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Natural Law and Christianity

A Brief History

R.H. Helmholz

This introductory chapter assesses the extent to which history sheds any light on the character of Christianity's connection with natural law. Its conclusions are based on propositions drawn from the works of representative European jurists who lived and wrote between 1140 and 1650, particularly those jurists who dealt primarily with the canon law. Their treatises and judicial decisions provide repeated and telling examples of the ways in which Christian theology came into contact with natural law. Their understanding of the nature of the *ius divinum* also came into the picture. The chapter begins, however, with a brief exposition of two current but opposing theories about the relationship between Christianity and natural law.

THE RELATIONSHIP BETWEEN CHRISTIANITY AND NATURAL LAW

One theory which occupies a place in modern scholarship is that there is a necessary connection between natural law and traditional forms of the Christian religion. The other theory proposes that this is not the case. Both theories purport to find support in the historical record.

Arguments Pro: The Association of Natural Law with Christianity

It requires no prolonged effort to demonstrate that the prevailing view among scholars active today associates natural law with traditional forms of Christianity. Brian Bix's useful *Dictionary of Legal Theory*, for instance, links 'modern legal theorists identified (or self-identified) as natural law theorists' with 'the tradition established by the work of [St. Thomas] Aquinas'.[1] If Aquinas was indeed the leading light in formulating the tenets of natural law as they were understood and applied in European history, its essentially religious character follows almost as a matter of course.

Confirmation of the existence of a necessary connection between Christianity and natural law is not wanting in other evidence from today. Students of Catholic social

[1] Brian Bix, *Dictionary of Legal Theory* (Oxford: Oxford University Press, 2004), 144.

thought make a close connection between their subject and the teachings found within the natural law tradition, and again it is Thomas Aquinas, a thirteenth-century Christian theologian, who they take to have most authoritatively stated the tenets of natural law. More often than not, it is a conclusion found in Aquinas' work around which these modern formulations of natural law revolve.[2] Seeing a close tie between the tenets of natural law and the Christian religion described by St Thomas, as they do, therefore seems axiomatic. Not only is this view widely shared today, but Aquinas himself may be read as having endorsed it. He held that '[a]ll rational creatures share in and make their own the eternal reason through which they have a natural inclination to due acts and purposes, [and] this sharing is what we call natural law'.[3]

This historical connection between traditional Christianity and natural law seems even more firmly entrenched outside the realm of jurisprudential theory. Those among us who remember the efforts of Roman Catholic bishops to hold back the flood tide of contraception sixty years ago will also recall that their efforts were based in part upon dictates they derived from natural law. The close association they made between religion and natural law remains imprinted on the popular mind. It has surfaced again in more recent days as an argument against the introduction of same-sex marriage. Opponents say that it is not just the Bible that condemns the experiment. Natural law does too.

Furthermore, the association between natural law and the Christian religion has captured the minds of most modern jurists who deny the existence of natural law. They reject both, regarding them as something like equal partners. And here too, the historical record seems to support them. The connection between Christianity and natural law is something that lawyers who first discarded natural law in favour of legal positivism took for granted. Supreme Court Justice Oliver Wendell Holmes is the great American example. Disdaining any conception of law that appeared to him to be 'a brooding omnipresence in the sky', Holmes turned instead to a hard form of legal positivism. 'The jurists who believe in natural law,' he wrote, 'seem to me to be in that naïve state of mind that accepts what has been familiar and accepted by them and their neighbors as something that must be accepted by all men everywhere.'[4] For him, as for John Austin, the will of the sovereign expressed in statutes and judicial decisions fully defined the law's content. Legal theory was at best a prediction of what judges would do in fact, not an attempt to put natural law into practice. Rejection of natural law has thus gone hand in hand with rejection of anything specifically associated with the Christian religion as a factor in the law's

[2] E.g. Heinrich Rommen, *The Natural Law: A Study in Legal and Social History and Philosophy*, T.R. Hanley, trans. (Indianapolis, IN: Liberty Fund, 1999), 108. They do not end there, of course.

[3] *Summa theologiae*, I.II.91.2.

