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MARKETING NATURAL LAW: AN OVER-DEBATED AND UNDERSOLD PRODUCT

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PART I. PRESENT PROSPECTS

OPPORTUNITIES FOR AND OBSTACLES TO THE ADOPTION OF NATURAL LAW AS THE MAJOR VALUE FOUNDATION OF A LEGAL SYSTEM

§ 1. Introduction: The current market for Natural Law - good news and bad news.

As the influence of John Austin grew in the nineteenth and twentieth centuries,¹ respect for Natural Law theories declined. It became

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1. Sir William Markby, lecturer of law in Oxford, in the introduction to his ELEMENTS OF LAW published in 1889, comments on the influence of Austin in changing the professional, on the job, training of lawyers into instruction on legal science carried out in the universities. His own work is subtitled in the Austrian manner Principles of General Jurisprudence. He has his own ideas but his main positions and vocabulary are Austrian; he also cites Austin rather frequently. This is typical of works in jurisprudence in that era; a similar trend, spearheaded by Christopher Columbus Langdell, was proceeding apace in America at this time. These new age legal authors were all quick to follow Austin's criticisms and disavowal of Natural Law and to term their approach descriptive jurisprudence, a science of law based on observation. Interestingly, some current authors see the dispute between positivism
known as the theory of the heavenly box, where immutable Divine Laws were stored. Thus described, the theory had two major drawbacks. First, one had to accept that there was such a box. Second, one had to determine exactly what laws were contained in that box. Viewed in this way, it is not surprising that there was little interest in Natural Law on the part of lawyers in general. Roman Catholic law schools continued to promote it, but it still seemed to have more to do with private morality among believers than with the law of the jurisdiction.

All of this has changed significantly over the last several decades. There has been a considerable resurgence of interest in Natural Law theory among lawyers in general; not only to persons with a Catholic background, but even among those with no particular commitment to religion whatsoever. The reasons for this are not difficult to discern. The social upheavals of the 1960s were characterized by a strong emphasis on human rights. Advocates of these rights became aware that they seemed to require some kind of theoretical foundation, which could be used to justify their claims. Natural Law was a very attractive candidate for the job, at least in comparison to the other available options such as:

1. The Hobbesian position was that law did not require any justification other than the fact that it had been duly enacted by the appropriate organs of the State. This option is, of course, impracticable since it is almost impossible, and certainly very expensive and effort-intensive, to enforce laws which do not have public support. It is also unthinkable from the human rights perspective. Human rights, more or less by definition, cannot be based on existing law and indeed have often been directly in conflict with it.

2. The utilitarian principle preferred by Bentham's followers, including Austin, had been the main theoretical tool used to justify laws during the latter part of the nineteenth century and well into the

and Natural Law as much ado about nothing. See Gerald Bradley, Natural Law: Christian Perspectives on Legal Thought 284-86 (Yale 2001).

2. One participant from the floor at a crowded religion and law session in the 1979 AALS meeting in Atlanta, Georgia began by announcing that he thought all this transcendental stuff was nonsense; he went on to remark that it was necessary for law and that we should be careful to protect and promote such beliefs in the general population (as Platonic useful fictions?).

3. Hobbes is taken to represent the positive theory of law, though he actually says more than this. He argues that it is reasonable to accept the governance of law because the alternative is the jungle, where life was poor, miserable, nasty brutish and short. This provides a motive for going along with the law, at least when someone is watching, but is hardly a justification in the modern sense.
twenty; it rapidly declined in popularity following the Second World War. It had a number of serious difficulties, but the main objection of human rights activists was that it appeared to allow the preferences of the majority to override the interests of minorities.4

3. It was the problem of minority rights that led John Rawls to abandon utilitarianism and seek an alternative foundation in social contract theory, but the apparent advantages of the social contract have proved illusory. Rawls' attempt to derive humane5 and environmental values from non-moral premises has an air of impossibility about it. To start by contracting on the basis of enlightened self-interest and end with the kinds of values that Rawls wishes to establish6 seems impossible. The impression inevitably springs to mind that the enterprise is like pulling a rabbit out of an empty hat; sleight of hand has been employed somewhere in the process.7

4. The law and economics movement was also promoted as a way of supplying an objective way of evaluating laws.8 Economic efficiency was declared to support approximately the same values as traditional moral theories.9 Economic analysis of law is as important as economic evaluation of medical proposals, which is itself currently popular. One should not embark on any serious venture without counting the cost. But economic efficiency is only one value, albeit an important one, among many. It cannot supply the place of the others. The most economically efficient way of doing something, as Austin pointed out,10

4. Bentham's argument, that the majority would not be happy knowing that minorities were miserable, must have sounded like a doubtful argument then and is certainly more so now.

5. I have preferred "humane values" to "liberal values" as the latter expression has heavy political overtones, which raise prejudices and obscure the issues.

6. These are generally described as prudential morals, where behavior is recommended on the ground of mere prudence, i.e. that it is not right or wrong but simply the best policy.

7. Brian Barry expresses this by saying, of Rawls' beginning and ending points, that you can't get there from here. He further comments on Rawls' drawn-out and difficult arguments, that proof of the impossible tends to be obscure and also takes longer. Brian Barry, The Liberal Theory of Justice 22 (1973).


9. Bentham made the same claim for utilitarianism. The economic theory of law has indeed been described as the last wag of the utilitarian dog's tail.

10. The Province of Jurisprudence Determined, Lecture 6 298 (Prometheus Books N.Y. 2000). The discussion of adoption of babies and the provision of donor organs for transplant from a purely economic perspective (advocating a free market) provides modern examples; it does seem rather odd to decide such questions on economic grounds without considering other values. See Landes & Posner, The Economics of the Baby Shortage, 7 J. Legal Stud. 323 (1978).
can turn out to be wrong in the sense that it will not advance the public welfare.

5. The last alternative is to despair and conclude that there are no values other than those which we create for ourselves and impose on others by power. This is the post-modern view that has been adopted by the more extreme proponents of the Critical Legal Studies movement. It has much in common with the radical existentialist philosophies that were popular in Europe following the Second World War. Those who experienced the total economic and cultural collapse of that era can be pardoned for losing faith in all previous ideas and values. They should also be given credit for realizing that one cannot live by total skepticism. But their solution, rebuilding the intellectual and moral world on notions and values of our own creation, can only be a temporary one. A world-view (ontology) which rests only on one’s own say-so, will not do. We are bound to ask for a better justification for ourselves, and we certainly need more in order to commend our views to other people. For these and other reasons, post-modernism will not function as a foundation for law and should only be considered when all other options have clearly failed.

It seems that if we wish to evaluate proposed legislation or to justify existing laws in the eyes of those who are supposed to live by them, we must have some theory that will establish moral foundations; there is no obvious alternative to Natural Law. This is the good news. The bad news is that despite this widespread appreciation of the need for basic moral values, and the perception that Natural Law might supply them, there is no rush on the part of the legal community, generally, to buy into Natural Law theory, or to do so without reservations and hesitations. Indeed many legal theorists, who posit real values, explicitly seek to distinguish their views from Natural Law notions.

11. An excellent example, unwittingly perhaps, is Arthur Leff, Unspeakable Ethics, Unnatural Law, 1979 DUKE L.J. 1229, where the author frankly bases all value statements on the speaker’s say-so. He ends by listing good people (who had supported good and fought evil) and bad people (same but in reverse). The first, he says, merit heaven and the latter deserve damnation. He ends this strident moral peroration with the question “says who?”.

12. For a critique of Postmodernism’s methodology, See Arthur Austin, A Primer on Deconstruction’s “Rhapsody of Word-Plays”, 71 N.C.L. REV. 201 (1992).

13. Ronald Dworkin, for example, describes Natural Law theory as saying that the “right answer” is locked up in a transcendental strong box. This he sees as nonsense. Ronald Dworkin, Taking Rights Seriously 216 (1977).
§ 2. Possible reasons for misgivings about Natural Law theory

A number of explanations can be put forth to explain the apparent reluctance of the legal community in general, and human rights advocates in particular, to identify itself with Natural Law theory.

1. Natural Law theory, as presented by its more authoritative interpreters, seems abstruse, employing technical terms and complex arguments, which give rise to the suspicion that intellectual sleight of hand may be present in the reasoning and that the conclusions are doubtful. It seems obvious that if Natural Law indeed exists and is knowable, that it ought to be capable of being stated in clearer and more understandable terms.

2. Natural Law theory in the modern world has been largely maintained and sustained by scholars and others standing within the Roman Catholic tradition. This is by no means universally true, but skepticism about the existence and nature of Natural Law has tended to dominate non-Catholic opinion at least since the time of John Austin.14 This close link with a particular religious denomination may appear suspicious to those concerned to maintain the right to espouse a particular religion or none at all.

