins in custom.<sup>172</sup> Selden, despite his emphasis on special revelation still makes Natural Law arguments without seeing he is doing so. In the midst of an argument that he knows the moral law because God told him the law, he says: “Whence comes the restraint? From a higher power. Nothing else can bind. I cannot bind myself, for I may untie myself again; nor an equal bind me: we may untie one another. It must be a superior, even God Almighty.”<sup>173</sup>

Selden goes on to disparage the power of contract even to bind apart from God’s telling him he must keep his promises.<sup>174</sup> How does Selden know these things? From right reason applied to the realities of the human situation and human nature. There is no Biblical proof text for them. Writers like Selden pushed for rejection of Natural Law theory, and made it more difficult to use by also pressing for the popularity of nominalist epistemologies that were unable to survive the radical skepticism that would attack all who trust in the empirical alone during the “enlightenment” and the centuries to follow.

### B. Enlightenment Jurisprudence

A number of philosophers of the Enlightenment including Thomas Hobbes,

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169. LAW AND REVOLUTION II, *supra* note 142, at 247.

170. *Id.* at 247.

171. AQUINAS, *supra* note 104, at pt. I-II, q. 97, a. 3.

172. LAW AND REVOLUTION II, *supra* note 142, at 248.

173. WRITTEN ON THE HEART, *supra* note 11, at 111-12.

174. *Id.* at 110-11.

Rousseau, and Montesquieu associate the “natural law” with whatever forms or conditions prevailed in the so-called state of nature—the time prior to the creation of human states and governments.<sup>175</sup> A number of jurists whom Bernard Inagaki refers to as “rationalistic jurists” in the period of the 1700s including Christian Wolff, Christian Thomasius and Samuel Pufendorf sought to deduce principles from an analysis of “what properly belongs to human nature” in an “a priori manner.”<sup>176</sup>

Although generalizing about eras, and grouping philosophers and political theorists can be hazardous, there are some ways in which such statements are supportable. There are things we can say, for instance, about the Enlightenment philosophy that culminated in the French Revolution and that is still behind many political acts and omissions today. The philosophers in the Enlightenment were heavily influenced by the successful development of Newtonian physics. Having seen that material progress could be made through the discovery and application of the physical laws of the universe, they likewise believed that it was possible for society to progress by discovering the laws behind society. They believed that science could be applied to the study of human beings and their interactions—the origin of the so-called social sciences.<sup>177</sup> To this end, the majority of Enlightenment philosophers looked to nature not in the sense of God’s design or the teleology behind human nature, but rather to theoretical and scientific observations about society.<sup>178</sup> In doing so, they relied strictly upon human reason. They believed that the power of unaided human reason could uncover for them all of these predetermined natural laws and orders. Yet they saw this order not so much as divine in origin as simply extant. To the degree they recognized a god, it was the deistic watchmaker god who wound up the universe and let it run. In rejecting the study of the teleology of human nature, they settled for fallen human nature as it is. To this end, a number of philosophers saw selfishness as one of the major laws behind understanding human conduct and building a better society. They saw selfishness not as bad but rather as a sort of normative principle that would have good results.<sup>179</sup> In doing this, they sought freedom from the order of the past associated with scholasticism and its understanding of the Natural Law.<sup>180</sup>

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175. See generally BERNARD R. INAGAKI, *THE CONSTITUTION OF JAPAN AND THE NATURAL LAW* 3 (2006).

176. *Id.*

177. ALBERTO M. PIEDRA, *NATURAL LAW: THE FOUNDATION OF AN ORDERLY ECONOMIC SYSTEM* 11-21 (2004).

178. *Id.*

179. *Id.* at 20-21.

180. *Id.* at 18-31.

