Journal of Law and Religion 31, no. 3 (2016): 367–379 © Center for the Study of Law and Religion at Emory University
doi:10.1017/jlr.2016.37

STATE OF THE FIELD ESSAY

NEW DIRECTIONS IN NATURAL LAW

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BOOKS DISCUSSED

Natural Law: A Jewish, Christian, and Islamic Trialogue. By Anver Emon, Matthew Levering, and David Novak. Oxford: Oxford University Press, 2014. Pp. 256. $83.00 (cloth). ISBN: 978-0198706601.

Searching for a Universal Ethic: Multidisciplinary, Ecumenical, and Interfaith Responses to the Catholic Natural Law Tradition. Edited by John Berkman and William C. Mattison, III. Grand Rapids: William B. Eerdmans, 2014. Pp. 339. $35.00 (paper). ISBN: 978-0802868442.

Divine Covenants and Moral Order: A Biblical Theology of Natural Law. By David VanDrunen. Grand Rapids: William B. Eerdmans, 2014. Pp. 594. $45.00 (paper). ISBN: 978-0802870940.

Natural Law in Court: A History of Legal Theory in Practice. By R. H. Helmholz. Cambridge, MA: Harvard University Press, 2015. Pp. 288. $45.00 (cloth). ISBN: 978-0674504585.

KEYWORDS: reason, emotion, God's law, human nature

INTRODUCTION

Notoriously, natural law means many things to many people. Natural law is discussed quite differently in the fields of ethics, law, and theology; it is employed quite differently in the spheres of political rhetoric, churches, and academia; it has been used quite differently in the eras of ancient Rome, medieval Europe, the Enlightenment, and the postmodern West; and something akin to natural law appears, with quite different associations, in the religious traditions of Christianity, Judaism, Islam, and Hinduism. In some contexts natural law refers to God's moral law. In other contexts natural law consists of norms that can be discerned solely through human reason. In still other contexts natural law describes rules that are naturally embedded in the physical world.

Is there anything, besides the term itself, that unifies the norms and methods of natural law? Different conceptions of natural law share a common opponent: the position that all instances of normativity are ultimately just conventions. That a red light means that one ought to stop, and a green light means that one ought to go is simply a convention; but there is something qualitatively different—something more profound and even natural—about the ought-ness involved in saying

https://doi.org/10.1017/jlr.2016.37 Published online by Cambridge University Press

one ought not to commit incest.[1] If a society did not prohibit incest, we are likely inclined to think something is deeply amiss. Compare this profound worry with our likely response to a society that uses pink traffic lights to signify "stop" and black lights to signify "go": we might be confused—or even amused. But nothing so deep as human nature has been violated by this choice of colors. Natural law traditions differ in the processes by which they claim this deeper-than-conventional normativity can be discerned, and in the domains of normativity with which they are concerned, most notably, ethics or law.

More telling, perhaps, than this sort of conceptual map, is a map of the scholarly positions that attract or repulse the philosophers, theologians, and historians who write about natural law. In the Anglophone scholarship of the past three decades, this is a map dominated by a way of understanding natural law that has origins in analytic jurisprudence. In 1980, the Australian Catholic philosopher John Finnis published *Natural Law and Natural Rights*, an influential effort to reframe the natural law tradition in the style of analytic philosophy. Finnis attempted to do for natural law what his doctoral advisor, H. L. A. Hart, had done for positive law: offer a conceptual analysis that set out the terms of debate for generations to come by laying out a clear, expansive, and internally coherent approach drawing on philosophical tools and concerns that had been developed in other areas of analytic philosophy.[2] That Finnis was an Oxford don for nearly fifty years, during a period in which Oxford was indisputably the leading center for philosophy of law, magnified his influence and the dissemination of his brand of natural law.[3] Most notable among the many students studying at Oxford was the American Catholic Robert P. George, who wrote a dissertation at Oxford under Finnis. While George's own scholarship has functioned less as a constructive contribution to the scholarship than as a consolidation and defense of the natural law position advanced by Finnis, George's tenure at Princeton, his presence in high-level American government and policy circles, and his public-facing writings (for example, in *First Things*) helped to spread the influence of Finnis's account.[4]

The methods developed by Finnis and popularized by George involve deriving norms from an account of practical rationality.[5] There exists a set of fundamental, incommensurable basic goods, such as friendship, knowledge, and life; and humans' rational nature means that reason allows us to act to pursue these basic goods. Living together in societies, humans need the help of a legal framework to coordinate among each other in pursuit of the basic goods. Laws that do not serve this function are, in the classic natural law formula, no laws at all. The work of Finnis, George, and their associates shares a common, if not uniform, method, and it also endorses socially conservative views on such issues as euthanasia, abortion, and homosexuality—positions closely aligned with the conservative wing of the Catholic Church. Finnis himself suggested that the same conclusions he reached through conceptual analysis could be reached through an

1 I am ignoring the second-order normativity involved in the claim that one ought to obey the law, in the traffic-light case.

2 John Finnis, *Natural Law and Natural Rights* (Oxford: Clarendon Press, 1980); H. L. A. Hart, *The Concept of Law* (Oxford: Clarendon Press, 1961).

3 John Finnis taught at Oxford from 1966 to 2010; he remains an honorary fellow at University College, Oxford. From 1995, Finnis has also held a faculty appointment at the University of Notre Dame.

4 George has served on the United States Commission on Civil Rights, the President's Council on Bioethics, the United States Commission on International Religious Freedom, and as a Judicial Fellow of the Supreme Court of the United States, among other positions.