3. Natural Law was the dominant, indeed the sole moral theory underlying both English Common Law and Continental Civil Law in the Middle Ages. As such, it can be perceived as outdated and belonging to a simpler and more homogenous world that has passed away and been replaced by a more complex and pluralistic one.15

14. Until the nineteenth century, Natural Law theory was as integral of a theory in Protestantism as it was in Catholic theology, and numerous versions of it were proposed by Scottish Presbyterian divines and jurists. But from the middle of the nineteenth century, Protestant theologians tended more and more to go along with the doubts of influential moral philosophers about the knowability, and therefore the relevance, of Natural Law for societal concerns. In the twentieth century, the powerful influence of Neo-Orthodox theology, associated with the name Karl Barth, has tended to denigrate the validity of opinions based on reason as opposed to revelation, and to make religious (and moral) conviction a miraculous rather than an unassisted rational event. In the last several decades, however, the influence of Barthian neo-orthodoxy has been waning, and the beginnings of a new synthesis between Revelation and Reason can be seen in Protestant and especially Evangelical Protestant writers. A similar notion, although orthodox on doctrinal matters, developed in the Netherlands in the nineteenth century with Abram Kuyper and has influenced a good deal of the intellectual side of American Reformed theology that has continental roots.

15. Interpreters of St. Thomas insist that he was arguing for the inclusion of diverse opinions in the Summa, rather than presenting a single homogeneous point of view. See J. Jenkins, Aquinas, Natural Law, and the Challenges of Diversity, in Common Truths: New Perspectives on Natural Law (Del. 2000). But we are talking here of perception rather than reality, of how the medieval positions are viewed by outsiders,
Lastly, and most importantly, Natural Law may be seen to be inevitably linked to moral conclusions that are inimical to widely held political positions. It is feared, in short, that adopting Natural Law theory would immediately and without further argument rule out of court the views of feminists, gay rights advocates, and minority groups generally. This objection was made obvious when Clarence Thomas, responding during his Supreme Court hearings to a question about his jurisprudential views, stated that he had a leaning toward Natural Law. The response from political activist groups was swift and hostile; Judge Thomas did not proceed to further expound or defend his opinions on this topic.

If the contemporary legal world is to accept and benefit from Natural Law theory these objections must be met and these doubts quieted.

PART II. PROBLEMS PREVENTING ACCEPTANCE OF NATURAL LAW THEORY

A More Detailed Review of the Objections to Natural Law and Responses to These Objections

§ 3. First objection - the abstruse appearance of Natural Law theory

John Finnis has commented that most of the criticisms of Natural Law theory rest on misunderstandings of its nature. This is obvious in the statements of those who unreflectively accept common opinion and have not studied or seriously thought about the subject independently. However, as Finnis has pointed out, these misunderstandings are also characteristic of contemporary juristic writers with estab-

rather than how they are decided by authoritative scholars. In any event, it might be argued that St. Thomas was expanding the homogenous point of view, incorporating diverse opinions in it, rather than accepting or legitimizing irreconcilable differences.

16. One witness, Democratic Representative Craig Washington (Texas), who protested the appointment of Clarence Thomas stated, "Judge Thomas has shown a previous longstanding disrespect for the civil liberties of groups, Judge Thomas has espoused as a fulcrum of his legal thought the concept of Natural Law, and Judge Thomas has shown a lack of respect for the rule of law." Natural Law has as much to do with judicial opinion, as voodoo has to do with the practice of medicine.

17. This concern reflects a dichotomy in the perception of Natural Law. There is a good kind - one that asserts natural rights-and there is bad kind - one that is perceived to set norms for conduct. The first is not objectionable, the latter is. See the discussion in A PRESERVING GRACE, 157-58 (Cromartie ed., Eerdmans 1997).


19. Representative Craig Washington, supra note 16, appears to fall into this category.
lished reputations as legal philosophers. But why are all these people, learned as well as unlearned, failing to perceive what Natural Law theory really is?

There are a number of causes for these persistent misunderstandings, and indeed this topic, like most others, has complex aspects. The experts on Natural Law, philosophers and others promoting and explaining it, must accept at least part of the blame. Profound and capable studies on the subject can be found in abundance, but they share one fatal drawback—they are difficult to read. Even persons who have served their time in philosophical studies may find the reading of these works laborious and difficult. With abstract technical terms, fine distinctions and tightly reasoned arguments are present in abundance. The more lucid passages are present but are spread somewhat thinly. It would almost seem as if these works were written with philosophical opponents in mind, the strange terms and winding paths serving as bulwarks and defensive maneuverings to frustrate possible philosophical counter-attacks. Yet be this as it may, the lay reader is usually discouraged, and abandons the task after one or two attempts to enter the fortress of the writer’s mind.

The complaint here is not that these bloodless duels among the experts are useless; they can, and usually do, sharpen concepts and advance the understanding of difficult topics such as Natural Law. But all of this effort is wasted if the results cannot be translated into terms which philosophical laypersons - which most lawyers tend to be - can understand. Persons of ordinarily intelligence, having no special philosophical qualifications, should be able to see what is intended and either agree or disagree in a rational manner. They should not be driven into exasperation or disgust. They should be able to accept or reject the arguments for what appear to them as good and sufficient reasons. It is not necessarily the role of the upper echelon philosophical experts to perform this task themselves, but someone needs to do it; and the philosophers should facilitate the translation into more understandable terms by making their own writings as clear and readable as possible.

A simplified review of classical Natural Law theory will be outlined in the next section, taking the basic ideas of St. Thomas as paradigmatic. The conceptual superstructures built on this foundation by

20. Human goods or ends may be described in learned writings as "forms of flourishing." One can be told that they are incommensurable so that they cannot be weighed against one another. These notions are not impossible to understand, but they are abstract and employ somewhat strange terms, requiring considerable imaginative effort on the part of philosophical laypersons, to render them intelligible.
modern scholars will not be discussed in any detail, if at all. This is not because they have nothing important to say, but rather because the basic selling argument can be made more easily without much reference to modern refinements.

§ 4. Positive response to the first objection: A simple version of the basic notions in Natural Law theory

1. In barest outline, the theory of Natural Law asserts that there are certain basic values which will be acknowledged everywhere, in all times and circumstances and by all persons (ubi, ubique et ab omni). These are very general principles and St. Thomas lists five of them, namely:

   a. The duty to do what you recognize to be right and to avoid what you conclude is wrong. This has often been taken to be a truism since the notion of rightness includes the duty to obey it. It can, however, be taken to mean that moral obligation (concluding that some things are right or wrong) is a basic fact of human experience which cannot be reduced to other terms. Moral propositions are acknowledged commands; they are imperative, not indicative (descriptions of advantages and disadvantages of behavior) or optative (I wish you would behave like this).

   b. The duty to preserve life. This has commonly been described in cases at law as the first principle of Natural Law, and has been interpreted, moreover, as the duty, or rather the right, to preserve one’s own life. Both of these statements are incorrect. It is the second principle of Natural Law (a minor point) but, more importantly, it is the duty to preserve human life in general. From time to time we have a duty to sacrifice our own lives to preserve the lives of other people or even to benefit them in some other way.

   c. Family duties. These are described by St. Thomas, perhaps inappropriately, as animal concerns, since we share them with many of the lower animals.

21. Grizez and Finnis have promoted an Aristotelian form of Natural Law, which includes values other than the moral kind. The predominantly moral version of Aquinas has been preferred here as more suitable for legal purposes. The other major disputed question, which is not raised here, relates to whether the general principles of Natural Law should be treated hierarchically (with some more important than others if a choice has to be made) or as incommensurable (i.e., all are of equal value so that when they conflict you must balance them as best you can). Grizez and Finnis adopt this latter position, and it seems most reasonable, especially in the light of the fact that it is difficult to get people to agree on a hierarchical order.

22. THE SUMMA THEOLOGICA (Benziger Bros. ed. 1947)
d. Social duties. These include, namely, the obligation to be a good citizen, a good neighbor, and a good friend.

e. The value of truth. This is not only about telling the truth, but more importantly concerns seeking the truth. This wider implication was the foundation upon which the great universities were being established in the thirteenth century, and it has remained an important academic value ever since.

2. This list is probably not intended by St. Thomas to be exclusive. Additional principles can be and have been added, for instance the duty to preserve the environment and to treat animals in a considerate manner. These two items are sometimes treated together as the duty of the stewardship of nature and natural resources.

3. These first principles are perceived by "right reason", which is the ability to see and reason about what is good as opposed to what is true. These perceptions of good are not habits (reflex behavior) as they might be in animals. In humans, certain things are seen to be right, and there is a moral obligation to seek to realize these values. By the further use of reason, less general propositions may be derived from the primary values, and so on until quite particular rules are reached.

4. Although the first principles are unchanging, the derivative principles and ultimate rules may admit exceptions. Many of the old moral dilemmas propounded by philosophers derive from this fact. So it is generally true that one should return borrowed articles, but in exceptional circumstances, as where someone wishes his gun returned to him in order that he may shoot his wife, the rule may not hold. Similarly when an armed and obviously homicidal madman asks me, "which way did X go?", my duty to tell the truth does not require literal and immediate provision of accurate information.