They sought to divorce any moral law or ethics from any transcendental origin.<sup>181</sup> They rejected the notion of any innate law written on the heart and instead emphasized empiricism and reason as their only tools.<sup>182</sup>

Thus, the self proclaimed liberators of society who had discarded the canons of external authority, as reflected in the natural law, had no alternative but to replace the vacuum created by their absence with a new faith in a natural law of harmony that could be discovered by their own unaided intellects. The new morality had to be based on a fresh set of values which they believed was more in accordance with man's natural goodness and which could be enforced through education and legislation.<sup>183</sup>

In a sense, the culmination of this focus on human reason and the ability to create a new human reality based on scientific observations led directly to the overwhelming positivism of Comte and the modern legal era.<sup>184</sup> Like much Enlightenment philosophy, it is simply another way in which man tries to escape from God and His moral authority.<sup>185</sup>

Following in the wake of the Enlightenment, scholars of the nineteenth, twentieth, and twenty-first centuries have largely been opposed to classical Natural Law theory. They see no reason why they should obey the commands of God. They actually believed that they could consider some of God's commands to be immoral and improper. Instead of locating moral force in God, they locate moral force in their own egos or wills. They deny that there is a strong connection between legality and morality. They actually believe, in some cases, that the notion of teleology or purpose is demeaning as contrary to human dignity.<sup>186</sup>

### C. Hans Kelson

Hans Kelson was one of the foremost legal positivists of the 1900s. He had several objections to Natural Law. First, as a Neo-Kantian, Kelson really thought that knowledge of the true nature or essence of things and their teleologies or purposes was inherently inaccessible to human beings. Since

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181. *Id.* at 19.

182. *Id.* at 20-21.

183. *Id.* at 22.

184. *Id.* at 22-23.

185. *Id.* at 23 (citing French scholar Henri de Lubac; see HENRI DE LUBAC, THE DRAMA OF ATHEIST HUMANISM 136 (1944)).

186. JEFFRIE G. MURPHY & JULES L. COLEMAN, PHILOSOPHY OF LAW: AN INTRODUCTION TO JURISPRUDENCE 7-9 (rev. ed. 1990).

many Natural Law theories are based upon exactly these ideas of purpose or kind, Kelson rejected them as viable theories.<sup>187</sup> Kelson also argues from the fact that conflicting moral systems making claims of religious character exist so that they can only be of a “relative character” rather than truly objective in nature.<sup>188</sup> Kelson also tried to claim that the system of Natural Law and the system of positive law, since they both claimed to be normative and yet were not totally in agreement, could not both be valid at the same time. Kelson saw Natural Law as a system of justice based upon the will of God and objective in nature. Positive law was identified by Kelson as an order of justice based on coercion and political power which he nevertheless considered to be normative and valid. This could not make an unequal claim for human conduct. Because Kelson does not accept the validity of Natural Law, he believes that the positive law system is therefore the one to which our true allegiance should belong.<sup>189</sup> Thus, in a sense, from the point of view of a natural lawyer, Kelson begs the question. He assumes that we do not know what Natural Law scholars say we cannot but know. Kelson also then assumes that because of this lack of knowledge, the positive law system is better than the objective Natural Law system when it is the former that should judge and evaluate the legitimacy of the latter. Kelson seems to assume that because positive law exists and coerces its citizens (victims?) it is therefore in some sense more real and more valid than a law allegedly given by God or flowing from the kind of thing human beings are. This is in a sense the very naturalistic fallacy that Kelson thinks natural lawyers commit. He is confusing the status quo with normativity. Can it be good that we are coerced by the state merely because we are, in fact, coerced by the state? Because the state will not recognize competitors, does this mean that no competitor exists and that no competitor is superior? Here, like the Sophists we discussed earlier, Kelson merely prefers the man-made to the “natural”—the human to the divine. But in his Neo-Kantianism Kelson effectively blinds himself to even the other understandings of “nature” by claiming he cannot see.

Current day jurists attempting to revive Natural Law have occasionally sought to avoid its strong associations with God or the divine in order to avoid the objections of the radical political liberal, the secularist. As we and others have argued before, this makes their argument more subject to accusations of use of the so-called naturalistic fallacy. In other words, their argument for an

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187. INAGAKI, *supra* note 175, at 6.

188. JOHN WARWICK MONTGOMERY, *THE LAW ABOVE THE LAW: WHY THE LAW NEEDS BIBLICAL FOUNDATIONS/HOW LEGAL THOUGHT SUPPORTS CHRISTIAN TRUST* 32-33 (1975) (quoting Hans Kelson, Lecture at the University of California (Nov. 20, 1962)).