5 Also closely aligned with the position of Finnis and George is the work of Catholic theologian Germain Grisez. For Grisez's comprehensive statement on moral theology, see his *The Way of the Lord Jesus*, 3 vols. (Chicago: Franciscan Herald Press, 1983–1987).

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explication of the work of Thomas Aquinas.[6] Much natural law scholarship in the last years of the twentieth century and the first years of the twenty-first century challenged the legal, ethical, and political position associated with Finnis and George.

Finnis's contemporaries devoted much time and ink during this period to refining an account of positive law, understood as a theory of law that sees no necessary connection between law and morals.[7] Looming, often unacknowledged, in the background of the field was natural law theory, particularly as articulated in Finnis's *Natural Law and Natural Rights*.[8] In the face of this fusillade of books and articles, the natural law camp offered a relatively muted response, with the work of Mark Murphy as a notable exception.[9] The natural law scholarship most closely aligned with the Finnis-George camp found a home in some law schools, where it typically came to be associated with the "conservative" faculty; and in certain journals like the *American Journal of Jurisprudence*, co-edited by Finnis and Gerald V. Bradley. While the active intellectual presence and publishing productivity of Finnis and George maintain the respectability of natural law as a field, and as a live option in scholarship on jurisprudence, the association of this ostensibly secular work with conservative, (sometimes crypto) Catholic thinkers has limited its cachet.[10]

While many philosophers of law have sidestepped substantive engagement with natural law views, the stakes for Catholic theologians are higher. Natural law has been a central theme of Catholic moral thought for decades, appearing in papal encyclicals and invoked repeatedly to support Catholic social teachings on controversial issues.[11] Natural law appears in the great medieval synthesis of Thomas Aquinas's *Summa Theologica*, and the question of how to interpret Thomistic natural law has attracted wide attention.[12] If it can be shown that the Finnis-George account of natural law misunderstands Aquinas, a contemporary pillar of intellectual support for conservative Catholic social teachings would be undermined. A number of strategies have been employed to this

6 John Finnis, *Aquinas: Moral, Political, and Legal Theory* (New York: Oxford University Press, 1998).

7 H. L. A. Hart addresses these issues directly in his early essays "Are There Any Natural Rights," *Philosophical Review* 64, no. 2 (1955), 175–91, and "Positivism and the Separation of Law and Morals," *Harvard Law Review* 71, no. 4 (1958), 593–629. Among the notable works developing legal positivism in Hart's wake are Joseph Raz, *The Authority of Law* (Oxford: Clarendon, 1979); John Gardner, "Legal Positivism: 5 ½ Myths," *American Journal of Jurisprudence* 46, no. 1 (2001): 199–227, Andrei Marmor, *Positive Law and Objective Values* (Oxford: Oxford University Press, 2007); Brian Leiter, *Naturalizing Jurisprudence: Essays on American Legal Realism and Naturalism in Legal Philosophy* (Oxford: Oxford University Press, 2007); Leslie Green, "Positivism and the Inseparability of Law and Morals," *New York University Law Review* 83, no. 4 (2008): 1035–58.

8 There have been critiques of Finnis's position from the law school world, ranging from Lloyd Weinreb, *Natural Law and Justice* (Cambridge, MA: Harvard University Press, 1987), to Nicholas Bamforth and David A. J. Richard, *Patriarchal Religion, Sexuality, and Gender: A Critique of New Natural Law* (Cambridge: Cambridge University Press, 2008); see also the work of philosopher Russell Hittinger, especially *A Critique of the New Natural Law Theory* (Notre Dame: University of Notre Dame Press, 1987).

9 Mark Murphy, *Natural Law and Practical Rationality* (Cambridge: Cambridge University Press, 2001); Mark Murphy, *Natural Law in Jurisprudence and Politics* (Cambridge: Cambridge University Press, 2006); Mark Murphy, *God and Moral Law: On the Theistic Explanation of Morality* (Oxford: Oxford University Press, 2011).

10 For example, George and George Duke co-edited the forthcoming *Cambridge Companion to Natural Law Jurisprudence* (Cambridge: Cambridge University Press).

11 For a historical account of natural law in the context of Catholic moral theology over the past century, see James F. Keenan, *A History of Catholic Moral Theology in the Twentieth Century: From Confessing Sins to Liberating Consciences* (London: Continuum, 2010).

12 For reflections on this general problem of interpretation and authority, see Mark D. Jordan, *Rewritten Theology: Aquinas after His Readers* (Malden: Blackwell, 2006). For a spectrum of responses to Finnis's and George's work from theologians and Christian philosophers, see Nigel Biggar, ed., *The Revival of Natural Law* (Aldershot: Ashgate, 2000).

https://doi.org/10.1017/jlr.2016.37 Published online by Cambridge University Press

end: some have emphasized the way that the virtues form a prerequisite to discerning natural law in Aquinas's thought;[13] others have emphasized the role of practical wisdom in particular;[14] others have explored the way the rational and the pre-rational (biological) should be understood together in Aquinas's thought;[15] and still others have emphasized the need to appreciate cultural contexts more when discerning the natural law.[16] There is, of course, another set of scholarship, by intellectual historians, focused on the sources and implications of Aquinas's natural law theory as it is situated in his thirteenth-century Parisian context.[17]