Secondary and derivative moral principles may also change due to altered circumstances or even through changes in peoples' ideas of right and wrong. Many of the principles of family law found in collections of legal maxims are clearly outdated. Women working outside the home have markedly altered family life. The perception of the relationship of husband and wife, or parents and children, has also changed. Thus societal and ideological changes inevitably alter the application of the principles, as St. Thomas readily acknowledged.

5. The general first principles cannot be eradicated from the heart of man. The most depraved or insane person, unless bereft of all semblance of reason, will recognize them as being valid. The most

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23. According to Professor Finnis, right reason (ratio recta) is thinking about something properly, not allowing one's judgment to be diverted by self-interest or some strong emotion, such as anger or jealousy etc.
depraved mass murderers may still recognize that what they are doing is wrong.\textsuperscript{24} This does not mean that people will follow the rules of right reason and be good. It likewise does not mean that the insane will see things the way that other people do. If a patient suffering from paranoid schizophrenia sees us as creatures from outer space intent on devouring small children, he will, quite properly from his own perspective, attempt to save the child and in the process may injure or kill us.

§ 5. The second and third objections - that medieval notions are inappropriate for modern law

The second and third objections, that Natural Law is medieval and Roman Catholic, are being taken together since they essentially make the same point. The religious criticism can hardly be that a notion is wrong because a particular denomination happens to have made it an important part of their doctrinal system. The same could be said of almost any important constitutional principle. For example, Baptists are particularly concerned with the separation of Church and State, and most churches feel strongly about the free exercise of religion. If the anti-ecclesiastical argument has any force, it must be that the Roman Catholic Church is perpetuating an ancient and outmoded dogma in the modern world.

In what sense is Natural Law out of keeping with the modern world? It can hardly be because its most basic position, that there are certain fixed moral principles, is unacceptable to contemporary persons. Nor are the first principles, as outlined by Aquinas, inapplicable in modern society. Modernists may deny the validity of all values except tolerance for one another, and post-modernists may deny the validity of any moral values and purposes whatsoever; these denials are to no avail. The basic values described by St. Thomas seem to be as appealing to modern persons as they ever were.\textsuperscript{25}

\textsuperscript{24} For this reason, few or no insane persons would be able to escape responsibility for their acts under strict application of the M'Naughten rule, which requires that the accused, to avoid liability on the grounds of insanity, must not understand the nature and quality of his acts or be unable to perceive that what he did was wrong.

\textsuperscript{25} It is interesting to note that in the Khrushchev memoirs, published in the United States as \textit{KHRUSHCHEV ON KHRUSHCHEV} (Little Brown 1991), comment on and criticism of the characters and behavior of various persons, was more or less the same as that expressed by people in other countries where religion and conventional morality were not discounted. It has been remarked that a Bishop may have written these comments.
Nevertheless, there is an important aspect of classical Natural Law theory which is very foreign to the modern mind, namely the form of the arguments by which Aquinas establishes his various positions. He proceeds in the geometrical manner favored by the medievals and their classical Greek mentors, establishing first principles as indubitable propositions (axioms), and then developing further propositions from them by deduction. This is not how most people think nowadays. Necessarily true propositions, in current thinking, only exist in purely formal systems, such as arithmetic. Two plus two certainly equals four, but there is no guarantee that this will ever occur in the real world since one can never be sure that any two things are precisely equal. There is thus something very suspicious about Aquinas' arguments. The rabbit comes out of the hat once more, but we are not quite sure how it came to be in the hat in the first place. This mode of thinking has continued in Natural Law thinking right into modern times. 26

§ 6. The final objection - that Natural Law will be morally oppressive

A number of Civil Rights groups are apprehensive of or actively hostile to Natural Law theories on the grounds that if Natural Law were followed their own views would seem to be ruled out of court from the beginning, without their having an opportunity to argue their case. Male dominance will be declared to be "natural" and the acts of homosexuals "unnatural" without further argument. 27 Yet from what has been said earlier, in exposition of Natural Law, it should be clear that particular controversies would seldom be decided without argument. Only the general rules are immutable; particular moral propositions derived from these rules are always subject to exceptions and amendments due to changing circumstances and even changing notions of right and wrong. This can be seen with all of Aquinas' main principles of Natural Law and indeed is frankly acknowledged by St. Thomas.

26. Thus Robert P. George in Natural Law and Positive Law states:
   As I understand the Natural Law, it consists of three sets of principles. First, and most fundamentally, a set of principles whose intelligibility as reasons does not depend on any more fundamental reasons to which they are mere means. Second, is a set of "intermediate" moral principles. Third, are the fully specific moral norms that require or forbid certain specific possible choices.

27. Roman Catholic Natural Law scholars have used Natural Law to support, among other matters, a prohibition on contraceptives, but that position is not compelled by Natural Law principles.
The general principle that we should preserve life is clear and universally accepted, but there are obvious exceptions when life must be taken in order to preserve life. Whether the general rule should be followed or an exception allowed will depend on the facts of the given case and the general circumstance surrounding it. When there is uncertainty as to the facts, there will be controversy as to what should be the rule. The debate about the death penalty indeed turns largely on the question as to whether or not it will have a deterrent effect on potential killers and so save lives. The term “life” can also be viewed in different ways. To some it will include animal as well as human life, and if it were possible, some would no doubt include vegetable life and even bacteria, fungi, viruses and perhaps virions (virus particles) as well. Concern for life can also be taken to include quality of life, so that euthanasia and at least some forms of abortion may need to be considered and debated.

The same thing could be said about the social principle. A good citizen is expected to obey the laws of the jurisdiction, but may in certain circumstances have a duty to disobey them. The Christian martyrs of the Roman Empire and other empires since that time felt that they had no choice but to break the law. The legal duty to report political dissidents to the authorities in Nazi Germany was breached by many for moral reasons; the opponents of racial discrimination felt morally obliged to follow the same course. The laws, which prohibit supporting the enemies of one’s country, are also based on the Natural Law social principle, but citizens who believe that their country is in the wrong may be led to support their country’s enemies. All of these people may be prosecuted in accordance with the law, but they are not necessarily moral wrongdoers in breaking it.

The duty to support one’s family also requires interpretation, so that different rules may emerge. The term “family” itself is capable of different interpretations, and this alone can give rise to controversy. Polygamy, polyandry, divorce, unisexual marriages, may be wrong, but they will not usually be adjudged to be so without argument.

The duty to tell the truth can be difficult to apply in certain cases. Sir Stafford Cripps, postwar Chancellor of the Exchequer in Britain and a scrupulously honorable person, concluded after careful consid-

28. Lethal or maiming force is generally regarded as unlawful to protect property. But it has been argued that a security officer would be justified in shooting, or otherwise seriously injuring, a madman running at a Da Vinci statue with a hammer in his hand.

29. The appropriate maxim is Nemo patriam in qua natus est excusere possit. (No one is allowed to forswear allegiance to their native land).
eration that it was his moral duty to lie about his intention to announce the devaluation of the British pound in his upcoming budget speech. This decision had disastrous effects on his previously untarnished reputation for truthfulness, and it probably permanently affected his self esteem as well.

The cognate duty to seek the truth, the great academic principle, is likewise capable of exceptions and differences of opinion. It has always been considered the duty of researchers to make their discoveries public in order to advance knowledge and hopefully benefit mankind, but this duty has never been easy to interpret in particular cases. Researchers have always raced to be first in making an important discovery or breakthrough, and in the process they have not hurried to provide information to potential rivals. Instead, they held their cards close to their chest. Newton and others wrote in secret code to frustrate any attempt to steal their work. Whether this secretiveness was right or wrong is a difficult question, and it is not getting any easier. A good deal of research must now be carried out in a commercial setting, where projects require massive funding and where discoveries must be protected until they are copyrighted.30

In all of these difficult cases there is room for debate; the facts and circumstances of each case must be determined and considered. This last is no easy task and can be a source of serious disagreement. Factual information is seldom complete and may indeed be downright scarce, so that differences of opinion on moral issues are likely to be a fact of life in modern society.

PART III. PROPOSALS FOR MAKING NATURAL LAW THEORY MORE WIDELY ACCEPTABLE

§ 7. Improving Natural Law theory by substituting modern formalism for syllogistic logic

Modern views of logic and logical form derive from two sources: the game theories of mathematics developed by nineteenth century mathematicians such as Gottlob Frege and the more recent language or logic developments in philosophy based on the work of Ludwig Wittgenstein.31 The gist of these notions is that the formal aspect of

30. The relations between universities, commercial sponsors and researchers have been sufficiently suspicious to call for a government inquiry. The General Accounting Office recently reported serious deficiencies in all of the cases in which they had investigated.

31. See Dr. Stanley McQuade, Medieval Ratio and Modern Formal Studies, 38 AM. J. JURIS. 359 (1993) (discussing the matter more fully).
thinking consists of games, like chess, with pieces, such as pawns, knights, and etc.; rules for the movements of the pieces; and definitions of the end of the game (outcome). The symbols, which together make up the games, may be words (as is commonly the case in law), numbers (as in arithmetic), letters (as in algebra) or icons (as in advanced mathematical work and also in the little figures representing molecules in chemistry). The games may be pure (just created or played for fun) or, as is more commonly the case, they can be applied to scientific research, law, or moral discussion.