189. *Id.* at 7-8.

objective moral standard can be undermined because they are equating what merely is the case with what is normative. Based on some uses of the use of nature that rely on knowing the essence or telos or essential nature of human beings as they are in truth, these theories are also more subject to the Neo-Kantian attack based on a claimed ignorance or inability of man to know things in themselves. Perhaps pushing the idea that the nature in Natural Law is really the nature of God, and that the true study of law is tied directly to the study of theology, will alienate the secularist. Such an argument, however, will drive home the argument against the Kantians and others, attacking their epistemological failings directly. The confrontation over epistemology, rather than being something that can or should be continually dodged, may actually be the point that must be pushed and won. Some scholars, like Joan Lockwood O'Donovan, have asserted that the issue of Augustinian versus nominalist epistemology made no difference in the history of reformation belief in Natural Law.<sup>190</sup> O'Donovan identifies Natural Law theorists throughout the late Middle Ages and Renaissance but continuously argues that nominalism and other epistemological views are irrelevant to the question of belief in Natural Law. While there were nominalists who claimed to believe in Natural Law, nominalism has been corrosive of Natural Law theory and the difficulty in justifying Aristotelian epistemology is arguably one of the things that made Natural Law theory collapse in the 1800s and 1900s. Natural Law theory was strongest when founded on an Augustinian or Platonic epistemology rather than a conceptualist or nominalist epistemology. Fortunately, this is an argument far too large to be fully addressed in this paper, but it is an argument worth pursuing and investigating.

#### *D. Post World War II Jurisprudence*

John Warwick Montgomery, with his usual erudition, finds the ultimate quote with respect to the post-war environment citing the Belgian philosopher C.H. Perelman:

This conception of judicial positivism collapses before the abuses of Hitlerism, like any scientific theory is irreconcilable with the facts. The universal reaction to the Nazi crimes forced the allied chiefs of state to institute the Nuremberg Trials and to interpret the adage *nullum crimen sine lege* in a non-positivistic sense because the law violated in the case did not derive from a system of positive law but from the conscience of all civilized men. The conviction that it was

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190. See O'DONOVAN, *supra* note 165.



impossible to leave these horrible crimes unpunished, although they fell outside a system of positive law, has prevailed over the positivistic conception of the grounding of the law.<sup>191</sup>

The Second World War caused a revival of interest in Natural Law. The American Realist Movement which had expressed an agnosticism or skepticism about the importance of the common good, objective moral principles, and all of the other ideas commonly associated with the Natural Law was taken aback by the vicious but highly legalistic state of Nazi Germany. American judicial realists like Karl Llewellyn and Jerome Frank were more or less silenced or converted by the specter of Germany.<sup>192</sup> American legal realist Jerome Frank wrote in a new preface to the sixth edition of *Law and the Modern Mind*: “I do not understand how any decent man today can refuse to adopt as the basis of modern civilization, the fundamental principles of Natural Law, relative to human conduct, as stated by Thomas Aquinas.”<sup>193</sup> This statement by Frank indicates some sort of philosophical conversion from the nominalistic skepticism common among the American Judicial Realists.

Natural Law had a profound effect, though unarticulated directly because of political reasons, on the development of the International Declaration of Human Rights in the immediate post-war era.<sup>194</sup> The delegates actually argued about the use of the word “nature.”<sup>195</sup> Mary Ann Glendon states about the development of the Declaration:

Prior to World War II, legal positivism (the view that there are no rights other than those granted by the laws of the state), flourished in the United States and Europe and was the dogma in the Soviet Union. But legally sanctioned atrocities committed in Nazi Germany had caused many people to re-evaluate the proposition that there is

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191. JOHN WARWICK MONTGOMERY, HUMAN RIGHTS AND HUMAN DIGNITY 87 (1986) (citing C.H. Perelman, *Can the Rights of Men be Founded?*) [hereinafter HUMAN RIGHTS AND HUMAN DIGNITY].

192. GEORGE C. CHRISTIE & PATRICK H. MARTIN, JURISPRUDENCE TEXT AND READING ON THE PHILOSOPHY OF LAW 740 (2d ed. 1973).

193. *Id.* at 741 n. 42.