While one way of broadening the natural law conversation is to challenge the foundations, as it were, another way is to look more widely.[18] In the last two decades, there has been an increase in the scholarship on multiple natural law traditions. Some of this scholarship, such as David Novak's work on Jewish natural law theories, takes the Finnis-George account as paradigmatic and finds a family resemblance in other traditions, whether or not the words "natural law" are explicitly invoked.[19] At the other extreme we may include studies of the laws of religious communities where law is taken to have some sort of divine provenance, but where the form of analysis is not determined by Anglophone natural law debates.[20] Among the most fruitful areas of inquiry has been the study of Protestant natural law, with Emory's Center for the Study of Law and Religion catalyzing research in this area.[21] There has also been a surge of interest in a set of related questions about human rights, demonstrating that ostensibly secular concerns actually developed out of European, Christian religious ideas.[22] Yet another adjacent set of scholarly work explores the way that natural law language is invoked in the context of political oratory, finding in public discourse yet another domain that may function to pluralize the meaning of natural law, thus loosening the monopoly of conservative Catholics in natural law theory.[23] George has defended an

13 John Bowlin, *Contingency and Fortune in Aquinas's Ethics* (Cambridge: Cambridge University Press, 1999).

14 Pamela Hall, *Narrative and the Natural Law: An Interpretation of Thomistic Ethics* (Notre Dame: University of Notre Dame Press, 1994).

15 Jean Porter, *Nature as Reason: A Thomistic Theory of Natural Law* (Grand Rapids: William B. Eerdmans, 2005).

16 Cristina Traina, *Feminist Ethics and Natural Law: The End of the Anathemas* (Washington, DC: Georgetown University Press, 1999).

17 Richard Tuck, *Natural Rights Theories: Their Origin and Development* (Cambridge: Cambridge University Press, 1979); Brian Tierney, *The Idea of Natural Rights: Studies on Natural Rights, Natural Law, and Church Law, 1150–1625* (Atlanta: Scholars Press, 1997); Francis Oakley, *Natural Law, Laws of Nature, Natural Rights: Continuity and Discontinuity in the History of Ideas* (New York: Continuum, 2005).

18 Of course another way to challenge the foundations, in addition to contesting Aquinas' interpretation, is to turn to the Bible itself. See Matthew Levering, *Biblical Natural Law: A Theocentric and Teleological Approach* (Oxford: Oxford University Press, 2008).

19 David Novak, *Natural Law in Judaism* (Cambridge: Cambridge University Press, 1998).

20 For example, Werner F. Menski, *Hindu Law: Beyond Tradition and Modernity* (Oxford: Oxford University Press, 2009).

21 See the Emory University Studies in Law and Religion book series, especially David VanDrunen, *Natural Law and the Two Kingdoms: A Study in the Development of Reformed Social Thought* (Grand Rapids: William B. Eerdmans, 2010); John Witte, *The Reformation of Rights: Law, Religion, and Human Rights in Early Modern Calvinism* (Cambridge: Cambridge University Press, 2008); Neil Daniel Arner, "Theological Voluntarism and the Natural Law: The Integrated Moral Theories of John Duns Scotus, John Calvin, and Samuel Pufendorf" (PhD diss., Yale University, 2012).

22 Samuel Moyn, *The Last Utopia: Human Rights and History* (Cambridge, MA: Belknap Press of Harvard University Press, 2010); Samuel Moyn, *Christian Human Rights* (Philadelphia: University of Pennsylvania Press, 2015).

23 Caleb Smith, *The Oracle and the Curse: A Poetics of Justice from the Revolution to the Civil War* (Cambridge, MA: Harvard University Press, 2013); Ted Smith, *Weird John Brown: Divine Violence and the Limits of Ethics* (Stanford: Stanford University Press, 2014).

https://doi.org/10.1017/jlr.2016.37 Published online by Cambridge University Press

historically expansive understanding of natural law leading up to his own work, but more often it is followers of Leo Strauss who identify and explicate the sites where "natural right" and "natural law" bubble up from the ancients to modern America.[24]

In this essay I examine recent scholarship on natural law, briefly describing four books that highlight the state of the field. I show how these works grapple with three perennial questions in the field: What is the role of reason in discerning natural law? What is the role of God in natural law? And what are the implications of natural law theory, particularly for courts and ordinary life? Finally, I gesture toward other new approaches in natural law theory, and introduce briefly the constructive natural law theory that I have developed in my own writings, drawing from the work of nineteenth- and twentieth-century African American political activists.

CONTOURS IN THE FIELD OF NATURAL LAW

The four texts that I take as exemplary of the current state of natural law scholarship show the field's range and ambition. Anver Emon, Matthew Levering, and David Novak's *Natural Law: A Jewish, Christian, and Islamic Trialogue* explores similarities and differences between the explicit or implicit use of natural law in the three traditions named in their title. *Searching for a Universal Ethic: Multidisciplinary, Ecumenical, and Interfaith Responses to the Catholic Natural Law Tradition*, edited by John Berkman and William Mattison, displays the large variety of ways that natural law is approached within Catholicism. David VanDrunen's *Divine Covenants and Moral Order: A Biblical Theology of Natural Law* offers a constructive natural law proposal through Biblical exegesis. In contrast, R. H. Helmholz's *Natural Law in Court: A History of Legal Theory in Practice* makes almost no mention of the Bible, focusing instead on documents and speeches crafted by lawyers in England, continental Europe, and the early United States, in which they appealed to moral and legal principles that were supposed to be universally shared by all human beings. These books reflect a general trend in the field of natural law, namely, the authors' interest in pluralizing conversations about natural law, bringing in voices and sources that have long been excluded or overlooked. As the title *Searching for a Universal Ethic* implies, natural law brings with it the ambition to serve as a language that can help diverse individuals and communities flourish together, and the scholarship on natural law is now acknowledging that sustained dialogue among diverse communities is necessary to the successful development of any compelling natural law theory.

