What Natural Law Is Not: Distinguishing Natural Law from Other, Related Normativities

Santiago Legarre[1]

ABSTRACT

"Natural law" in this paper does not mean what it means in three different contexts in which the expression sometimes is used. This paper shall indicate in what respects the meaning that the author holds to be focal has something in common with and how it differentiates from the other meanings. In so doing, this paper will inevitably start to define natural law.

[1] LL.B., Universidad Católica Argentina; M.St., Oxford; Ph.D., Universidad de Buenos Aires. Professor of Law, Universidad Católica Argentina; Independent Researcher, CONICET (Buenos Aires); Visiting Professor, Notre Dame Law School (Indiana) and Strathmore Law School (Nairobi).

INTRODUCTION

Natural law requires an explanation. To do so, it is useful to explain first what natural law is not. Given the unending confusions, both terminological and conceptual, this clarification is virtually necessary, and is tackled in this paper.

The term "natural law" is confusing and misleading—so much so that Finnis, the leading contemporary natural law scholar, has written a lengthy book, *Natural Law and Natural Rights*, throughout which he avoids using the term "natural law" consistently and purposefully to prevent misunderstandings.[2] Furthermore, "natural law" has an old-fashioned ring to it that might dissuade readers. Although readers would be disenchanted if they assumed they would find in the author's writing something substantially different from the classical natural law theory of Aristotle and Thomas Aquinas, this paper alerts the readers to the fact that his presentation of the classical teachings, though by no means uniquely the author's,[3] is indeed "new."

WHAT NATURAL LAW IS NOT

"Natural law" in this paper does not mean what it means in three different contexts in which the expression sometimes is used. This paper shall indicate in what respects the meaning that the author holds to be focal has something in common with and how it differentiates from the other meanings. In so doing, this paper will inevitably start to define natural law.

First, natural law in this paper is not the singular of the plural expression "natural laws," that is, the laws of nature, such as the laws of thermodynamics and, more generally, of physics—and chemistry, biology, and even "laws," such as "big fish eat small fish" or "wildebeest migrate"—where gravity, for example, would be a "natural law."[4] These natural laws differ from

[2] *See* JOHN FINNIS, NATURAL LAW AND NATURAL RIGHTS (2d ed. 2011). Chapter II of the book is tellingly titled "Images and Objections." See Maris Köpcke Tinturé, Positive Law's Moral Purpose(s): Towards a New Consensus?, 56 AM. J. JURIS. 183, 213 (2011) (review essay) ("The important and potentially fruitful common threads between 'natural law theories' and [more positivist approaches] only begin to emerge . . . once the distracting quarrels about labels are set aside.").

[3] After years of positivism's cultural dominance, there is presently a revival of natural law theory, though many times the revival of natural law theory appears under other names—many of which do not even include the label "natural." See Cristóbal Orrego, Natural Law Under Other Names: De Nominibus Non est Disputandum, 52 AM. J. JURIS. 77, 77 (2007) (maintaining that in the last half of the twentieth century there has been a revival of some basic tenets of the theory of natural law); see also Randy Barnett, A Law Professors' Guide to Natural Law and Natural Rights, 20 HARV. J.L. & PUB. POL'Y 655, 656 n.5 (1997) (highlighting how natural law rhetoric is presently less mysterious than it used to be).

[4] Zuckert observes that a scientific law of nature, such as gravity, cannot be disobeyed, but a moral law of nature can. Michael P. Zuckert, Do Natural Rights Derive from Natural Law?, 20 HARV. J.L. & PUB. POL'Y 695, 715 (1997). Further, as explained by Orrego, "natural" in "natural law" "does not mean something related to the physical

what natural law means in this paper in that natural laws do not apply exclusively to human agents;[5] instead, natural law as understood in this paper applies only to persons. Furthermore, to the extent that the laws of physics apply to humans, human freedom is irrelevant for the operation of those laws. If, for example, someone jumps from the ninth floor of a building, the person will fall and eventually die, regardless of his hypothetical will to live.[6] "Natural laws" are in that sense inexorable—unlike, as shall be seen, the author's natural law.[7]

The fact that the term "natural law" may be, and sometimes is, used to refer to each one of these singular physical natural laws invites confusion, thus necessitating this clarification. When Doctor Strange, in the recent cinematic adaptation of the eponymous Marvel comic, is reprimanded by Mister Wong, a so-called guardian of the natural law, for violating the natural law of time, what Mister Wong means is hardly related to what the author means by a breach of natural law: the latter is a freely chosen action or omission, not only a physical performance or fact, and it is certainly not inexorable.[8] One is free to abide or not to abide by what is indicated to one by natural law, as morally right or wrong. The latter indication is like a whisper, a quiet voice that, unless one has become quite deaf to it, suggests in one's metaphorical ear to do that or not to do this. The listener is free to ignore that "natural law whisper" or to act under its influence— although he will face negative moral consequences if he chooses to ignore the whisper and, if well formed, the listener's conscience will reprimand him.[9]