[4] O.W. Holmes, 'Natural Law', in *Collected Legal Papers* (New York: Harcourt, Brace and Howe, 1920, repr. 1952), 312. See also John Chipman Gray, *The Nature and Sources of the Law*, 2nd edn (Cambridge, MA: Harvard University Press, 1921), 309: natural law is described as 'this exploded superstition'.

present development. As a working assumption, this position can be said to govern mainstream legal thought today. In it, a close tie between natural law and traditional religion appears both self-evident and pernicious.

Arguments Con: The Disjunction of Natural Law and Christianity

But it is not as simple as this. Were he alive today, Thomas Aquinas himself might have begun by an opening sentence endorsing the modern opinion, something like 'It seems that natural law finds its origins in the Christian religion.' He might even have quoted some of the evidence just stated. But take note. He would not have stopped there. His very next sentence would have undermined this initial conclusion. It would have shown its falsity. He might have added: 'But to the contrary, a gloss on the text of St. Paul's letter to the Romans asserts that the Gentiles, who know not the true God, nevertheless act according to natural law.'[5] In other words, Aquinas himself would have gone on to add his own conclusion, one that showed the opening conclusion to be false. It could not be correct upon fuller consideration, precisely because all men and women, not just Christians, were governed by natural law.

And this, as I take it, has always been the most widely accepted view among writers about natural law. To them, there is no required connection between natural law and the Christian religion. That conclusion actually follows from what Aquinas himself taught. If all rational creatures have a natural inclination to shape their conduct according to rules drawn from natural law, it must follow that acceptance of the tenets of the Christian religion is not a necessary part of understanding the import of natural law. All men and women do not follow the Christian religion, but all are subject to natural law. The modern equation of religion with natural law is therefore false.

That conclusion would also have been heard and accepted by all students of the *ius commune* during the Middle Ages and through the age of the Enlightenment. It was placed at the outset of the Roman law's Institutes, as it also was in the Digest. Most famously, the Roman jurist Ulpian (d. 228) held that natural law was something that 'nature itself has taught to all animals' (Digest, 1.1.3), and what he wrote was stated and repeated in lectures at the very outset of every lawyer's education. Not a Christian, Ulpian mentioned no source of this teaching apart from nature itself, and he asserted that by some form of instinct even brute animals shared a measure of the knowledge of natural law. No religion there.

What Ulpian taught was echoed in the common learning of later centuries. For example, the famous thirteenth-century jurist Azo (c. 1150–1230) taught the identical lesson to his readers and students, although he also added 'God' to 'Nature' as the ultimate source of the knowledge of animals.[6] In fact he equated the two. Was this to

[5] See *Summa theologiae*, I.II.91.2.

[6] Azo, *Summa Institutionum* (n.p. 1533), Bk. I, tit. De iure naturali gentium et civili, no. 1: 'ius naturale est quod natura id est ipse Deus docuit omnia animalia.'

change the common understanding of natural law's character or of its source? No, as modern scholarship has shown. It made no difference.[7] In whatever ways natural law had first come into existence, it governed a significant part of the behaviour of all creatures, human beings and animals alike. That was the *communis opinio* among the jurists. It made no reference to Christianity.

This disjunction between natural law and the Christian religion was also the subject of an oft-quoted assertion by Hugo Grotius (d. 1645), the great natural lawyer. In the introduction to *De iure belli ac pacis* (1625), he wrote that 'a degree of validity' would exist in his conclusions 'even if we should concede that which cannot be conceded without the utmost wickedness, that there is no God, or that the affairs of men are of no concern to Him'.[8] Grotius surely meant this to stand as a strong statement of natural law's necessary place in all life, not as an invitation to atheism. Nevertheless, his words have sometimes been taken as a significant step in separating the realms of religion and law. A representative commentator has used it to assert that '[o]ne of [Grotius'] great achievements was to secularise natural law by detaching it from Christianity'.[9] This claims too much. An identical conclusion had been accepted among the so-called Second Scholastics in Spain, writers like Francisco de Vitoria (d. 1546) and Francisco Suárez (d. 1617), whose ties to religion were close. In fact, Grotius' statement merely restated in dramatic language something that had always been inherent in natural law thought. Jurists writing within the traditions of natural law in past centuries had never supposed that there was a perfect match between the teachings of the Christian religion and the tenets of natural law.