Berkman and Mattison open *Searching for a Universal Ethic* with a Vatican-produced document, "In Search of a Universal Ethic: A New Look at the Natural Law," and follow it with twenty-one essays considering this document from various angles. While the document that begins the book is an official product of the pope's International Theological Commission, and it was circulated to Catholic bishops, it does not carry the same weight as a papal encyclical. First circulated in 2009, the document seeks concisely to explain the key components of Catholic natural law

24 For George's expansive view, see Robert P. George, *The Clash of Orthodoxies: Law, Religion, and Morality in Crisis* (Wilmington: ISI Books, 2001). Strauss's view is advanced in *Natural Right and History* (Chicago: University of Chicago Press, 1953) and applied to the American context by Michael P. Zuckert in *The Natural Rights Republic: Studies in the Foundation of the American Political Tradition* (Notre Dame: University of Notre Dame Press, 1996). The most recent and comprehensive development of the Straussian position on these issues is S. Adam Seagrave, *The Foundations of Natural Morality: On the Compatibility of Natural Rights and the Natural Law* (Chicago: University of Chicago Press, 2014).

https://doi.org/10.1017/jlr.2016.37 Published online by Cambridge University Press

theory for practicing Catholics and, more ambitiously, as part of an effort to open a global conversation about shared values. What is crucial about these values, according to the commission, is that they are objective—the same everywhere and at all times—and they are accessible to all. While the commission finds the Universal Declaration of Human Rights promising, it argues that it is necessary "to make explicit the ethical foundation of human rights" so as to offer guidance in discerning what counts as human rights, thereby avoiding "a certain propensity towards multiplying human rights more according to the disordered desires of the consumerist individual or the demands of interest groups, rather than the objective requirements of the common good of humanity" (28). Foundational questions about ethics have been ignored by our secularist culture, yet the commission finds elements of natural law theory in all great "wisdom traditions," ranging from African traditional religions to Islam to Buddhism.

In describing the contents of the natural law, the commission aspires to pitch a broad tent. The most basic tenet of the natural law is "do good and avoid evil"—very broad, indeed. From there the commission urges reflection on inclinations that are common to all human beings: preservation of life, procreation, and sociality. (These are framed in broader terms than the seven basic goods proposed by Finnis.) After such reflection, we ought to use our practical reason to decide what norms are necessary to pursue these goods. Yet the commission is careful to avoid an exclusive focus on reason: it argues that the virtues, affective sensitivities, and prudence are also necessary to pursue these goods. It is also careful not to pursue examples that are too specific, instead describing a general process, acknowledging its complexity, and leaving room for interpretation as to how precisely the natural law is to be implemented in any particular circumstance. While this allows for flexibility, it also allows for universality: all human beings are capable of following the natural law. Christians, uniquely, have a model of what perfect obedience looks like in the life and person of Jesus Christ.

While all but two of the responses included in *Searching for a Universal Ethic* are written by Anglophone scholars, "In Search of a Universal Ethic" itself was first written in French, and it responds especially to cultural and theological dynamics in Europe. The document studiously avoids contemporary scholarship; its most frequent references are to Augustine, Aquinas, and Vatican documents, particularly those of Pope Benedict XVI (who was originally a member of the commission before being elevated to the papacy). Livio Melina's essay is particularly helpful in orienting Anglophone readers to that European context, and Melina's emphasis on the body's affects and the body's actions are suggestive of a more holistic approach to natural law, one in which abstract reason takes a secondary role.[25] In comparison, the pair of essays by Steven A. Long and Martin Rhonheimer on the metaphysics of nature, the role of practical reason, and the connections between nature and reason are scholastic in the worst sense, losing sight of what is most humane in the commission's presentation in favor of a one-dimensional and abstract engagement with Aquinas. The British Dominican Fergus Kerr's essay on David Hume and G. E. Moore is among the most fascinating because it challenges the overly simplistic story about the moral degradation of secular modernity, as presented by the commission. Kerr demonstrates how these two quintessentially secular, modern thinkers, explicitly named by the commission as opponents of natural law, shared much in common with the natural law views put forward by the commission. Both are committed to the existence of objective moral norms that

25 "[A]ction, which is rooted in the body, is always already oriented to the meaning that is inscribed in human nature by the Creator. It finds its beginning in passion, which is precisely that reaction which reveals to man the possibility of a new and greater fullness that freedom is called on to acknowledge and embrace in the light of reason" (Melina, *Searching for a Universal Ethic*, 299).

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can be discerned by all human beings, using characteristically human qualities. However, Hume and Moore insist that reason alone cannot discern these objective moral norms; other aspects of human nature, including the passions, are necessary. This points to an unresolved tension in the commission's document: while at times moving away from an exclusive focus on reason, it does not recognize that the rationalism of some natural law theories, particularly in the Thomistic tradition, is just as invidious as the rationalism embraced by secular modernity.

David VanDrunen has established himself as a leading figure in Protestant natural law theories, and in *Divine Covenants and Moral Order* he turns from exegesis of that tradition to constructive participation. The book asks how, beginning with the conceptual categories inherited from the Reformation, it would be possible to develop a theory of natural law. This problem is particularly vexing because a rejection of humanity's inherent goodness is often understood to be at the heart of Protestantism. The only possibility of salvation is through faith in Jesus Christ. Protestant theologians have historically understood natural human inclinations to range in their moral valence from deeply ambiguous to wholly evil. In other words, Protestant natural law theorists must look for a different starting point than their Catholic counterparts, for whom the natural inclination to the good is a place to begin.