194. *See generally* MARY ANN GLENDON, A WORLD MADE NEW: ELEANOR ROOSEVELT AND THE UNIVERSAL DECLARATION OF HUMAN RIGHTS (2002).

195. *Id.* at 146-47. The book describes how the delegates working on the *International Declaration of Human Rights* chose to ignore the issue of exactly where the human rights came from in order to avoid arguments—largely with the Communists—over where human rights actually came from. But the rights described and the thought processes behind the men who drove the Declaration, unlike Charles Malik, were definitely indebted to Natural Law and Christianity.

no higher law by which the laws of nation-states can be judged. The Declaration implicitly rejected the positivist position by stating that fundamental rights are recognized, rather than conferred.<sup>196</sup>

Higher law or Natural Law was also used as a justification for the trials of the Nazis who claimed to be obedient to the national positive law of Germany at the Nuremberg Trials. Bernard R. Inagaki has also maintained with good arguments that the 1946 Constitution of Japan was heavily indebted to the “thomistic concept of natural law.”<sup>197</sup> Inagaki does a good job of laying out four basic principles that he sees as a “common or popular” understanding of Natural Law in the post-war milieu:

First of all they exert the existence of a certain higher law or measure of justice, the authority of which is beyond the will of any individuals and that of the state. Secondly, this higher law has a definite influence upon the rules of human positive law inasmuch as it is their source and the measure of their validity. Third, this higher law is generally considered to be universal, eternal, and inviolable. Finally, this higher law is considered to be the basis of fundamental human rights and freedoms. These elements, which are common to most of the diverse concepts of natural law, then, constitute the common or popular concept of natural law, which is to be the point of departure in our study of the true concept of natural law.<sup>198</sup>

In Inagaki’s popular neo-thomist approach he says this about the term “natural”:

First of all, the term natural signifies that the natural law is in man from the time of his birth because of his rational nature, although the full knowledge of the natural law is possessed by him only potentially. Secondly, the natural law is called natural, because it belongs to man as such or as a species, and not to man insofar as he possesses certain special qualities or social privileges. Thirdly, the term natural indicates that man is in some way naturally inclined to the observance of the natural law.<sup>199</sup>

Here we see an understanding of why Natural Law is natural that synthesizes three of the many definitions we have seen before. First, knowledge of the

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196. *Id.* at 176.

197. *See* INAGAKI, *supra* note 175.

198. *Id.* at 1-2.

199. *Id.* at 3.

Natural Law is inborn to human beings, second, knowledge of the Natural Law goes with the kind of thing a human being is, and third, human beings are inclined to observe or do the things the Natural Law requires in some way.

*E. Maritain and the Connatural*

Jacques Maritain maintained that Natural Law is “natural” for two reasons: First, it is connected with human nature, and second, it is known by means of the “natural” phenomenon of “connatural” knowledge.<sup>200</sup>

Natural Law is an order based in nature, or required appropriately by human nature, whose regulations are naturally known by man—*naturally*, which is to say, through the inclinations by means of which the rational creature participates in the divine law.<sup>201</sup>

By saying that Natural Law is connected to, or involves, human nature Maritain is not taking the common view that the content of Natural Law can be derived through logic applied to the data of human nature. Instead, he is saying that both the content of the Natural Law and human nature reflect God’s design for how human beings are to act and function in order to thrive.<sup>202</sup> While Natural Law principles are not irrational, Maritain says we do not know them through the construction of logical systems.<sup>203</sup> Instead, we know them by the “natural” means of connatural learning. Exactly what this means is difficult to pin down. Maritain insists connatural knowledge is not innate, and is not the product of pure reasoning. It is, in part, knowing by being.<sup>204</sup> We see it in mystical experience and the insight of gifted poets.<sup>205</sup> We also see it in our inclinations. I think Maritain, however, would deny it is seen in our appetites.

## V. CONTEMPORARY NATURAL LAW RENAISSANCE

While we have seen somewhat of a renaissance of Natural Law theory in our own day among Neo-Thomists and are beginning to now see a revival of a Reformation view of Natural Law, the primary attempts at theories that have been regarded as Natural Law theories in the 1900s have been modest in nature and have sought to avoid controversial metaphysical or theological claims.<sup>206</sup>

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200. JACQUES MARITAIN, *NATURAL LAW* 9 (William Sweet ed., 2001).