CHRISTIANITY IN NATURAL LAW JURISPRUDENCE

If the historical match between religion and natural law was not perfect, there was nevertheless a decided factual link between them. The link is readily apparent once one leaves the world of theory and enters into concrete legal questions. There, the two were not kept apart. They shared many features, and in practice they were usually identical in their consequences. This made sense. Both had their source in God's will. It is true that natural law was thought to extend beyond the bounds set by the Christian religion. It reached even animals, not just human beings. It also governed all men and women, not just Christians. However, it did not on this account exclude Christians. Quite the contrary. It embraced them. It gave them a head start. It had a direct impact on the law by which they were governed, so that in practice if not in theory the Christian religion long played a significant role in the working out of what natural law required. Making a connection between the two was

[7] Brian Tierney, '*Natura id est Deus*: A Case of Juristic Pantheism?', *Journal of the History of Ideas* 24 (1963): 307–322.
[8] *De iure belli ac pacis*, Proleg. no. 11.
[9] Randall Lesaffer, *European Legal History: A Cultural and Political Perspective*, Jan Arriens, trans. (Cambridge: Cambridge University Press, 2009), 448.

easy; to all appearances it was all but inevitable in the historical conditions that existed in earlier centuries.

Statements and examples making the connection can be found in one treatise after another. Consider, for example, the following statement about the connection between law and religion. It was made by Thomas Rutherforth (d. 1771). He served as Regius Professor of Divinity in Cambridge University and was the author of a work drawn from his lectures which he called *Institutes of Natural Law* (1754–1756):

> The existence of a God is written throughout every part of nature in such legible characters; and the duty of honouring him is so plain to every capacity; that they who disbelieve his existence, or deny him that honour which is due to him, cannot but be understood to offend against the clearest precepts of the law of nature: they must be willfully blind if they do not see their duty, and perversely criminal if they do not practice it.[10]

Rutherforth would perhaps have admitted the existence of a theoretical divide between natural law and the Christian religion. They were not identical. In fact, however, he found it an easy divide to cross. There were many bridges. Only the 'willfully blind' would not make the journey. For purposes of convenience and analysis, I have divided the places where natural law and religion commonly intersected in the law into three categories. They are as follows: (1) Natural Law and the Bible, (2) Natural Law and the Canon Law and (3) Natural Law and Legal Problems.

Before coming to these subjects, however, one obvious but relevant factual point about the subject should be stated. It is that many of the most influential natural lawyers were in fact theologians, clerics or apologists for the Christian religion. Not all, of course. Some were mere lawyers. But many more writers on natural law were connected professionally with the promotion of religion. Of those mentioned so far, Thomas Aquinas was a Dominican friar, Hugo Grotius was author of a book entitled *On the Truth of the Christian Religion*, Francisco de Vitoria was a Dominican friar, Francisco Suárez was a Jesuit and Thomas Rutherforth was archdeacon of Essex. That these writers on natural law should have been interested in the Christian religion, finding it relevant to their own understanding of law and jurisprudence, is hardly surprising. They were servants of the author of natural law. It was fitting therefore, perhaps even inevitable, that these men should have made explicit connections between natural law and its author.

Natural Law and the Bible

The normal starting point for making these connections was the Christian Bible. That fact is of particular importance today because of the ecumenical perspective taken in this volume. One of the reasons that acceptance of natural law's place in

[10] *Institutes*, Second American Edition Revised (Baltimore, 1832), Bk. I, c. 18 no. 9.

human life was shared by Christians of many stripes was that the Scriptures endorsed it. Whatever may be the case today and whatever may have been the disagreements then, historically its importance was not one of the issues that divided Protestants from Catholics. Biblical passages appear in most academic tracts on natural law, no matter the writer's religious affiliation. This common recognition was not without scriptural justification. The Old Testament affirms that God had said, 'I will put my law in their inward parts and write it in their hearts' (Jeremiah 31.33). The Psalmist proclaimed that he would 'delight to do thy will, O my God: Yea, thy law is within my heart' (Psalm 40.8). The Book of Isaiah recorded that God had promised salvation to those who kept his law (Isaiah 56.1). The New Testament also affirms the truth of the assertion that among God's creations the law of nature occupied a vital place. Speaking of his chosen people, God had declared, 'I will put my laws into their hearts, and in their minds will I write them, and their sins and iniquities will I remember no more' (Hebrews 10.16–17). What could these passages refer to but to a law meant to guide human conduct? That described the natural law's own purpose.