The proposal VanDrunen puts forth begins with a crucial distinction: God made two covenants with humanity, a covenant of works, with Adam, and a covenant of grace, a gift received by the faithful. The covenant of works preserves creation while the covenant of grace promises eternal life. Between Adam's original disobedience to God and the coming of Christ, the covenant of works required obedience, and this was fundamentally obedience to the natural law. The specific laws described in the Bible, such as those given to Noah and to Moses, are not exhaustive accounts of the natural law, but they are partial accounts, targeted at a particular community at a particular time. VanDrunen uses natural law in an expansive sense, as indicated by the term "moral order" in his title. On his account, God did not simply create objects (and people, and animals, and so on) in the world, God also created a moral order that accompanied all those objects. VanDrunen distinguishes the protological moral order, associated with the covenant of works, from the eschatological moral order, associated with the covenant of grace. No special revelation is necessary to participate in the protological moral order, because this moral order can be discerned simply from creation, but special revelation is necessary to participate in the eschatological moral order. This is, indeed, a complex story, particularly because VanDrunen holds that the two moral orders are both present throughout the Bible, just with shifting emphases: before the Fall, the emphasis is on the eschatological order. With the Fall the emphasis shifts toward the protological order before returning, with the coming of Jesus Christ to the eschatological. Yet even in the New Testament, where the eschatological order is pervasive, the protological order continues to play an important role (requiring significant exegetical work on passages where Paul seems to be starkly opposing grace to law).

Divine Covenants and Moral Order is an ambitious book. Informed by an interest in natural law, much of its hefty five hundred-plus pages consists of biblical exegesis. VanDrunen goes verse by verse, navigating a thicket of biblical scholarship as well as scholarship on other sacred texts of the ancient Near East in order to show just how pervasive natural law ideas, though not necessarily the language of "natural law," are in the Hebrew Bible and New Testament. While some of this exegetical labor is directed at the usual passages, such as those in Genesis and Romans, VanDrunen also includes a fascinating discussion of Proverbs read as a contribution to natural law. The point that VanDrunen finds in Proverbs is a point he finds running throughout the Bible: the natural law is not so much about a set of rules as it is about a process of discernment. We can become better at discerning the natural law by carefully observing and reflecting on the

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natural moral order, a process that takes place in Israel, with the help of specific divine guideposts, but that also happens beyond Israel. VanDrunen affirms that certain principles of the moral order can be known, such as the importance of marriage and distinctive gender roles, and retributive justice (which he interprets charitably: no gouged eyes necessary). Ultimately, Christians come to realize that the natural moral order is penultimate, though, paradoxically, they must honor it even as they bear witness to the eschatological moral order. While VanDrunen is inconclusive on what this would look like in practice, he suggests that the instantiation of the eschatological moral order might be confined to the church, where all are family and all give in abundance (478–79).

"In Search of a Universal Ethic" purports to demonstrate the commonalities found in Christian, Jewish, and Islamic (and other) moral traditions, though commentators contest the way these commonalities are portrayed.[26] The "trialogue" between leading Catholic, Jewish, and Islamic natural law theorists presented in *Natural Law* seeks to enter more deeply into each of these three traditions, and to put each tradition into deeper conversation with the others using an interlocutive format (each essay is followed by responses from the two other authors).[27] Matthew Levering's essay focuses on interpretations of the first three chapters of *Romans*—especially Paul's statement about how Gentiles have the law "written on their hearts"—proffered by the church fathers in the East (Origen and John Chrysostom) and in the West (Ambrosiaster, Pelagius, and Augustine). This illustrates the diversity within the Christian tradition (happily adding voices other than Aquinas's to the conversation), and it also emphasizes that, for Christians, accounts of natural law are to be checked against scripture rather than against reason alone. Levering is concerned with marshalling resources that both affirm a universally accessible natural law and preserve a special role for Christ in allowing us to obey the natural law; furthermore, natural law makes it possible to imitate Christ.

David Novak and Anver Emon, colleagues at the University of Toronto, have both written the definitive books on natural law in their respective traditions, and in their essays for *Natural Law* they summarize this work.[28] Characteristically, Novak's work is filled with footnotes to rabbinic sources, but the substance of his essay hues quite closely to the Finnis-George approach to natural law. Practical reason is definitive of our human nature, and through reflection on practical reason we can reach conclusions about the natural law. Outside of his footnotes, it is often difficult to hear what is distinctively Jewish in Novak's approach, for example, when he writes, "When the reason of the command is universal and thus immediately evident to all a priori, the command can be considered a natural law precept" (Novak, *Natural Law*, 12). God commands humans to follow natural law, but for Novak this is equivalent to saying that God commands us to be reasonable, that is, to follow the normative consequences of reflection on our capacity to reason. Novak distinguishes this from revealed divine law, obedience to which is not contingent upon our reasoned affirmation thereof (Novak, *Natural Law*, 15). Like Finnis and George, Novak argues that a belief in God must accompany a commitment to the natural law. Unlike them, he suggests that the specific precepts of

26 Most notably, Anver Emon argues that the International Theological Commission is particularly careless in its treatment of Islam because it points to the Muʿtazilite theological school to demonstrate the Islamic interest in natural law, but the Muʿtazilite school is now generally considered heterodox (Emon, *Searching for a Universal Ethic*, 128–29).

27 For an intellectual-historical rather than constructive engagement between these three traditions, see Rémi Brague, *The Law of God: The Philosophical History of an Idea* (Chicago: University of Chicago Press, 2007); originally published in French in 2005. Reference to Brague's compelling work is nearly absent from *Natural Law*; this absence is another reminder of the insularity of Anglophone natural law debates.