201. *Id.* at 45.

202. *Id.* at 28.

203. *Id.* at 9.

204. *Id.* at 15.

205. *Id.* at 16-19.

206. MURPHY & COLEMAN, *supra* note 186, at 19.

H. L. A. Hart's discussion in the concept of law has been characterized by some as an actual minimum content theory of Natural Law even though Hart is commonly thought of as a rigorous positivist.<sup>207</sup> Hart notices that there are in fact areas of overlap between the concerns of morality and the concerns of the legal system. He notes that they need to solve common problems that arise from the human condition and the human situation. These problems arise from certain facts such as a human desire for security and the human experience of vulnerability, human dependence on cooperation, human self-interest, and lack of unlimited altruism, the moderate scarcity of the world in which we live, and human beings' limited knowledge, understanding and self-control. These features can be described as "natural features of the human condition." So, in some sense the very minimum discussion that comes from noticing the overlap of the two problems and in any way allowing cooperation between the two realms of morality and law is in some sense a "Natural Law theory." In this instance, natural simply means the facts or features are prevailing experiences of empirically observable human life.<sup>208</sup>

Murphy and Coleman note about this system: "Since some of the legal solutions to the basic problems of human existence will be clearly immoral, it should be clear that a legal system can address itself to the 'minimum content' of natural law and still be very evil."<sup>209</sup>

A second major minimum content theory associated with Natural Law is that of Lon Fuller. Fuller looks in a sense to the morality of legal systems as a whole.<sup>210</sup> Fuller notes that there are certain normative ideas about how the legal system should function that flow from the very idea of having a legal system. If laws are not known, somewhat consistent, knowable, understandable, uniformly applied, not subject to arbitrary and capricious application, the whole idea of having a system or regime of rules that we hope to have obeyed would be undermined.<sup>211</sup>

Fuller recognizes that the principles he derives are "moral values of justice and fairness."<sup>212</sup> Fuller refers to his notion as the "internal morality of the law" and the "morality that makes laws possible."<sup>213</sup> I have not found any discussion by Fuller of why he likes the word "natural" with respect to this view. Apparently, it is merely the association with the fact that moral principles are

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207. *Id.* at 37.

208. *Id.* at 37-38.

209. *Id.* at 38.

210. *Id.*

211. *Id.* at 38-39.

212. *Id.* at 39.

213. *Id.*

involved in tempering the law that makes this a Natural Law view in the mind of most commentators. To speculate or to apply reasoning to this, it would seem that what Fuller is really looking at is the nature of law and legal systems themselves. In a sense, he is still engaging in a teleological exploration for normative principles like Aquinas and Aristotle, but he is looking in particular at the teleology of the law and the legal system as a whole. This works because most people in the western world are fairly clear and unified about the purpose of legal systems. Most people are not willing to admit to others that they see the legal system as an opportunity for gaining wealth and power for themselves or that they see the legal system merely as a way of pacifying the masses in order to maintain their solidified power and wealth. Rather, most people do think of legal systems as being for the sort of thing Fuller says they are. Just as Aristotle could rely on his audience to accept the feelings common among the wise of the Greeks, and as Aquinas could recognize his fellow Christians would understand what God had made humans for, so too Fuller can rely on modern Americans and Europeans to understand what a legal system is supposed to be. Of course, from a Christian perspective, the only reason we have this common insight is because of a culture that has been steeped in Christianity. What Fuller is really mining is the design of God for just law and human government: the rule of law.