The contents of the Ten Commandments were an oft-cited illustration of natural law's close connection with Christianity. Moses had written the Commandments down as they had been revealed to him by God (Exodus 34.28). The jurists understood them as stating some of the principles of natural law. 'Thou shalt not kill' was one obvious example. 'Honour thy father and mother' was another. These were commands of God, stated in the Scriptures. In that sense they were parts of the divine law, particularly applicable to Jews and to Christians. They were also among the principles that God had inscribed in the hearts of all peoples, no matter their religion. But that they appeared in the Christian Scriptures gave further and particular reason for their observance and their close tie to the Christian religion.

The Ten Commandments were stated in general terms, of course, and they were subject to reasonable exceptions under the positive law, as were most of the principles of natural law. But as statements of principle, they did not change from one age to another or from one place to another, and they were not without force in the law applied in practice. An example was the Ten Commandments' prohibition against bearing false witness. It expressed one of natural law's principles. The proper task of the positive or municipal law was to put it into concrete form: making perjury a crime, ruling out the testimony of witnesses who had lied and perhaps even preventing enforcement of contracts tainted by one party's deceit. These instances were regarded as expressions of the commandment's larger intent. It was also found repeatedly in the Scriptures (e.g. Proverbs 16.19; Matthew 26.60). The intent was to provide guidance, ensuring that human law worked to secure fidelity to the aims of justice and the common good. Positive law might do this in various ways – that is one reason that different systems of positive law existed in the world – but the permissible ways were always controlled in scope by this part of natural law, one which God himself had given to men in the ninth of the Ten Commandments.

Such explicit uses of the Scriptures as statements of the natural law do not exhaust the subject. The jurists found natural law principles in many apparently unpromising parts of the Bible. Their use of the story of the expulsion of Adam and Eve from the Garden of Eden was long the textbook example. In it the canonists saw a basic pattern established for human law, one grounded in natural law. To modern readers, what they drew from the biblical account of mankind's earliest days may seem fanciful, if not absurd. But the story was used so often by jurists writing about natural law that we will be substituting our own prejudices for theirs if we dismiss out of hand what they found in the story of the Garden of Eden.

The starting point was God's command to Adam: '[O]f the tree of the knowledge of good and evil, thou shalt not eat' (Genesis 2.17). This statement contained one of the basic principles of what would become an accepted part of natural law: No one should be punished for an action that had not been prohibited and sufficiently defined by the law. God's express prohibition against eating from the tree of knowledge, issued in so many words to the first man, thus served as a model for all human law. It should conform to the principle illustrated by the story. Of course, Adam did eat the fruit of the tree. He disobeyed the command. As a consequence, we read: 'And the Lord God called unto Adam, and said unto him, Where art thou?' (Genesis 3.9). Here Adam was being called to answer for his violation of the very law God had given him. This passage too was read as establishing one of the basic elements of criminal procedure, the necessity of a sufficient citation. Did God not know where Adam was? That could not have been. Then why did God call out to Adam, seemingly pretending that he did not know? The reason was to demonstrate that every defendant must be summoned before he can be lawfully punished. It was a tenet of natural law that no person should be punished or deprived of his basic rights unless he had been summoned and given an adequate opportunity to speak on his own behalf. Under the impact of analytical jurisprudence, making use of this biblical example as its immediate source of reference, natural lawyers established this principle of due process. They treated it as required by the natural law.