In his later thinking, Wittgenstein came to focus on the importance of function (the purpose of the application) for understanding the logic of symbolic games, including language. He felt that his earlier work had focused on descriptive language (nouns and adjectives) and overlooked the fact that language can be used for other purposes, e.g., to issue commands or to make jokes. When a formal game is applied to anything, the project is not properly set up unless the purposes of the enterprise, the goals which it is hoped will be achieved, have been clearly defined. Even when exactly the same formal game is used, if it is employed for a different purpose, the enterprise is not the same; failure to recognize the difference will probably result in formal logical error.

There are thus three elements to be described in applied logics:

1. The actual formal game or games used. This might be a numbers game where something is being quantified, counted, weighed, or estimated as a percentage. It could also be a set of icons, or little pictograms, as used in chemistry, where one ball represents the nucleus, smaller ones represent the electrons, and matchsticks represent the bonds between them. It could of course be a word game representing the elements of some legal category, such as the tort of nuisance.

2. The entity or enterprise to which they are being applied. This could be weighing or selling goods, representing the periodic table of chemical elements, or, in the case of law, settling disputes.

3. The purposes or objectives of the application. In the case of a sale of apples one might be trying to ensure that the goods are truly fungible, each item being roughly the equivalent of the others. In chemistry the objective might be to explain the interactions of chemical sub-

stances. In law the objective might be described as justice, the best harmony of relevant values that can be achieved.

These elements can be expressed graphically as:

\[
\begin{align*}
\text{SYMBOLIC GAMES} & \quad \Rightarrow \quad \text{ENDS or VALUES} \\
\text{[PURE GAMES]} & \\
(e.g. \text{word games}) & \\
\downarrow &
\end{align*}
\]

\[
\begin{align*}
\text{SITUATIONS} & \\
\text{[APPLICATIONS]} & \\
(legal \text{ or otherwise}) &
\end{align*}
\]

The place of values, including Natural Law principles, will normally be in this third part, with the purposes to be served by the application.

If this relatively minor formal change in traditional Natural Law thinking is made, it can be seen that Medieval formal thinking can be transposed quite easily into modern ways of arguing. Indeed it is rather apt for representation in terms of the kinds of formal arrangements used in science generally and computer science in particular.\textsuperscript{33}

\textbf{\S 8. The need to derive more particular moral values from the general principles of Natural Law}

The principal difficulty with Natural Law is not that it is too dogmatic, but that it is too general to be useful in deciding particular cases. The real problem is bringing the broad first principles down to Earth. In the classical version of Natural Law, this was done by deductive or quasi-deductive reasoning. The most general principles were treated like the axioms of geometry\textsuperscript{34} and used to derive less and less

\textsuperscript{33} The anti-logical movement in law, stemming from the pragmatism of Holmes through Legal Realism and continuing as the Critical Legal Studies movement, is seriously out of step with the increasing development and use of formal systems in science, business, and virtually every sphere of life. Deconstructionists see formalism, or foundationalism, as always abusive, an exercise of power over others using words. If I can select the values and symbols to be used, provide some examples of their applications, and persuade you that the game can be "fair" only if you play it my way, I have picked your pocket and you are none the wiser. This is cynicism masquerading as philosophy.

\textsuperscript{34} The clearest example of this way of thinking is in Sir John Fortescue, \emph{Dialogue In Praise of the Common Law} (1537), in which he endeavors to persuade his pupil, the young prince in exile, that knowledge of the law is as necessary to a king as skill at arms. Answering his pupil's astute objection that such knowledge would take too long to acquire, the Chancellor states that a sufficient knowledge of the principles, all that the king would require, could be managed in a single year. He says:
general principles until specific rules were reached, commanding or forbidding certain particular kinds of behavior. Medieval lawyers, for instance, had to travel by deduction from the general notion of preserving life to specific criminal rules; e.g., that it was always murder\textsuperscript{35} to kill someone from ambush (the direct application of the principle) but only homicide to do so in the heat of a quarrel\textsuperscript{36} (the exceptional case). Similarly they had to derive the legal abhorrence of fraud from two basic first principles, namely the need to tell the truth and the social axiom that one should be a good citizen, a good neighbor and a good friend.

Graphically this approach could be represented in traditional logical form as:

\[
\begin{align*}
\text{MOST GENERAL PRINCIPLES (AXIOMS)} & \quad \downarrow \\
\text{LESS GENERAL PRINCIPLES} & \quad \downarrow \\
\text{PARTICULAR RULES} & 
\end{align*}
\]

As was mentioned earlier, it is unlikely that this geometrical method of deriving less general principles and rules from first principles was ever, or could ever have been carried out in practice. But it is clearly necessary that by some means, the transformation of the axioms into more particular rules should be achieved. Otherwise, they are unlikely to be useful in actually deciding moral questions. This kind of scaling down of the moral axioms in fact was accomplished in the law by the development of the legal maxims.\textsuperscript{37} The maxims, of which there were more than two thousand, were pithy little sayings in Latin or Norman-French or occasionally in Anglo-Saxon or English, which were used to help lawyers practice and courts decide cases. They were generally moral in some sense or other, even when they had to do with

\textsuperscript{35} Murdrum was originally the payment that had to be made by a village if a Norman was found dead within its boundaries. The term murdrum later came to be applied to killing from ambush (the original term for this was forsteal). This was a botleas offence, i.e. it could not be purged by paying a sum of money to the family of the deceased person.

\textsuperscript{36} Called "chaude melée" or "chance medley."

\textsuperscript{37} For a fuller discussion of the status of the maxims, with selected examples, See Dr. Stanley McQuade, \textit{Ancient Legal Maxims and Modern Human Rights}, 18 \textit{Campbell L. Rev.} 75 (1996).
apparently neutral topics such as avoiding wasting the court's time. They were often treated as being equivalent to the axioms of Natural Law, but clearly this is not so. They are much too particular for that.\textsuperscript{38} How this scaling down was accomplished is not really known, but it is very unlikely to have been by strict logical deduction. Two or three factors were probably involved in accrediting a maxim, namely:

1. Common consensus of moral opinion, where the transition from the axioms to particular rules were agreeable to all or most parties.
2. Agreement about or acceptance of factual conclusions involved in particular types of cases.
3. Actual evidence on factual issues.

The first two factors are obviously important and surprisingly helpful even in pluralistic societies. A review of a standard collection of maxims reveals surprisingly few that are outdated. Notable examples of desuetude are those concerning the legal importance of the Christian Sabbath (\textit{dies dominicus}) where legal affairs transacted on that day are declared to be invalid,\textsuperscript{39} and some of the maxims relating to family law.\textsuperscript{40} Most of the others command as wide agreement today as they did in the late Middle Ages and early sixteenth century when they were committed to writing.\textsuperscript{41} Similarly, agreement about or acceptance of factual conclusions involved in particular types of cases helped accredit maxims. For instance, it may be taken or widely agreed to be a fact that children brought up in the conventional monogamous home with two parents are more likely to do well and stay out of trouble than those raised in other environments. In the same way, common experience in the legal community can be used to establish fairly particular rules, as where it is stated that clandestine gifts are always suspicious.\textsuperscript{42}

The third factor, actual and established factual information, is always relevant but rarely available. Even when present, it may not be convincing. It normally takes the form of statistical studies which, like clandestine gifts, are always suspicious. This lack of confidence in statistical evidence may be ultimately wrong-headed, but it is understand-

\textsuperscript{38} Typical examples are \textit{Nemo dat quod non habet}, (you can't give (title) that you haven't got) and \textit{Qui peccat ebrius luat sobrius} (injure drunk and pay sober).
\textsuperscript{39} \textit{Dies Dominicus non est juridicus} (Noy's Maxims No. 2) which translates as "The Lords day is not a day for legal business". Deeds created on that day might even be declared void.
\textsuperscript{40} \textit{Uxor non est sui juris sed sub potestate viri}. (The wife is under the authority of her husband.).
\textsuperscript{41} The maxims relating to fraud are good examples.
\textsuperscript{42} Dona clandestina sunt semper suspiciosa.
able. It is the popular perception of statistical studies (e.g., in the realm of health) that what was confidently stated in one year may be qualified or even denied in the next. 43

The maxims of the law then support the proposition that practical and useful intermediate and particular values can be developed, especially by means of common consent. This resembles the hypothetical bargaining process described by Professor Rawls 44 but with one essential difference. It assumes common values, the basic axioms of Natural Law, which allow one to arrive at humane and useful moral positions without the dubious, complex arguments required by Rawls in his attempt to reach the same ends starting from rational self interest. 45

§ 9. Are intellectual and moral integrity infringed by accepting the doctrine of Natural Law?