28 Novak, *Jewish Natural Law*; Anver Emon, *Islamic Natural Law Theories* (New York: Oxford University Press, 2010). See also Anver Emon, ed., *Islamic and Jewish Legal Reasoning: Encountering Our Legal Other* (London: Oneworld Publications, 2016).

https://doi.org/10.1017/jlr.2016.37 Published online by Cambridge University Press

the natural law are found in the laws given by God to Noah, though the way Novak interprets these makes them sound quite like the precepts of the conservative Catholic version of natural law: no incest, homosexuality, adultery, bestiality, abortion, murder, blasphemy, idolatry, and so on; these all advance goods in our life together.

Refreshingly, Anver Emon begins his reflections on Islamic natural law theory with an analysis and classification of Islamic sources. As he notes, this is a challenging task, given the great volume of relevant material in the tradition and, even more so, given the three distinct fields in which this material is found: Islamic metaphysics, jurisprudence, and theology. Emon distinguishes two Islamic theological positions, that of the "hard" natural law school, arguing that a good God would create a good world and so normative conclusions can be read off the natural world; and that of the "soft" natural law school, arguing that God does not have to create a world that is good (that would constrain God), but because of God's grace humans have reason that allows us to reach normative conclusions from reflection on the natural world. Emon grapples with the apparent tension between the determinacy of the natural world presupposed by Islamic jurisprudence and the indeterminacy discussed in Islamic natural philosophy (allowing, for example, God to work miracles). He concludes, persuasively, that the latter serves as a check on the former, reminding Islamic natural lawyers not to become overconfident in their conclusions—that they are, after all, merely human.

While natural law ideas have long circulated in a variety of intellectual circles, and often intellectuals claim that natural law is relevant to law as practiced in a courtroom, it is less clear how much relevance natural law theories actually have on the practice of law. R. H. Helmholz sets out to address this question in *Natural Law in Court*. He approaches this task rather like an ethnographer, immersing himself in the legal worlds of early modern Europe, England, and America by reading a very large number of cases, discerning patterns, and reporting those patterns to his readers. He pairs chapters on these three archives with chapters on legal education in these three contexts. Knowing what aspiring lawyers were taught sets the backdrop for interpreting often subtle references to natural law in the cases that Helmholz reads.

Most clearly in the European context, where legal education centered on Roman law and canon law, the relevant form of natural law derived from a classical rather than a scholastic tradition. Natural law referred to law found in the heart of every human being and served as the foundation for all law: positive law was built atop natural law. In Helmholz's account, the classical tradition, widely discussed Bible passages, and conventional wisdom all complemented each other in forming the foundations of the legal system. To take one prominent example, a particularly important—because of its relevance to legal practice—natural law precept held that parents are obliged to support their children. This precept still needed to be interpreted, and it could be interpreted expansively, for example including obligations to grandchildren, to vassals, or to support the university education of a child, all of which were attributed to the natural law.

The conclusion that Helmholz reaches, based on his study of education and practice in three distinct contexts, is that natural law and positive law were both regularly invoked, though neither was dispositive. Each required interpretation. An appeal to natural law could be rhetorically powerful, but appeals to natural law could be used to support many different, and even opposing positions. In the courtroom, appeals to natural law did not depend on arguments about human inclinations to the good, nor about reflection on human nature. Rather, natural law was much closer to conventional wisdom, a step away from the technicalities of positive law and toward shared values. While natural law famously was invoked in cases concerning slavery, its presence was often quite mundane. Helmholz finds many cases of natural law being invoked in property disputes over things like valuable whales that washed ashore, oysters found in rivers, and so on. Natural law supposedly

https://doi.org/10.1017/jlr.2016.37 Published online by Cambridge University Press

required that what is found in rivers or washed ashore belongs to those who find and take it; yet royal prerogative held that such findings belonged to the crown—creating conflicts in both England and, especially, the colonies, where the rights of the crown were even more tenuous.

PROBLEMS

New developments in natural law make us turn again to three questions that perennially plague natural law theories. The careful conceptual analysis performed by the philosophers of law who led the resurgence of interest in natural law theory has helped to clarify these questions, even if the answers offered by those same philosophers of law now seem inadequate. The first question concerns the role of reason in discerning the natural law. In the Finnis-George account of natural law, reason is at the heart of natural law. The image of God in the human being is best reflected in the human capacity to reason; it is what distinguishes humans from animals; and the capacity to reason, by reasoning about reason, allows us to discern the precepts of the natural law. As we reason about reason, we see that (practical) reason guides us to certain basic goods, and we come to realize that if we want these basic goods as we live together in society (sociality also being a basic good), we need a system of positive laws that reflect the natural law insofar as positive laws function as an extension of our practical reasoning, helping us achieve the basic goods. Note how the very first part of this argument, about the image of God, is not necessary for this account to work.[29]

"In Search of a Universal Ethic" attributes this feature of some natural law thinkers to "wrongly identifying the rationality of the natural law with the rationality of human reason alone, without taking into account the rationality immanent in nature" (*Searching for a Universal* Ethic, 74n75)—essentially expressing a deeper worry about secular modernity, with its privileging of the autonomous, rational agent. What this more expansive account of reason might mean, however, remains vague—left to interpreters of Aquinas arguing about the details of his metaphysics (see again the essays by Long and Rhonheimer in *Searching for a Universal Ethic*). The problem here, suffered by Novak, Finnis, George (who has a co-authored essay reiterating his position in *Searching for a Universal Ethic*), and others seems to be more acute, and more narrow. It seems to be a symptom of a particular moment in analytic philosophy, not of secular (post)modernity in general. After the linguistic turn replaced metaphysical speculation with language as the rock on which philosophizing could stand, a more recent turn has treated reasons (individuated, not the nebulous category of reason) as fundamental. They go all the way down, as it were. Unlike reasoning, a means of solving problems, this turn takes reasons as ontological, the building blocks of our worlds and ourselves.[30] Such a view is appealing to lawyers, whose business it is to trade in reasons, but it should not be particularly appealing to those concerned with ethics in any holistic sense.