Incidentally, the likes of Mister Wong typically add the paper "the" to construct the expression "the natural law," as singular of "natural laws"; whereas, the author—and most of those who use the expression in the classical sense—just say "natural law."[10] This indication can be a small, trifling way to tell *ab initio* what the speaker or writer in question likely has in mind

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world, but rather to the rational world of human morality." Cristóbal Orrego, The Relevance of the Central Natural Law Tradition for Cross-Cultural Comparison: Philosophical and Systematic Considerations, 8 J. COMP. L. 26, 32 (2014).

[5] The whole of these natural laws was called by the Theistic classics "eternal law": the "hand" of God governing everything—the author's metaphor. THOMAS AQUINAS, SUMMA THEOLOGIAE I–II, q. 91, 1 c (Anton C. Pegis ed., Random House 1944) (c. 1265). But confusingly enough, and given that everything includes free persons, the part of that eternal law governing them the part of that eternal law governing them was called by those classics, and by the author here, natural law. Id. at q. 91, 2 c.

[6] Another example is the death of living creatures, which happens sooner or later. Sometimes people are heard saying, "Her grandfather died. Well, it was natural that he should die before her." Again, this sense—where "natural" means statistically prevailing—is not what is meant in this paper by "natural" in natural law.

[7] *See* FINNIS, NATURAL LAW AND NATURAL RIGHTS, *supra* note 10, at 420–21.

[8] DOCTOR STRANGE (Marvel Studios 2016).

[9] *See infra* note 72.

[10] *See* ROBERT P. GEORGE, IN DEFENSE OF NATURAL LAW (Oxford Univ. Press 1999).

when he uses the expression. Along similar lines, those scholars who use the term "natural law" in its classical, moral sense will never use the plural "natural laws," a terminological choice that stresses that only one true morality exists: natural, moral law—though it has several principles and precepts.[11]

Secondly, natural law is not Christian morality. In 2016, the author gave a lecture at Cornell Law School on the topic of the natural law foundations of comparative constitutionalism. The first question, or rather remark, received was, "Surely what you are talking about when you discuss natural law is the *Catechism of the Catholic Church*!"[12] This observation was the object of several questions too in 2017 when the author presented on natural law and constitutional law at the Paul M. Hebert Law Center, Louisiana State University.[13] Judge O'Scannlain, of the Ninth Circuit put it neatly: "There is . . . a widespread view that the natural law is parochial, specifically, Catholic."[14] The "widespread view," though wrong, is quite understandable. Some of the contents of natural law morality overlap with those of Christian morality.[15] Furthermore, some of the writers in the natural law tradition have held that the Ten Commandments contain a summary version of natural law;[16] plus, there is also the circumstance that several of those writers, including Thomas Aquinas, the most celebrated one of all, are canonized by the Catholic Church and therefore are called "saints."[17]

That some of the contents of two different normative orders coincide, however, does not make them the same thing. First, the coincidence in question is by no means one between natural law and the morality of the Catholic religion only. Other religions, too, subscribe to a morality that overlaps with natural law, and the aforementioned statement that the Ten Commandments render natural law in a nutshell confirms this different overlap—those commandments are

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[11] AQUINAS, *supra* note 13, at I–II, q. 94, 2 c.
[12] The lecture took place on November 21, 2016, and it was graciously sponsored by the American Constitution Society. Professor Santiago Legarre, Professor of Law, Universidad Católica Argentina, Presentation at Cornell Law School (Nov. 21, 2016), https://www.youtube.com/watch?v=3gFEcpwZOc0&list=PLj8_LAnn8CZc_fAlI3kaSkohn2V8ybGys [https://perma.cc/A7Q2-82A9].
[13] The lecture took place on January 24, 2017, and it was graciously sponsored by the Eric Voegelin Institute. Professor Santiago Legarre, Professor of Law, Universidad Católica Argentina, Presentation at Paul M. Hebert Law Center (Jan. 24, 2017), https://www.youtube.com/watch?v=hRMo1sSSIJw&index=2&list=PLj8_LAnn8CZc_fAlI3kaSkohn2V8ybGys [https://perma.cc/ADN8-VXDF].
[14] Hon. Diarmuid F. O'Scannlain, *The Natural Law in the American Tradition*, 79 FORDHAM L. REV. 1513, 1514 (2011).
[15] AQUINAS, *supra* note 13, at I–II, q. 94, 6 c.
[16] FINNIS, NATURAL LAW AND NATURAL RIGHTS, *supra* note 10, at 101.
[17] *See* JOHN FINNIS, AQUINAS: MORAL, POLITICAL, AND LEGAL THEORY.