The final hurdle to be overcome in persuading the majority of the legal community in general, and human rights advocates in particular, to integrate Natural Law notions into their thinking, is the feeling that by buying into Natural Law they are somehow compromising their intellectual integrity, like swallowing a tablet when you are not sure what kind of pill it is. The answer, in brief, which will be spelled out more fully in this and the following sections, is that Natural Law theory is not a single homogeneous theory. There are several possible formulations from which to choose and it is likely that one or the other of these will prove understandable and satisfactory to most shades of philosophical and political opinion.

43. Dr. Robert Campbell, a psychologist and long time compiler and analyst of statistical data, wrote as follows:

I firmly believe that nothing in the history of scientific psychology has retarded progress as much as has the concept of statistical significance. This concept was originally developed to relieve the investigator of deciding what was important and - regrettably - a good many investigators have been willing to have that power taken out of their hands -- I have two quarrels with this: first, any researcher who does not know his area well enough to know intuitively - - when he has found a meaningful result, can hardly be expected to advance the edge of truth very much. Second, factors whose influence can be detected only when compared with chance are so trivial that they might as well be ignored. Psychological findings established by "different from chance" methods are so chaotic that if laid end to end, they would make a pretty good table of random numbers.

ROBERT CAMPBELL, HANDBOOK FOR THE STRONG VOCATIONAL INTEREST BLANK (1971).

44. JOHN RAWLS, A THEORY OF JUSTICE (1971).

45. Barry, supra note 7, (commenting on Rawls' thesis, says that "If you put nothing but wants in at the beginning, you can get nothing but wants out at the end.").
The learned expositors of Natural Law theory have pointed out that it has existed in many forms at different times. The varieties of Natural Law theory are in fact protean, but for present purposes they will be classified according to their theoretical bases, i.e., the reasons for accepting them, rather than other differences between them. From this perspective, Natural Law doctrines can be expressed in one or another of four different forms.

1. Theological versions. These derive the authority of value systems, including Natural Law, from their Divine origin. There are several sub-types here.
   a. The values have been actually promulgated by the Divinity. This was a common feature of systems of law in the ancient world, e.g. the Code of Hammurabi and the Mosaic Codes.
   b. The ability to perceive and understand the common values has been imprinted into human nature by the Deity. This is probably the preferred option of St. Thomas.
   c. The values themselves have been imprinted into human nature by the Deity, much as programs are executed on to the hard drive of a computer. They are “written on the heart.” They may be distorted by human sin, but cannot be eradicated. In fact they are hard wired (genetically, perhaps) into the system so that they cannot be removed by anything short of destruction of the mind. This last may represent the ultimate view of David Hume.

2. Philosophical versions. Here the value systems are set in the context of and derive their authority from some more general philosophical positions. These are usually world views (ontologies) of some sort or another and may be theological, non-theological or even anti-theological.
   a. The theological versions may be illustrated by the common pattern of St. Paul’s Epistles, where in the earlier chapters he lays down a theological groundwork and in the remainder draws conclusions about behavior.
   b. Non-theological versions may be represented by nineteenth century objective idealist philosophies such as those of Hegel or Marx. Hugo Grotius’ establishment of Natural Law principles as non-theological axioms would also fall into this category.

47. For a defense of this view from a theological position, See J. Budziszewski, WRITTEN ON THE HEART: THE CASE FOR NATURAL LAW (Intervarsity Press 1997).
48. See option 3 infra.
49. Grotius has been taken by most scholars to have placed himself in this category by his famous statement that even if we were to grant that God does not exist (etiamsi
c. Anti-theological versions can be represented by the views of more radical types of Existentialist philosopher such as Heidegger and Sartre. These paint a somewhat depressing view of human existence and then attempt to develop a practical response to the situation of a more or less positive nature.50

3. Psychological versions. Our values, in this view, are part of our psychological make up. No better reasons can be given for them, and as such they are inescapable. They are there and we cannot shake them off.51 This would appear to have been the ultimate, though not the favorite position of the Scottish philosopher, David Hume. As a radical empiricist, Hume began by positing that all knowledge derived ultimately from impressions entering the mind through the senses; there was no a priori knowledge existing without sense experience.

From this starting point he concluded that there was no reason to believe in cause and effect, in the independent existence of external bodies, or in the existence of minds other than our own. He even saw no reason to believe in the continuing existence of our own selves (personal identity), since all that we immediately perceive are present impressions of ourselves coupled with memories of a similar self existing, e.g., last night. The only connection that we can show between our present and previous selves is resemblance; there is no way of knowing, on Hume's empiricist premises, that the two are identical. Hume, on this showing, has passed as the supreme skeptic, but there are indications here and there in his writings that his ultimate opinions were otherwise. In his Enquiry Concerning Human Under-

daremus- - Deus non esse); the principles of Natural Law would still have validity. This may be one element in his thinking but does not represent the entirety of Grotius' views on the subject. John Finnis, Natural Law and Natural Rights (J.L. A. Hart, ed., 1980) (citing Hugo Grotius, De Jure Belli et Pacis, Prolegomena, para. 11 (trans. Kelsey, Oxford 1925) (1626)).

50. Heidegger takes the most basic human experience to be a feeling of nothingness, that life has no meaning, which gives rise to angst (dread). An important factor driving home this thought is the human experience of death, the knowledge that we shall all inevitably perish. The positive value proposition which he draws from this fact is that, as fellow condemned creatures, we ought to be very tolerant of one another. In view of the fact that we are about to die, sooner or later, our differences with and grievances against one another seem very small. Hubert L. Dreyfus, "Heidegger, Martin" Microsoft ® Encarta ® Online Encyclopedia 2005 at http://Encarta.msn.com/encyclopedia_761553935/Heidegger_Martin.html#endads ("The feeling of dread (Angst) brings the individual to a confrontation with death and the ultimate meaninglessness of life, but only in this confrontation can an authentic sense of Being and of freedom be attained.").

51. A modern example of such a position may well be James Q. Wilson, The Moral Sense (First Free Press 1997).
standing, Hume points out that while no one can refute the skeptical arguments, no one can believe them: we cannot apply them in practice and as soon as we stop philosophizing and return to our ordinary activities, they are forgotten and we believe as we always did.\textsuperscript{52} This was probably not a palatable conclusion for Hume and will be found only as a hint or a footnote here and there, but it appears in all his writings. He observes for instance in his works on moral philosophy and in the \textit{Dialogue Concerning Natural Religion}, that his real views are little different from those of anyone else.\textsuperscript{53} His philosophical cavils remain and cannot be refuted, but the skepticism which they imply cannot be believed. Whether these considerations place Hume in the same category as Aquinas, so far as morals are concerned, and with Kant, so far as the notions of physical objects, persons, and causation are concerned is a nice question. There is reason to think that he viewed all these objective notions as inescapably and unavoidably part of human nature. He also probably thought that they were implanted there by something Divine.

4. \textbf{Pragmatic versions.} These views consider the moral principles of Natural Law as a consensus of ideas that have been found generally useful, and so obtain widespread acceptance. This is the view of John Austin,\textsuperscript{54} and a number of modern writers can be found who explicitly or implicitly adopt this approach. Such writers will accept the common values of mankind and argue no more about them or their origin; further inquiry, from their perspective, is wasted effort since the questions are ultimately unanswerable.

\textsuperscript{52} \textit{DAVID HUME, AN ENQUIRY CONCERNING HUMAN UNDERSTANDING} (Tom L. Beauchamp ed., Oxford 1999)(1748). ("But a Pyrrhonian [extreme skeptic] cannot expect that his philosophy will have any constant influence on the mind: Or if it had, that its influence would be beneficial to society . . . . Nature is always too strong for principle. And though a Pyrrhonian may throw himself or others into a momentary amazement and confusion by his profound reasonings; the first and most trivial event in life will put to flight all his doubts and scruples . . . . When he awakes from his dream, he will be the first to join in the laugh against himself, and to confess, that all his objections are mere amusement, and can have no other tendency than to show the whimsical condition of mankind, who must act and reason and believe; though they are not able, by their most diligent enquiry, to satisfy themselves concerning the foundation of these operations, or to remove the objections, which may be raised against them.").

\textsuperscript{53} \textit{DAVID HUME, DIALOGUES CONCERNING NATURAL RELIGION} (Martin Bell ed., Penguin 1990).

\textsuperscript{54} \textit{JOHN AUSTIN, THE PROVINCE OF JURISPRUDENCE DETERMINED, LECTURE V 178} (Promethius 2000).
§ 10. Choosing the optimal version of Natural Law

If we assume that values are necessary for the development, interpretation, or justification of laws, we are driven, by the lack of a feasible alternative, to consider the adoption of some version or other of Natural Law. The only remaining question, then, is “which one?”