It should be added that the Bible did not serve primarily as a handbook of civil rights, as might be said of the example of the need for proper citation prefigured in the Garden of Eden. Sometimes it worked the other way. The Bible contained some harsher lessons connected with, and seemingly even compelled by, both divine and natural law. An illustration is the biblical justification given in support of the medieval church's penal law. Sentences of excommunication – the principal sanction at the disposal of the courts of the church – separated the person sentenced from the sacraments of the church. In its strongest form, excommunication cut that person off from the company of other Christians. In theory, it could have devastating consequences. At least in the minds of the medieval canonists, this strong sanction was no mere human invention. They were necessary parts of the law. Excommunication's existence was based on teachings found in the New Testament. In Matthew 18.17, Jesus himself had directed that a sinning brother

who refused to heed the church's voice should be treated as 'a heathen and a publican'. In the first letter of St Paul to the Corinthians, the Apostle had directed his readers to 'deliver to Satan' a man found guilty of serious moral transgressions; believers were 'not to keep company' with such transgressors (1 Corinthians 5.5). Indifference to wrongful conduct was not a lesson taught by natural law. Sometimes punishment was a necessary part of that law.[11] The fate of Adam and Eve also drove home that point. They were not let off with a warning.

Natural Law and the Canon Law

The canon law was the law of the medieval church, and it too was the site of connections between natural law and the Christian religion. Jurists who specialised in its study worked within the traditions of natural law no less than did contemporary theologians or medieval civilians who began with the Roman law. All of them accepted and cited natural law. They held that the canon law sometimes went beyond natural law not simply because the church had a freedom to enact rules of purely positive law. It also did so in the sense that God had added specific commands to which obedience was owed by Christians but not by all peoples. Those specific commands to Christians made up the *ius divinum*, properly speaking. An example was the prohibition against divorce (Matthew 19.9) – part of God's plan for Christians but not part of the natural law. There were always points of intersection, places where the two were identical. However, the overlap between these two fundamental sources of law was never complete. It was for this reason it was necessary to carve out a separate category for divine law, as we see elsewhere in this volume, keeping it separate from natural law.

The classical canon law, properly speaking, was the product of the scholastic revival of the twelfth and thirteenth centuries, although it built upon older traditions. Its formulation followed after the recovery of the texts and the start of the study of the Roman law at Bologna by a century or so. Many good introductions to how these events occurred now exist,[12] and a chapter on the history of the natural law is no place for attempting to improve on them. Let it be enough to say that the canon law consisted of several basic parts. The first was the *Concordia discordantium canonum*, called the *Decretum*, which was compiled by Gratian near to the year 1140. It was a schoolbook that brought together conciliar decrees and other authorities from the first millennium of the church's existence, seeking to state the church's law by reconciling contradictions within it. The second half included the papal decretals

[11] Richard Fraher, 'Preventing Crime in the High Middle Ages: The Medieval Lawyers' Search for Deterrence', in Stanley Chodorow and James Sweeney, eds., *Popes, Teachers and the Canon Law in the Middle Ages: Festschrift for Brian Tierney* (Ithaca, NY: Cornell University Press, 1989), 212–233.

[12] E.g. Wilfried Hartmann and Kenneth Pennington, eds., *The History of Medieval Canon Law in the Classical Period, 1140–1234* (Washington, DC: Catholic University of America Press, 2008); O.F. Robinson, T.D. Fergus and W.M. Gordon, *European Legal History*, 3rd edn (Oxford: Oxford University Press, 2000), 72–90; James A. Brundage, *Medieval Canon Law* (Harlow: Longman, 1995).

assembled by Raymond of Peñaforte for Pope Gregory IX and placed in a separate book called the *Liber extra* (1234), the *Liber sextus* (1298), then a further book of decretals compiled at the behest of Pope Boniface VIII, adding recent conciliar enactments and bringing the church's law up to date. It was completed by several minor collections added to this corpus in the later Middle Ages. Together these collections were called the *Corpus iuris canonici*, just as the Roman law was customarily referred to as the *Corpus iuris civilis*. The collections, together with the glosses that inevitably accompanied the texts themselves and later conciliar and papal decrees, remained the basic law of the Catholic church until the twentieth century.