mainly, and certainly initially, Jewish.[18] Furthermore, important Jewish scholars argue that natural law is significantly present in the Old Testament, even if under different names.[19] Secondly, any revealed religious morality, including the Jewish and Christian varieties in their different instantiations and confessions, has a requisite that is absent in natural law morality: faith. One of the key tenets of natural law is its appeal to reason only. There is no need of God's revealing natural law morality and no need for human beings to believe in Him and His authority to be able to discern between what is right and what is wrong—that is, natural law.[20] To stress this notion, when the author teaches jurisprudence, he tells his students that natural law is "the religion of the atheist"—an idea quite in line with Saint Paul's words to the Roman pagans: even though they did not have the revealed religion, they "still through their own innate sense [that is, natural law] behave as the [Jewish] Law commands . . . . They can demonstrate the effect of the [natural] Law engraved on their hearts, to which their own conscience bears witness."[21] Of course, the fact that pagan writers, such as Sophocles, Plato, Aristotle, and Cicero all accepted that there is natural moral law—under different names and not by faith in a revelation—confirms the general sentiment of the argument in this paper.[22] For how can a pre-Christian concept be Christian?

Saint Paul's words about the gentiles or the author's claiming that natural law is the religion of the atheist by no means suggests that natural law is irrelevant for the believer: he also can engage in natural, moral reasoning—abstaining momentarily from using his faith—if he, for whatever reason, so wishes. Having made clear that an essential difference exists between natural law and the morality of any revealed religion, it is worth stressing, again, that, other than overlapping contents, another similarity exists between them and, in particular, between natural law and Catholic morality: both natural law morality and Catholic morality, as well as some other religious moralities, presuppose freedom.[23] In this respect, natural law is closer to Catholic

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[18] *Exodus* 20:1–17 (New Jerusalem Bible).

[19] DAVID NOVAK, NATURAL LAW IN JUDAISM 31 61 (1987). The author is no scholar of Judaism but has written on the subject. *See* Santiago Legarre, *Natural Law in Judaism Revisited*, 82 PRUDENTIA IURIS 239, 240–44 (2016).

[20] FINNIS, NATURAL LAW AND NATURAL RIGHTS, *supra* note 10, at 88.

[21] *Romans* 2:14–15 (New Jerusalem Bible).

[22] The "central tradition of natural law," explains Kirk, has "roots in Plato and Aristotle, [is] later and more fully expounded by Cicero, Seneca, and the Roman jurisconsults; then passing from the Stoic sages to the Fathers of the Church." Russell Kirk, *Natural Law and the Constitution of the United States*, 69 NOTRE DAME L. REV. 1035, 1036 (1993).

[23] FINNIS, NATURAL LAW AND NATURAL RIGHTS, *supra* note 10, at 420–21.

morality than it is to "natural laws." For natural laws, as already explained, freedom is quite irrelevant. Nevertheless, Catholic morality still differs from natural law—not only because it requires faith but also because its normative order is of a much higher and more exacting character than that of natural law.[24] Indeed, Catholic morality aspires to guide the faithful to heaven by promoting their identification with Christ through the operation of supernatural grace, for which purposes it imposes on Christians obligations that are foreign to and sometimes more exacting than natural law.[25] Case in point, the obligation of attending Mass on Sunday and of fasting during Lent are clear instances of religious duties that are not in and of themselves moral, natural law obligations insofar as their direct source is the Church's authority and not reason.[26]

Thirdly, natural law should be differentiated from so-called "natural law jurisprudence"—a tag sometimes attached to a certain theory of interpretation of the United States Constitution.[27] That theory has been traced to early decisions of the United States Supreme Court that regularly relied on supposed natural law concepts, sometimes at the expense of the Constitution.[28] When the theory was revived during the *Lochner* era,[29] disguised as substantive due process jurisprudence,[30] and revived again with the Warren Court and in more recent cases, too,[31] it triggered similar criticisms of resurrecting natural law.[32] In a nutshell,

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[24] FINNIS, AQUINAS: MORAL, POLITICAL, AND LEGAL THEORY, *supra* note 24, at 226.

[25] For an example, see *Matthew* 6:1–2 (New Jerusalem Bible).