1. The pragmatic alternative. For those still apprehensive of Natural Law doctrine, the least threatening alternative is the fourth, the pragmatic version. It comes with little or no metaphysical or theological baggage; and it would allow us to employ the typical list of basic values commonly accepted in most societies, in order to develop or evaluate legislation or judicial decisions. Nevertheless, it may not be the best choice. It comes up short on two counts. First, it begs the question as to why these values are so widely held. Second, these values lose some of their authority when we are told they are simply widely accepted. At one time the view that the earth is flat was widely accepted. If these values are only to be followed because most people think they are useful, there seems to be no good reason why they should not be ignored when they are contrary to our individual interests, provided of course, that they can be ignored with impunity.

2. The psychological alternative. The psychological alternative has similar drawbacks. It too leaves open the question as to how the Natural Law imperatives came to be imprinted in our nature. It is likewise weak in its authority to require obedience. The presence of the Natural Law values does not compel us to obey them, only to admit that they are right and that it is our duty to obey them. We could then, given a conflict between the law and our personal interest, view them as mere psychological hang-ups which we may be able to overcome. If not, we may choose to accept a little guilt as the price of considerable gain.

3. The philosophical alternative. This is a better choice in that metaphysical pictures of the nature of the universe provide a cosmological background and explanation for moral principles. There is also the implication that breaking these rules and acting contrary to them is cutting against the grain, and as such is bound to be difficult and unprofitable in every case. There may, however, be two problems here.

   a. The first is that the cosmological picture may not be credible. This point will be discussed in relation to theological ethics.

55. Ernest Bramah, in his Kai Lung stories, has rival Chinese philosophers disputing, with suitable supporting arguments, about whether the world is suspended from a celestial spider by a thread or rides on the back of an enormous turtle; or whether the universe is proceeding from nothing to anything or from anything to nothing. ERNEST BRAMAH, KAI LUNG’S GOLDEN HOURS (1938).
b. The second is the old philosophical dogma that one cannot argue from "is" to "ought." Consequently, ontology and ethics are not linked together in any way. This argument, despite its wide acceptance, is little more than a verbal quibble. It is clearly true that "is" and "ought" are distinct terms and neither is the equivalent of the other. It is not true, however, that the two are dissociated and cannot affect one another. The duty to preserve life, or any other duty, is carried out in the context of factual situations that clearly influence whether and how the duty is to be performed. And since the nature of the universe is the ultimate and complete set of circumstances in which we act, our notions as to what sort of place the universe is, will affect the ways in which we carry out our moral duties.56

4. The theological alternative. This, it is submitted, is the preferred option in Natural Law for a number of reasons.

a. It explains and supports Natural Law which, without it, hangs between heaven and earth like Mohammed's coffin. Natural Law has always functioned in a theological context of one sort or another. The Stoic version of Natural Law, which was incorporated into the thinking of the Roman jurisconsultants, was set in the context of a cosmology or perhaps a theology, which saw the universe as a great mind and so emphasized the importance of thinking and intelligence. Humans have the ability to think in an excellent degree compared to animals and so are to be respected. Much of the Stoic ethic followed from this ontological principle which emphasized the value and dignity of all persons and that we should render to each one whatever was his due. This notion in turn gave rise to the Roman Law doctrine of equity: the equal and fair treatment of individuals. And this was required because all persons share in some measure the divine property of mind that made them worthy of respect. The laws of the Bible, in both Old and New Testaments, likewise explain their rules by reference to theology, mainly using the concept of the character of God as the reason for laws.57

Some authors, who clearly belong in the Natural Law tradition, have been quoted as holding that Natural Law, deriving from axioms, has a purely logical foundation and does not require any theological

56. G.K. Chesterson, a bachelor condemned to live in lodgings, allegedly reported that he always discussed with prospective landladies their views of the nature of the universe, and claimed it was a most reliable indicator as to how he would be treated.

57. The Ten Commandments begin with the statement "I am the Lord thy God" and the nature and acts of God are constantly given as reasons for rules. Exodus 20:2. Similarly in the Sermon on the Mount, the nature of God is given as the background reason for the principles. Matthew 5:3 - 7:29.
underpinnings. This opinion has been attributed to Aquinas and more especially to the Dutch lawyer and theologian, Hugo Grotius. Grotius' most famous sentence is that even if we were to grant that God did not exist (etiamsi daremus -Deus non esse) - which would be most wicked - Natural Law would still have a degree of validity.\textsuperscript{58} It is to be doubted, however, that a complete dissociation of Natural Law from theology can unequivocally be attributed even to Grotius,\textsuperscript{59} much less Aquinas. They, along with most interpreters of Natural Law, beginning with classical Greek writers, viewed the law of Nature as the voice of reason indicating the Divine will. But a certain dissociation between theology and conscience (in the sense of right reason) can be seen and may even be desirable for some purposes. Grotius valued it in order to establish international commercial laws without the confusion which might be engendered by religious and theological debate; and it may also be helpful in relation to the present inquiry. But it is not necessary, nor even advisable, to dissociate the two entirely. Finnis, for example, points out that while a theological context is not absolutely necessary for Natural law, it is an appropriate and helpful setting. It is possible to give an account of Natural Law without explicitly considering its possible theological underpinnings, but it will thereby lose something in explanatory power. There is an unanswered question as to the origins lurking behind it, which insists on popping out on the slightest excuse. In the same way, many influential modern physicists have been saying that the arrangements of the natural phenomena which they study presuppose an intelligent Creator. But as a practical matter it is possible, and indeed usual, to study physics without referring to this explanatory background.\textsuperscript{60}

b. The theological alternative provides a reason for obeying the law other than its inherent "rightness." A belief in a righteous overseer of human affairs is a powerful incentive to act according to Natural Law and to respect any legal system which can credibly claim to be based upon it.

\textsuperscript{58} FINNIS, 44, supra note 49.

\textsuperscript{59} See discussion of Grotius' views, supra note 49.

\textsuperscript{60} Finnis' example is that laws of molecular motion, which can be discussed without an explanation of their foundation in the nature of things, seem to require and benefit from such explanation. See FINNIS, supra note 49.
§ 11. Can a version of Natural Law, built on a theological framework, be used as a guide for positive lawmaking in a pluralistic society constitutionally committed to the disestablishment of religion?

There are clear advantages in adopting Natural Law as a foundation for a legal system, or indeed beyond law as principles for ordinary living. It has been asserted here that a theological form of Natural Law connected to the God revealed not only in nature, but also in the text of Holy Scripture, as is the Thomistic version, is the preferred option. The question now arises, can a version built on such a theological framework be used as a guide for positive law making in the context of a pluralistic society that is constitutionally committed to the avoidance

61. There is no monolithic theological version. The theological versions vary in large part on the basis of their appeal to an inspired text. Some, because of their concern for the consequences of sin on our ability to extract natural law principles, have appealed regularly to such text to norm the Natural Law doctrine. See BUDZISZEWSKI, supra note 47 or David Smolin, The Enforcement of Natural Law by the State: A Response to Professor Calhoun, 16 U. DAYTON L. REV. 381 (1991). Others, like Grotius, have built their natural law theory with little or no reference to the church or its authoritative texts. It would appear possible to build a theological version (but not the most theologically orthodox version) on the convictions that Robert Bellah has identified as those that shape what he has called “American Civil Religion.” See Robert Bellah, American Association of Law Schools Law and Religion Panel: Law as Our Civil Religion, 31 MERCER L. REV. 482-85. This kind of common set of theological beliefs was described traditionally as “natural religion.” This set of very basic beliefs has generally been represented by a set of propositions such as the following.

a. That the Universe is the handiwork of an intelligent Being.

b. That this Being is concerned about right and wrong (i.e., moral notions such as are expressed in St. Thomas’ main principles of Natural Law).

c. That this Being has imprinted these basic moral notions in the nature of every human being.

d. That this Being is concerned about the plight of the distressed and disadvantaged. (i.e., humanitarian concerns) and has imprinted a sense of such concerns in every human being.

e. That this Being is concerned about the management of the created Universe (i.e., environmental concerns) and has imprinted a sense of such concerns in every human being.

Apologists including Aquinas have sought to demonstrate that this set of basic ontological propositions (natural theology or whatever one wishes to call them) is inherently plausible. The improbability of a random or accidental creation of the world as we know it, almost exceeds our ability to visualize the numbers involved in calculating it. This is widely accepted, even, or maybe especially, among theoretical physicists. See DAVID FOSTER, THE PHILOSOPHICAL SCIENTISTS (BARNES & NOBLE 1993). The remaining propositions rest on the facts of our own nature and the improbability that a Creator who was impersonal, immoral, and unconcerned, could have created us. Such convictions are inherently believable and thus could command general respect. They are not equivalent to saying that the world rests on the back of a gigantic turtle.
of the establishment of religion. 62 We most definitely believe the answer to be yes.

First, there is no Establishment Clause violation when a theological justification for a rule can be or is offered. While all laws connected with moral obligations serve to demonstrate the point, a few particular examples may be helpful illustrate. The Civil Rights Movement and the federal and state laws that resulted from it were to a large degree built on and justified by a theological version of natural law. Those resultant rules are neither culturally nor constitutionally suspect because of that connection.