After the Reformation, the texts of the *Corpus iuris canonici* were used by Protestant lawyers, in spite of the popish origins of its texts – origins that might seem to have rendered them obsolete or suspect. There were Protestants who wished to see them discarded root and branch, but the arguments for their continued use proved stronger. Prohibitions against simony – for example, the buying and selling of spiritual offices – were not held in monopoly by any one branch of the Christian church. Papal decretals could be used to demonstrate the incompatibility of simony with Christian values. They were. Many, perhaps most, of the papal decretals were similarly treated as statements of basic religious values in the centuries following the Reformation even within Protestant circles. English civilians like Thomas Ridley (d. 1629) held that many papal decretals possessed 'the authority of a law in themselves'.[13] Hugo Grotius was not out of line with other Protestant lawyers when he invoked the authority of a decretal of Pope Alexander III (d. 1181) to deal with the question, important in natural law, of the legal force of an oath taken under the constraint of fear.[14] Even Johann Oldendorp (d. 1567), much less given to citation to the law of the church than Grotius, resorted to the Gregorian decretals in dealing with the law of marriage and divorce.[15] To most Protestant lawyers in the late sixteenth and the seventeenth centuries, the origins of statements of rules of law seem often to have mattered less than their contents.

It may be that among the reasons Protestant lawyers accepted the authority of many canonical texts is that all the books of the *Corpus iuris canonici* incorporated references both to the Bible and to natural law. Gratian's *Decretum* begins with a description of natural law taken from Isidore of Seville's *Etymologies*: 'The law of nature is common to all nations, for it exists everywhere as proceeding from an instinct of nature' (D. 1 c. 7). The text goes on to give examples of its contents – the coming together of man and woman, the bringing up of children and the common possession of property are three of them. The *glossa ordinaria* added to the list and also sought to clarify their meaning. So, for instance, although common ownership of all property was part of the law of nature, its reach had everywhere been restricted

[13] *View of the Civile and Ecclesiasticall Law* (Oxford, 1662), Bk. I, c. 5 § 1.
[14] *De iure belli ac pacis*, Bk. II, c. 20, no. 3.
[15] *De sponsalibus*, no. 1, in Oldendorp, *Opera*, Vol. 2 (Basel, 1559, repr. 1966), 757.

by the *ius gentium*. It still existed only in a few areas of the law – the air in the sky and the waters in oceans and rivers. They were *res nullius*. However, common ownership had proved inconvenient for many aspects of human life. Men will not work to produce goods or crops if what they grow can be appropriated at will by strangers. Private ownership of land and chattels must therefore be accepted. It must be protected by human law. In times of scarcity, the original rule did come back into play; rights in private property were subject to a stronger obligation to share when lives were at stake. Then, a law of sociability which preserved human life and allowed it to flourish prevailed. This was common learning of the times. It was a view shared across denominational boundaries. It is only an example, but it may help to explain why it was that Protestant lawyers sometimes turned to the texts of the canon law for authority. Those texts stated and worked out some of the consequences of accepting the authority of natural law.

Any student of the church's law would have met the natural law almost from the first moment of his study. For the canonist, study began with the *Decretum*, which defined the kinds of law that existed, including natural law. Not only would any beginning student find that recognition clearly stated, he would soon have encountered a prominent example of one of natural law's limitations. As just noted, common possession of property remained among the tenets of natural law even though that regime's impact on human life had been restricted in fact. How had this happened? A student might well have asked that obvious question. A common answer then given was that at an early date all men had met together 'in a large plain' in order to effect an organizational change and decided to adopt a move towards property – a possibility that William Blackstone (1723–1780), the great English lawyer, described as 'too wild to be seriously admitted', though he went on to suppose that same result had been reached by an only slightly different route. Acceptance of this institution, he concluded, had been the gradual product of human experience and maturity.[16] An actual meeting may not have occurred, but the same decision had been reached in an equivalent way.

The subsequent books of the *Corpus iuris canonici*, principally the Gregorian decretals and the Sext, would have brought students of the canon law into repeated contact with natural law, although more by its application to specific parts of the church's existing laws than by treatments of the subject speculating on its origins. For the most part, these books contained decisions on specific points of law and procedure made in response to questions brought before the papal court for guidance. Some decisions by great councils of the church were included in the decretals and later books, and most of their content was not jurisprudential in nature. They were examples of its application. The decretals were applied law, most of it being taken from the decisions of actual cases, then brought together and edited to serve as a guide to the church's law. With reason, the contents of the

[16] *Commentaries on the Laws of England*, Vol. 1 (1765–1769) 47.