Recent work in natural law theory points toward a growing openness to conceive the relevant part of human nature more broadly than the new philosophical emphasis on reasons would allow. In *Searching for a Universal Ethic*, European writers in the Catholic tradition and some Anglophone natural law theorists show an openness to exploring the role of the virtues and the emotions in natural law theory. Even Finnis makes room in his theory for prudence, a virtue

29 But see Finnis, *Natural Law and Natural Rights*, chapter 13, for an argument for the necessary role of God in such a natural law theory.

30 See especially the development of "reasons fundamentalism" in T. M. Scanlon, *Being Realistic about Reasons* (Oxford: Oxford University Press, 2014); see also Derek Parfit, *On What Matters* (Oxford: Oxford University Press, 2011).

https://doi.org/10.1017/jlr.2016.37 Published online by Cambridge University Press

that is difficult to reduce to practical reason.[31] Recent work on the ethical relevance of the emotions, and the allusion in this direction in "In Search of a Universal Ethic," suggests that this is a fruitful direction for future scholarship.[32] The capacity to emote seems just as essentially human, and just as important in an account of how the human reflects the divine, as the capacity to reason.[33] How might the capacity to emote result in normative prescriptions? It does not seem less plausible than deriving normative prescriptions from the capacity to reason: there can be an affective directedness toward goods just as a good can provide a reason for acting. Just as practical rationality can go wrong, affective sensitivities can go wrong.

Does natural law require the existence of God? This is among the most controversial elements of debates about natural law, and it is one of the reasons that such debates are avoided by many philosophers and lawyers. The existence of God often seems to be an afterthought—and also a hidden premise. This apparent subterfuge is perhaps a reflection of the seemingly irresolvable dilemma at the heart of religious accounts of natural law: If natural law provides our ethics, why do we need God? If God provides our ethics, why do we need natural law? Perhaps in some religious communities, everyone is subject to natural law while members of the community itself are subject to more rigorous ethical precepts; but this is clearly not the case for a missionary tradition, like Christianity, that seeks to offer salvation to all.[34] When this problem is solved by presenting Jesus as an example of how to be particularly obedient to the natural law, or as an example of the virtues necessary for such obedience, the unique role of Jesus as essential to the Christian story seems to be denuded.

Yet another way of presenting this problem that natural law theories face is as a type of Feuerbachian critique. Ludwig Feuerbach charged that what Christianity really does is project onto God the qualities that we admire most about human beings.[35] Might natural law project the human values that we like most into the divine realm, making them natural or divine law? Just as theologians object to Feuerbach that there are good reasons to believe in the Christian story, natural law theorists would object that there are good reasons to hold that the precepts of natural law are, indeed, universal and objective. But that does little to diminish the persuasive power of the Feuerbachian challenge: those supposedly universal, divinely ordained precepts just seem so much like *our* values; depictions of God just sound so much like people *we* admire. The force of this critique sharpens when it is made even more specific: the precepts of the natural law discerned, in an ostensibly secular process, by conservative Catholics sounds suspiciously like the ethical commitments of conservative Catholics; the precepts of the natural law discerned by liberal Catholics sound suspiciously like the moral commitments of liberal Catholics, and so on.

The Christian theologian Denys Turner proposes that Christians ought to embrace rather than reject the Feuerbachian critique.[36] Christians ought to take their task to be that of idolatry critique:

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31 John Finnis, "Prudence about Ends," in *Reason in Action: Collected Essays*, vol. 1 (Oxford: Oxford University Press, 2011), 173–86. In general, Finnis is much more open than is George to appreciating the role of the virtues and to resisting reasons fundamentalism.

32 See, for example, Martha Nussbaum, *Political Emotions: Why Love Matters for Justice* (Cambridge, MA: Harvard University Press, 2013); Joshua Hordern, *Political Affections: Civic Participation and Moral Theology* (Oxford: Oxford University Press, 2013); Michael L. Frazer, *The Enlightenment of Sympathy: Justice and the Moral Sentiments in the Eighteenth Century and Today* (Oxford: Oxford University Press, 2010).

33 It is essential to the biblical story that God is angry, jealous, suffering, and loving, to take but four examples.

34 Though note how VanDrunen sees the Christian church as a site where a higher, pre-eschatological moral order is enacted.

35 Ludwig Feuerbach, *The Essence of Christianity* (New York: Harper, 1957).

36 Denys Turner, "Marxism, Liberation Theology, and the Way of Negation," in *The Cambridge Companion to Liberation Theology*, ed. Christopher Rowland (Cambridge: Cambridge University Press, 1999), 229–47.

https://doi.org/10.1017/jlr.2016.37 Published online by Cambridge University Press

searching out worldly values that are elevated to otherworldly status and exposing such mystifications, a task that Turner identifies with liberation theology. What if natural law theorists embraced this insight? Instead of taking their task as searching out universal, objective, divinely ordained moral norms, they would take their task as searching out and challenging those norms that purport to be universal, objective, and divinely ordained, exposing these as projections of the desires of a specific community or class, at a specific moment in time. This would not be a purely deconstructive project, one approach to natural law continually challenging all others. Rather, it would look for the ways that purportedly objective, universal principles are found in positive law, and it would seek to demystify, or perhaps denature them. While this approach may seem to oppose, rather than participate in, the natural law tradition, it bears the same relationship to the natural law tradition that negative theology bears to theology. It uses a human capacity (for critique) to clear away false claimants to the universal, resulting in a better orientation to the genuinely universal even as it remains elusive. Natural law theorists have not as yet pursued this path, but it promises to allow for surprising alliances, for example between critical legal theorists and natural law theorists.