Even the Constitutional Convention provides an example. As Marci Hamilton has pointed out, there was a strong consensus at the Convention that power should not be held by a single entity or individual, but instead should be shared. 63 Similarly, even the issue of shared political power at the Constitutional Convention illustrates the point. Some at the Convention came to their position based largely on their religious convictions regarding the fallen nature of humankind. Others at the Convention came to the same conclusions not on the basis of theological convictions with regard to the fall, but simply as a result of historical study or sheer political pragmatism. The fact that theological justifications were offered in support of our Constitutional structure does not make the Constitutional structure suspect under the Establishment Clause.

These examples illustrate that theorizing, including theorizing about the common good, is always built on foundational (pre-theoretical) convictions. 64 From a Constitutional perspective then, it is the substance of the theorizing (state-mandated scripture readings or prayers in schools) 65 and not the pre-theoretical convictions that serve as the foundational justifications for a law that raises establishment concerns.

Therefore, in this pluralistic culture we can assume that many foundational convictions will lead to theorizing about the common

62. U.S. CONST., amend. I ("Congress shall make no law respecting the establishment of religion . . .").
64. Some have argued that all of these foundational convictions are theological in nature. See NICHOLAS WOLTERSTORFF, REASON WITHIN THE BOUNDS OF RELIGION (1976); ALBERT M. WOLTERS, CREATION REGAINED: A BIBLICAL BASIS FOR A REFORMATIOINAL WORLDVIEW (1985).
good. Our purpose here has been to encourage those who struggle to find norms for positive law to ground those norms in a theologically-developed theory of Natural Law. It will provide not only guidance for lawmaking, but also a reason for obeying the law and a legal system that can rightfully claim that it is grounded upon it.

PART IV. SUMMARY AND CONCLUSIONS

§ 12. A brief review of preceding arguments

1. There is a widespread perception of the inadequacy, indeed impracticability, of positive law, which rests on no other foundation than that it has been properly enacted by the appropriate legislative and regulatory agencies of the state. A moral foundation is required both to encourage a law-abiding attitude among the general population and also to act as ends and goals for laws which permit them to be improved and interpreted. This is the good news auguring well for the future of Natural Law theory.

2. The bad news is that there is considerable uneasiness about the adoption of Natural Law notions, especially among human rights advocates. There is the feeling that it would preemptively nullify any effort by rights groups that have not traditionally received protection.

3. The concern of such groups is that they would be ruled out of court with no way to state their case: their views would simply and dogmatically be declared contrary to Nature. Such objections are based on the notion that Natural Law consists of sets of specific rules. The classical version of Natural Law does not support this notion, but claims rather that only the most general principles are self-evident axioms which leave no room for argument. Less general principles, and particular rules derived from these first principles, admit of exceptions and also may vary with time and circumstance and cultural inclinations.

4. The point was also made that the misperceptions of Natural Law are to a considerable extent due to difficulty in reading the literature on the subject. This difficulty was attributed in part to the fact that Natural Law advocates write for one another, conducting bloodless battles, and that insufficient effort is put into explaining the matter in terms that would be understood by the generality of the legal profession and the community as a whole. A simplified, and perhaps oversimplified version of Natural Law was outlined in order to take care of objections based on misunderstandings of the doctrine.

5. The other objections to Natural Law boil down to the perception that it is ancient and outdated, with no credibility in the modern world. There is some substance to this argument in the sense that the
medieval arguments for and presentations of Natural Law appear somewhat antiquated to modern readers. Formal adjustments in the theory were suggested; it was urged that the medieval syllogistic logical form should be replaced by more current logics, especially the language/logic notions deriving from the later, revised thinking of Ludwig Wittgenstein.

6. All formal systems, including mathematics and logic, are currently viewed as games, like chess, with pieces, moves and a definition of winning. Law can be defined as sets of word games applied to disputes (actual or potential) to achieve certain goals and objectives. The Natural Law elements would feature in this scheme not so much as part of the game structure but rather as an important set of objectives and goals. Disputes should be decided or laws enacted so as to achieve the optimum accomplishment of these values. Justice can indeed be defined in such terms as a harmony of values.66

7. The greatest difficulty with Natural Law is the generality of its principles so that they are not apt for deciding particular cases. The general principles (axioms) must be translated into more particular forms in order to be useful. The medieval legal maxims represent such particular value statements. The manner of their production is unknown, but is unlikely to have been deduction. Probably they were rested on substantial agreement among the members of the community in general or in the legal community, or both. This process was described as a version of Rawls' contract theory, but with the difference that the medievals would have started with the main Natural Law principles, not rational self interest.

8. With regard to the acceptance of Natural Law by the generality of lawyers and the wider public, it was pointed out that there have been and are a number of versions of the theory. Four in particular were considered, which are relevant to the present discussion, since they relate to the forms in which different people have deemed the theory to be acceptable: theological, philosophical, psychological and pragmatic versions of Natural Law.

66. Plato describes justice as being like the proper tuning of a lyre, i.e. a harmony. The question of how these principles are to be balanced is left open here. It was mentioned earlier that one group of Natural Law advocates claim that they can be hierarchically arranged, i.e. some are more important that others. Grisez and Finnis, on the other hand, insist that they are incommensurable. One wonders if a scoring system, numbering the principles and adding or subtracting to produce a summated score (after the manner of decision theory in medicine and elsewhere) might be considered.
9. One or other of these versions should be acceptable to most people; but it was argued that the theological types are preferable, as they both explain why the law is as it is; and also make it more authoritative, and so likely to be respected and obeyed.

10. It was argued that the theological version that connects to the character of God as revealed in nature and Scripture, one like Thomas' version, is to be preferred, because of the support which it provides both for moral values and positive civic virtues.

11. Finally, the question of whether a theological version of Natural Law could be used as a guide for positive lawmaking in a pluralistic society that is constitutionally committed to the disestablishment of religion was considered. It was argued that such a version could be used without constitutional objection, because the Constitution is concerned with whether the substance of the law, not its conceptual foundations and justifications, constitute an establishment of religion.

The objectives of this paper, in short, have been to present a simple understandable version of Natural Law, to meet objections to it, and to suggest that without compromising the pluralistic values of disestablishment, it could be adopted as the theoretical value foundation for those involved in the formation of a legal system.

§ 13. Final pitch to those hesitant about accepting Natural Law notions

We have here a fine product. It was designed in ancient times and has proved itself capable of being adapted to meet the needs of every age, both legal and societal. It provides, as it has always provided, a basis for living together in harmony and moving forward to better arrangements of our affairs. Think of its advantages.

1. It supports, theoretically and practically, the basic axiom that right is right and wrong is wrong (first principle). It allows that there can be differences of opinion as to exactly what is right or wrong in particular situations; but if this crucial element is not in place, we have no basis for discussion and ultimately no direction, except blind expediency, as to which road we should take. We may differ on detailed matters, but we must begin here as St. Thomas did.

2. It promotes respect for human beings and efforts everywhere to aid the plight of the victims of war and other distressed people. This relates to the second principle of Natural Law, which should not be confined in its social applications to issues such as abortion and the

67. This principle has been much abused and curtailed in its applications in law. It has been characterized by a number of judges, with no hint of reservation or doubt, as the first principle of Natural Law, which it is not, and worse, that it consists of the right and duty to preserve one's own life. This may be all that the law asks of us, but it
death penalty, important as these are. People are killed everywhere for lesser reasons or no reason at all, the right to life seems to end at birth. Respect for life implies a commitment to humanity, to the lives and welfare of people everywhere, present and future. St. Thomas' proof of this axiom is interesting. He states the basic principle that every human being has good ends or goals which must be achieved, and that we live in order to achieve them. In short, commitment to life is not preserving mere existence, though that is a necessary part of it. It is encouraging and aiding one another to achieve the good goals and ends that we know, in our heart of hearts, we ought to be striving toward.

3. It supports efforts to improve family life (third principle). There is debate about the nature of the family, which is perfectly acceptable under classical Natural Law principles. Everyone should be free to make their case and should not be unfairly discriminated against for their final opinions. However, it certainly appears that the common consensus of humanity, coinciding with such evidence as there is, is that the best model here is the traditional family unit of loving parents uniting to create a home environment where children can be nourished in every way and encouraged to achieve their full potential. This perception of the matter may turn out to be wrong; St. Thomas has clearly pointed out that our views as to how it applies in detail can change with time and circumstance. But we must make present judgments and until clear evidence suggests otherwise (and opponents have here the right and duty to make their case about the nature of family life) it most certainly is very arguable that the traditional family represents the central paradigm which should be supported and encouraged by every honorable means.

The paradigm of the traditional family is probably the most controversial of the Natural Law principles; political opponents at the end of the day may remain suspicious and hostile. But this pitch must also be made to society as a whole who, in the interests of justice, need to be convinced that it does not unfairly compromise those who do not agree with it. And it should not be seen as unfair but indeed advanta-
geous to its opponents. They are trying to plot a course in untried seas and should consider that their experiment might be a failure. In the meantime, they are not only able to pursue their course and make their case but also benefit from the more tried and proven notions of society about the benefits of the traditional family. They should not complain then if the law goes along with this general presumption and endeavors to promote and encourage it. They have lost nothing that they already had, and may have gained something else in the process.