[26] The first precept, "You shall attend Mass on Sundays and holy days of obligation," requires the faithful to participate in the Eucharistic celebration when the Christian community gathers together on the day commemorating the Resurrection of the Lord. *Catechism of the Catholic Church*, n.2042, THE HOLY SEE, http://www.vatican.va/archive/ENG0015/__P75.HTM (last visited Feb. 28, 2018) [https://perma.cc/69K8-9LMP]. The fifth precept, "You shall observe the prescribed days of fasting and abstinence," ensures the times of ascesis and penance which prepare us for the liturgical feasts; they help us acquire mastery over our instincts and freedom of heart. *Id.* n.2043.

[27] As the Wall Street Journal put it recently, "[N]atural law, . . . in the 19th and early 20th century influenced Supreme Court decisions invalidating progressive legislation." Jess Bravin, *Gorsuch has Strong Tie to Proponent of Morality-Based 'Natural Law'*, WALL ST. J. (Mar. 15, 2017, 4:42 PM) (on file with author).

[28] Roger P. Alford, *In Search of a Theory for Constitutional Comparativism*, 52 UCLA L. REV. 639, 660–63 (2005) (citing Supreme Court decisions from the early years relying on "natural law" concepts at the expense of the written constitution); *see also* Jeffrey A. Pojanowski & Kevin C. Walsh, *Enduring Originalism*, 105 GEO. L.J. 97, 118 (2016) ("Many associate natural law with things like Justice Chase's purportedly antiformal opinion in *Calder v. Bull*")
(internal citations omitted).

[29] Justice Black, dissenting in *Griswold v. Connecticut*, 381 U.S. 479, 515 (1965), famously stated by way of criticism that what the majority was embracing was "the same natural law due process philosophy found in Lochner v. New York [198 U.S. 45 (1905)]."

[30] It has sometimes been labeled "natural law due process philosophy" or "natural law due process theory." *Griswold*, 381 U.S. at 524, 511 n.3 (Black, J., dissenting).

[31] For examples, from *Griswold* onwards, see Alford, *supra* note 36, at 667–73.

natural law jurisprudence posits the substitution of the text of the Constitution by abstract notions of justice, that is, "natural law." This natural law jurisprudence has rightly been criticized.[33]

But this natural law jurisprudence is not the natural law this paper contemplates. Indeed, as Professor Roger P. Alford has remarked, some versions of natural law jurisprudence as constitutional theory are compatible with a certain relativism that denies moral truth.[34] Nothing could be further from the view supported in this paper than *that* natural law. Not only does the author's classical conception of natural law adhere to moral cognitivism, but it also is perfectly compatible with, and indeed requires, presumptively, respect for man-made, written laws in all their positivity.[35] Unlike natural law jurisprudence, which favors the use of natural law by judges "to strike down all state laws which they think are unwise, dangerous, or irrational"[36] and seems to invoke a "mysterious and uncertain natural law concept as a reason for striking down . . . state law,"[37] the new classical natural law theory defended in this paper denounces that jurisprudence as a judicial misuse of natural law and advocates, instead, respect for positive law as a requirement precisely of natural law itself.

Finally, by way of contrast with natural law jurisprudence, which is a parochial doctrine—a theory of interpretation in the United States—the author's natural law is, in a way, the opposite: a universal concept that transcends boundaries not only of geography but also of time.

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[32] Justice Black is worth quoting again: the reasoning of the majority in *Griswold*, he argued critically, "was the same natural law due process philosophy which many later opinions repudiated." *Griswold*, 381 U.S. at 516.

[33] Richard Posner, *No Thanks, We Already Have Our Own Laws*, LEGAL AFFAIRS, http://legalaffairs.org/issues/July-August-2004/feature_posner_julaug04
.msp (last visited Mar. 14, 2017) (arguing against the revival of natural law jurisprudence) [https://perma.cc/EN4A-8BGD].

[34] Roger. P. Alford, Roper v. Simmons *and Our Constitution in International Equipoise*, 53 UCLA L. REV. 1, 19 (2005).

[35] *See* Santiago Legarre, "A New Natural Law Reading of the Constitution" 78 *Louisiana Law Review* 877 (2018) and Santiago Legarre "H.L.A. Hart and the Making of the New Natural Law Theory" 8 *Jurisprudence* 82 (2016).

[36] *Griswold*, 381 U.S. at 517 n.10 (Black, J., dissenting). Along similar lines, and also noting the Lochnerian roots of this jurisprudence, see Justice Stewart's dissent in the same case. *Id.* at 528 (Stewart, J., dissenting).

[37] *Id.* at 522 (Black, J., dissenting).