The final problem faced by theorists of natural law concerns the distance between theory and practice. While theorists of natural law often gesture toward the practical implications of their work, they rarely engage with the way natural law is deployed in contemporary courtrooms or in the political arena. Conversely, Helmholz's fascinating study pays little attention to developments in natural law theory contemporary to the developments in legal education and practice that it tracks. Just as some political theorists have charged that their field has gone astray by doing abstract theorizing first, then applying it—in grotesquely unrealistic ways—to political practice, with the result that political theory has little traction in the real world, natural law theorists should worry about how their ideas connect to social and political life.[37] What would it look like to develop an account of natural law that attended equally to practice (legal or ethical) and to theory? What would it look like to start with practice (legal or ethical) and then build a natural law theory out of the concerns, virtues, and intellectual work already present in that practice?

This concern about the distance between theory and practice can be put another way when practice is not confined to the courtroom. After all, it is likely that the rulings of conservative Catholic US Supreme Court justices, at least, are informed, in part, by natural law theory.[38] The main site where ordinary citizens encounter natural law is in political rhetoric, yet natural law theorists rarely, if ever, address the roles that natural law does or should play in political rhetoric. This is a quite different genre than that of staid deliberation in an academic conference room where one might quietly reflect on basic goods. Political rhetoric is lively and loud, and all the more so when natural law is being invoked. There remains a substantial distance between scholarship on the justice-orienting potential of prophetic political speech and natural law, but it should be possible to narrow this divide.[39] Might there be a way that public invocations of natural law evoke the emotions and provoke reasoning in a way that primes listeners to discern the natural law?

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37 Raymond Geuss, *Philosophy and Real Politics* (Princeton: Princeton University Press, 2008).

38 This is an unusual case because of the role of the Supreme Court Justice as part-judge, part-intellectual; it is likely untrue for lower court judges. Clarence Thomas wrote about natural law theory before he joined the court, causing a controversy at his confirmation hearings. See, for example, Thomas, "The Higher Law Background of the Privileges or Immunities Clause of the Fourteenth Amendment," *Harvard Journal of Law and Public Policy* 12, no. 1 (1989), 63–70.

39 Cathleen Kaveny, *Prophecy without Contempt: Religious Discourse in the Public Square* (Cambridge, MA: Harvard University Press, 2016); George Shulman, *American Prophecy: Race and Redemption in American Political Culture* (Minneapolis: University of Minnesota Press, 2008).

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In addressing the proceeding problems, I have already hinted at the constructive account of natural law that I have developed in my own scholarship.[40] In *Black Natural Law*, I develop this account of natural law by paying careful attention to a particular tradition of political engagement where the language and ideas of natural law are continually invoked – namely, the mainstream of African American political activism from the mid-nineteenth to the mid-twentieth century, from Frederick Douglass to Martin Luther King, Jr. In other words, I start with a tradition of ethical and political practice, and I build an account of natural law through exegesis, critical reconstruction, and systematization of that practice. In this tradition, the image of God is closely connected with natural law: as in the natural law traditions discussed above, recognizing the image of God in our distinctively human characteristics is the starting point for discerning the normativity of natural law. However, in the African American tradition, the image of God in the human includes not only the capacity to reason but also the capacity for emotion. Ultimately, however, the image of God is irreducible to human terms, just as we can never fully describe God in human terms. This means that natural law is first and foremost a critical project. Any positive laws or social norms that present themselves as derived from reflection on a purely rational human nature must be challenged. African American political leaders during this period pointedly challenged ostensibly neutral, ostensibly rational laws and norms (for example, those of segregation) that, in fact, concealed their provenance in the self-interest of the powerful. These critiques were framed in terms of natural law: through reflection on the image of God in the human being it was possible to discern how such laws ran counter to God's law. I explore how such critiques were never levelled in isolation, or around an Oxford seminar table, but instead were responsive to, and were presented as part of, the active struggles of the African American community. Presenting such a natural law position in public evoked the affects and activated the rationality of listeners, helping them to discern the natural law for themselves rather than offering them the conclusions of natural law on a platter. Finally, from this close study of African American natural law I conclude that marginalized members of a community have the greatest capacity to discern the natural law, when the natural law is understood in the sense that I describe here. This is because the experience of unjust suffering breaks through the illusions put forward by the powerful, exposing what seem to be universal, objective norms or laws as merely projections of the self-interest of the powerful—exposing them as no laws at all.

To conclude, recent scholarship in natural law has moved beyond a conversation defined in the terms of analytic philosophers. The conversation has broadened by recovering new historical sources, by considering religious traditions beyond Christianity, and by appreciating that human nature consists of more than just the capacity to reason. Natural law is becoming truly humanistic, allowing historians and scholars of culture to join philosophers and theologians in probing perennial questions. The challenge now is to integrate the insights that these various participants bring to the conversation. As discussions pluralize, it may be tempting to simply catalog the many varieties of natural law that occur at various times and in various places. Yet the ambition of natural law scholarship, at its best, is greater than this. The next generation of scholars will have to grapple with how to advance the constructive project of theorizing the connection between law and morals when the diversity of contexts and the complexity of human nature is more fully taken into account.

40 Vincent W. Lloyd, *Black Natural Law* (Oxford: Oxford University Press, 2016).

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