A third and different view that is sometimes thought of as a modern Natural Law view, is the view of Ronald Dworken. Dworken's view is often considered a Natural Law view merely because Dworken believes that moral principles should be involved with the law and in deciding difficult cases and because Dworken is a critic of legal positivism.<sup>214</sup> Dworken, however, relies not upon moral principles that he attributes to human nature or to the divine, but rather on evolving moral principles that he associates with the core views of society. In a lecture at the University of California, Los Angeles on an approach to abortion rights, Dworken noted that he believed that the courts should look to the moral consensus of our society. In doing this, he noted that the court should ignore people who thought that abortion was always right or always wrong, since both of them are minorities and are considered the lunatic fringe by a large group of people in the middle. Instead, Dworken noted that most people in America think that abortion should be allowed in some cases and forbidden in some cases. Therefore because this is what the core of what most moderate people in the middle think, it must be the right thing to do under the circumstances. Though Dworken's idea of moral principles is largely related to social consensus and evolving social views, it has nothing to do with

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214. *Id.* at 39-51.

any particular fixed “nature.” Instead, for Dworken, the only relevant nature is the nature of our corporate will or at least the corporate will of those whom Dworken respects.

This use of “evolving morality” that is never fixed, but always accommodates greater and greater sexual freedom and caters to every social whim is the great fear of strict constructionists and has been a great barrier to the return of a serious application of Natural Law as a judicial doctrine rather than a mere legislative consideration. It is why the Nature of a successful Natural Law theory needs to be, and remain in accord with, the Nature of God.

#### A. Robert P. George

Robert George is the most famous of the Neo-Thomist Natural Law writers of our time. George appears to equate the term “natural” with moral. Natural Law is natural because it is a moral law that is not of human origin.<sup>215</sup> In this sense “natural” would seem to be a contrast to “artificial”—something made by the artifice of humans. George also contends that this law is “in principle accessible to human reason and not dependent on, though entirely compatible with, and indeed, illumined by divine revelation.”<sup>216</sup> In context, George may mean special revelation when he refers to “revelation” because he next cites the “written on their hearts” quote from *Romans*, a passage which would seem to say Natural Law is a matter of general revelation.<sup>217</sup> George’s explanation of the “natural” adjective is not inconsistent with the idea that the Nature of Natural Law is God’s nature. George identifies the Natural Law as Natural because of its source—and George identifies God as that source. Where George’s philosophy may differ is that he seems to emphasize reason alone as the foundation within God of Natural Law by contrast to the whole nature of God. George might well reply, nonetheless, that reason is the pre-eminent characteristic of God’s nature.

#### B. John Warwick Montgomery

John Warwick Montgomery has addressed the question of the natural in Natural Law in a discussion of the philosophy of Finnis stating:

Like every natural law thinker, Finnis must solve the problem of defining what man’s nature really is. True, man frequently desires knowledge, life, and friendships; but it is equally the case

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215. ROBERT P. GEORGE, *THE CLASH OF ORTHODOXIES* 169 (2001).

216. *Id.*

217. *Id.*

empirically that human beings have often sought to deceive, kill, and subjugate their fellows. After all, Hobbes—and Machiavelli before him—built his totalitarian social theory strictly on the natural law basis that human life is ‘nasty, brutish, and short!’ A successful natural law theory must be able to say whether the good or the bad in human life is truly ‘natural’ and to what degree—for otherwise no one can determine what rights are properly to be protected in society.<sup>218</sup>

Here Montgomery cuts to the core of the problem. If we base our definition of what is natural on human nature, we have the problem that the observational aspects of human nature include evil. If we base it upon the sort of thing that the human being is, how do we exclude the way humans behave and include only the way humans were meant to be when originally created in the image of God? How do we determine what is natural by looking at a nature (in the sense of the way things actually are in the world of people, plants and animals) that is fallen and affected by sin. The only way is really by looking to the design of God Himself by looking to the Word of God that reveals the nature of God. In his many successful works, including *Human Rights and Human Dignity* and *The Law Above the Law*, Montgomery lays an apologetic foundation for the use of the Bible and orthodox Christian theology to provide the clearest understanding of what is really required by the higher law whose genuine author is, of course, really God Himself. As Montgomery argues, the real basis for Natural Law, natural rights and human rights however you describe them, is really to be found in the Bible as it reveals God Himself. Part of the task of bringing human government back to Natural Law and genuine human rights is always going to be an apologetic task of explaining and persuading people about Christianity and its truth. For political purposes we may also need to resort to public reasons. Such reasons should flow from Scripture, but should be justifiable to people with other worldviews or who remain unpersuaded by the evidence for Christianity. In many ways Montgomery’s approach is more theologically justifiable, especially if we think of the nature of the Natural Law as the nature of God. It also has the advantage of avoiding the cultural baggage attached to “Christian fundamentalism” as understood by the press, while not forsaking orthodox belief in Christian fundamentals and classic evangelicalism.