4. Natural law supports social concern, civic duty and social actions to improve the human condition. This is the fourth principle of Natural Law, which indicates that we should be good friends, good neighbors and good citizens. It has many applications. Generally it supports any action to improve the conditions of mankind. It also undergirds efforts to improve harmony in the community and human relationships generally. In the context of law and government, it means that we should actively participate in civic affairs and accept offices, large or small, when called upon to do so. Accepting office for the right reasons is no easy trip, and it is not for the faint hearted. But public service should not be left to those seeking office for the wrong reasons. The only acceptable motive for public officials, according to Natural Law, is concern for the common wealth and the desire to serve well. We are all human beings and other motivations enter into our actions, but if this one is not present and overriding, we should not be in positions of responsibility. Conversely, the ultimate motivation of all members of society should be directed to the same end. There is much need for Natural Law advocacy here. We are inclined to pay lip service to this principle, urging that whatever measure we propose or support is for the public benefit. It is common, however, for self interest to dress itself up in the garments of justice and trumpet itself as seeking justice and acting pro bono publico.

Most importantly, Natural Law supports honesty in general and academic honesty in particular. This is Aquinas’ fifth principle of respect for truth, and it has two aspects. In personal and public life it has to do with being truthful and above board in dealing with one another. In the academic world it is the basis for the eternal search for truth, both intellectual and practical. St. Thomas and his generation placed great emphasis upon this latter aspect, tramping bare footed over muddy roads in winter across Europe in order to find teachers who would help them acquire knowledge and further their desire to know what was true and what was really good. This value is currently very much under philosophical and cultural attack, both in the academic world and in business and private life also.
Post-modernism indeed has raised again the old Sophist contention that truth is a dream and that all we have is opinion (is this sophistical view a dream also?). This view has been widely promoted in recent decades, and with some success. The skeptical comment of the late, lamented Pontius Pilate on truth has many advocates, some of them within the law. But there is no sensible alternative here. If there is no truth, there is only advocacy, the ability to make all propositions, whatever, seem good. Esse quam videri is reversed and made to stand on its head. But this road leads nowhere and indeed has little to recommend it. It makes nonsense of scientific progress of all kinds and indeed would make any kind of serious thinking impossible. David Hume's comment, mentioned earlier, is apt here. After spending most of his energies exposing the weakness of all commonly held opinions, he commented that Pyrrhonism (skepticism), while ultimately irrefutable since all propositions admit of doubt, is also unbelievable. We cannot live like that and we cannot even consistently think like that for very long. We must then be advocates for truth and make these points publicly, using every opportunity to do so as effectively as we can.

These basic principles, well expounded by St. Thomas and in our own day also, have wide - if not universal - appeal. They have been offered here in four models, the pragmatic, the genetic, the philosophical and the theological. We heartily recommend the last. It makes all the difference in the world if a theory is deeply grounded in the nature of things. And the nature of things is ultimately a theological question even if the question is answered in the negative.

The advantages of a theological version of Natural Law like that of St. Thomas, connected to the character of God revealed in nature and in Scripture are particularly obvious in the area of rights advocacy, whether human, environmental or animal rights. The arguments of secular rights advocates have always been more effective because they do not deny but accept the benefits of theological support in the community at large. Without this they are weak, if not ridiculous. We are

70. Esse quam videri (to be, not merely to appear to be) happens to be the motto of North Carolina, but we live in the age of "spin" where public relations are deemed all important. Public relations are important, but they must be based on what we really think and do, on truth, not just expediency.
71. This is the reason behind Lord Rutherford's comment, variously reported, that statistics is a terrible way to do science. Statistical studies only become truly believable in the context of the theoretical structures and mechanisms underlying them. Until this point one wonders if they are soundly based or not. See Campbell, supra note 43 (discussing the difference between validity and significance in statistical studies).
urged to be concerned for the future, when the world will become a polluted sewer and children will be born with two heads and three feet. But why should we care? We will not be there when it happens, especially if we are wiped out first in a nuclear war. Such concern as we may have for our children and grandchildren will likewise not help much; the future is their world and they must do what they can with it. We have more pressing needs in the present and will not be induced to worry much about the future without the notion of duty and the hope of ultimate success, which largely derives from our occult or overt theological views.

The ultimate motive for caring for the environment is the notion of stewardship: we hold these things in trust. But until we decide where the trust originates, it is a legal fiction with little power to control our preoccupation with present crises or to dim perceptions of long-term effects of our practices on humanity as a whole. The Genesis story of the earth\textsuperscript{72} as the garden in which man is placed as manager and curator, is the best, if not the only basis for environmentalism. The same holds for animal rights. The prudential arguments used to support animals rights concerns, are likewise unconvincing and indeed almost ludicrous. It is said that in allowing endangered species to disappear, we may be depriving ourselves (or more likely future generations) of a cure for cancer or some other disease, concealed within the tissues or glandular secretions of these creatures. It is also argued sometimes, more by implication than up front, that Nature has been evolving by trial and error for so long that it is dangerous to disturb the balance.\textsuperscript{73} This is also unconvincing especially if the process is seen as fortuitous and blind. Species have been disappearing for eons before we appeared, and although this has accelerated in our own times through increased population spread and rising pollution, we are still here and are likely to be here for the foreseeable future. If Nature is only a blind process, we might well get away with ignoring its behests, if it has any; for we have done it in the past, with some success if not with impunity. The only real reasons for preserving species, be they plant, animal or whatever, is that they are wonderful things from the hand of an intelli-

\textsuperscript{72.} \textit{Genesis} 1:26; 2:15.

\textsuperscript{73.} Nature or Evolution is commonly portrayed in otherwise excellent nature conservation programs, as a sort of quasi-deity, with attributes of wisdom and experience, which should not be ignored. At the same time it is being openly described as a blind process proceeding by accidental variation and natural selection. And this is presented as if it were a proven axiom of biological science rather than an article of faith, and an implausible one at that.
gent and artistic Creator, exactly the way in which theological version of Natural law portrays them.

§ 14. Final pitch to the legal community

Natural Law theory is not only relevant to social reformers, rights activists and the public in general. It also has had long and important associations with law from the earliest times; indeed it was mainly the legal community that emphasized its importance. It would seem to follow then that if it is to be restored to its proper place as the foundation of legal and community morality, much of the work will be devolved on the legal community, and especially on the law schools. Legal scholars must continue to study and elucidate its nature and its application; teachers must then explain it as clearly as possible. Attractive course materials should be developed and made available to law schools and, perhaps more importantly, to universities generally. And finally we must carry the message to the community at large. We have an excellent product and if we busy ourselves in the task of promulgating and promoting it we could expect some success. We must, as part of this process, attempt to meet the objections of oppo-

74. Savigny's view of the legal profession might be relevant here; namely that, with all its branches taken together, it constitutes a collegium in the medieval sense of the word, a collection of professional persons devoted to maintaining and promoting the good objectives of their craft. The custody of the law ought then to be entrusted to the legal profession, which, generally speaking, is the case. Legislatures may feel that they have the final word but they are careful in most jurisdictions to filter their proposals through a committee of lawyers. This is done to make sure (or attempt to do so) that the final product is fitted properly into existing legal forms and expressed in clearly understandable legal terms. The supreme business of the legal community, according to Savigny, is legal science, harmonizing and organizing the jumble of legal materials spewed out by courts, legislatures and government agencies into apt and usable forms; but there are other requirements. The aims and objectives of the legal community must be articulated and observed and explained to outsiders. This would mean that it is part of the business of lawyers to promote knowledge of and respect for its goals in the community at large. Applied in present circumstances, this would mean that the legal profession should take up the question of Natural Law first and then, if satisfied as to its bona fides, proceed to commend it to society in general. Savigny substituted the volksgeist (spirit of the nation) for Natural Law, which he did not really understand. This vagary is easily corrected and should not be allowed to obscure the numerous excellent notions about the legal profession which he developed and promoted to the betterment of the German universities generally and law schools in particular. See Friedrich Karl von Savigny, Of the Vocation of Our Age for Legislation and Jurisprudence (Abraham Hayward Trans., 1831) (1814).

75. The Campbell law faculty have developed a whole set of computerized interactive materials on Jurisprudence topics generally (including Natural Law) using Click-2 Learn software produced by Asymetrix, Seattle.
ments and if possible bring them over to support at least some version of Natural Law. This may be a more difficult task, but we have a duty to explain it and enter into dialogue with them. It is possible that better understanding of the subject may get rid of most objections and assurances that it is not a secret weapon to be used against them may allay at least some of their suspicions.

76. Abraham Lincoln's view of destroying his enemies by turning them into friends is obviously a better approach than attacking them. Of course this ideal may not always be possible. One version of the Irish Blessing may be more realistic: "May you have no enemies; if you have enemies may they become your friends; and if they will not, may they sprain their ankle so that you will know them when you see them."