### C. Robert Lowry Clinton

In his recent and ambitious book, *God & Man in the Law*, Robert Lowry

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218. HUMAN RIGHTS AND HUMAN DIGNITY, *supra* note 191, at 90.

Clinton gives a powerful critique of modern and post-modern approaches to jurisprudence.

Clinton reflects the idea that Natural Law must be natural because it reflects human nature. Clinton seeks to address the problem of restraining the judiciary through substantive as opposed to jurisdictional limits. He discusses a return to the principles of the unwritten English constitution of the time of America's founding. In the process Clinton critiques the neo-Hegelian elite notions that sometimes pass for "Natural Law" theories today, including that of Michael Moore. Clinton says Moore's theory cannot be a Natural Law theory because it lacks a comprehensive theory of human nature.<sup>219</sup> "Natural Law is founded upon the experience of moral imperatives in the law and is developed from the attempt to provide that experience with a basis in human nature."<sup>220</sup> Clinton adds a virtue ethic based quote from Etienne Gilson to elaborate his notions of the need for a concrete connection between the normative and habits, acts and will.<sup>221</sup>

As an alternative, he posits a partial synthesis of the thoughts of Plato as interpreted by Eric Voeglin, Aristotle, Aquinas, Kant, Arrow, and Etienne Gilson with some excellent quotes from G. K. Chesterton for seasoning. Clinton is a sort of historicist in that he finds legal history to be the concrete embodiment of the Natural Law. He concludes therefore that the traditions of the common law and its precedent Roman and Greek institutions are normative.<sup>222</sup>

Clinton sees Natural Law as focusing on human nature. For Clinton, we cannot base law on abstractions like autonomy or equality. These ideas separated from concrete reality run amuck and create absurd and destructive results.<sup>223</sup> Clinton sees the lesson of Plato and Aristotle to be that good government must be grounded in experience. Clinton says about Natural Law, in part quoting Voeglin: "It is 'natural' because God 'instilled it into man's mind so as to be known by him naturally,' the sense in which human nature is conceived in God's image."<sup>224</sup> He clarifies his own view that: "Natural Law is founded upon the experience of moral imperatives in the law and is developed from the attempt to provide that experience with a rational basis in human nature. Any ascription of moral truth to a rule or principle not developed thus

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219. ROBERT LOWRY CLINTON, *GOD AND MAN IN THE LAW: THE FOUNDATIONS OF ANGLO-AMERICAN CONSTITUTIONALISM* 83-87 (1997).

220. *Id.* at 86.

221. *Id.* at 87.

222. *See generally id.*

223. *Id.* at 65-72, 218-19.

224. *Id.* at 152.



is either a pretension or a fraud.”<sup>225</sup> And “natural law is not a product of speculative, abstract reason; rather, much like the common law, it is the result of practical reason applied to human experience.”<sup>226</sup>

What Clinton’s theory fails to recognize is that tradition and experience include institutional evil as well as good. While it is good to be cautious in changing institutions, it is difficult to look at history and not say that certain institutions and regimes, even in the “Western tradition,” are easily found wanting and in need of revision. Slavery and segregation were institutions that needed to be abolished despite over two hundred years of “tradition.” We judge errant institutions not merely by the characteristics of humans, because humans are bigoted, cruel and covetous as well as equal before God. We do not merely judge them by other institutions. Nor do we judge them by vague notions of the purposes or goods of human flourishing alone. We judge them, at least in part, by revelation. And that revelation flows from the nature of God, not the nature of man.

Clinton has extensive discussions of *being*. *Being* is not a thing; it is a relationship to God—the only one who is self-existent, and as such the source of *being*. Some realities find their existence in the mind of God and man and not in concrete experience. The errors of abstractions are not in their lack of embodiment, but in their failure to correspond to the Nature of God and his order as revealed.

#### D. J. Budziszewski

J. Budziszewski may well prove to be one of the most important philosophers of our time because he is eloquently reacquainting American Evangelical Protestants with classic Natural Law ideas in a persuasive and practical way. He says:

Our subject is called *natural* law because it is built into the design of human nature and woven into the fabric of the normal human mind. Another reason for calling it natural is that we rightly take it to be about what it really is—a rule like the prohibition of murder reflects not a mere illusion or projection, but genuine knowledge. It expresses the actual moral character of a certain kind of act.<sup>227</sup>

Budziszewski also insists that Natural Law is not innate, not biological instinct, not just a deceptive cover name for Biblical law, not the same as the

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225. *Id.* at 86.

226. *Id.* at 146.

227. WHAT WE CAN’T NOT KNOW, *supra* note 84, at 14.

observations of science about the physical world, and, not the same as the theories about Natural Law.<sup>228</sup>

Budziszewski is closer to seeing God's nature as key in the implications of some of his other statements. He does note that God's actions are always in accord with his nature. This is close proximity to noting that the creativity of human legislatures is limited by Natural Law and by our familiarity only with the creation as it is, not as it might be.<sup>229</sup>

Budziszewski also understands that there is a connection between moral knowledge and our ability to learn language.<sup>230</sup> Connecting the Natural Law, universals, and language is essential to the survival, not only of Natural Law theory, but of the ideals of the rule of law, just adjudication and just judicial interpretation of laws; but that is another large topic in itself.

Budziszewski's work is impressive, not only in its persuasiveness, but in its accessibility. If any particular writer has started to change popular evangelical opinion about Natural Law it is Budziszewski.

## VI. CONCLUSION

Taking in all of the ideas of why Natural Law is called natural we can see the advantages and disadvantages of each version. But in a way, the Stoics and Cicero, who first made the term popular and common had one of the most interesting approaches because they saw the divine, the natural world, reason, and human nature as, in a sense, all the same thing. In latter years this unity was broken apart because Christians know that God is not the same thing as us humans or the created universe. In the separation of the ideas linked in the term Natural Law as used by the Stoics and Cicero, perhaps we took the wrong fork in the dividing road. The nature that really unites reason and telos is not our own; we merely mirror that nature in a damaged looking glass. *It is God's nature* that really reflects the logos, reason, the design of the universe, and the telos of all creatures. Things are really "natural" if in accord with God's design, purposes and will. So perhaps we have been misled into exploring the wrong nature when we sought Natural Law in human nature. The real relevant nature behind the Natural Law is God's, not man's.

This makes Natural Law no less accessible. For *Romans* tells us that what has been known about God has been known from the beginning—revealed in creation, design, cause and effect, human design, and innate conscience.<sup>231</sup>

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228. *Id.*

229. *Id.* at 99.

230. *Id.* at 120.

231. *Id.* at 77-106.

The response to the notion that the nature of Natural Law is God's nature is reasonably predictable. It is an instrumental argument rather than an argument from first principles. The skeptic will say: "accepting God's nature as the foundation of Natural Law will offend non-believers, it will put Natural Law arguments outside the accepted limits of politically liberal discourse, and it will prevent the use of Natural Law to create common ground with non-believers." There are two replies. First, let truth be truth regardless of the consequences. And, second, none of these predictions need prove true. There is a difference between the existence of a thing and the explanation of how we know it.<sup>232</sup> Theories may differ without destruction of the thing theorized about. People have common moral knowledge from general revelation whether they recognize the source or not. It is the reality of this knowledge that can be politically useful.

If the practical problems of the theory are so minimal, then why does the theory matter? What is the harm in people continuing to believe Natural Law is based on human nature or some worldly nature?

First, there is always harm in error.

Second, a specific harm here is that an erroneous view supports arguments for false content of Natural Law. If some part of human reality is the measure of all things ethical, then abortion, sex without commitment, selfishness and other ungodly acts and attributes will continue to be inserted in the list of what is supposed by humans to be part of Natural Law. Attributing false ideas to God is not impossible, but it is a little bit harder to sell. It is easy to think we are the way we want to be. It is harder to claim that God is as we want him to be.

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232. WRITTEN ON THE HEART, *supra* note 11, at 65.