

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

*Santiago Legarre**

Abstract: *There has been great confusion around the use of the term ‘natural law.’ Leading authorities avoid using it altogether and the main proponent of natural law theory in English, John Mitchell Finnis, hardly uses it in his writings. ‘Natural law’ in this paper does not mean what it means in three different contexts in which the expression sometimes is used. These contexts are as follows. First, “natural law” as one of the several “natural laws” formerly called “eternal law”. Second, “natural law” as a religious idea, related to the teachings of the Catholic Church. Third, “natural law” as a certain mode of American jurisprudence, which has fallen into great discredit.*

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 that prevail in those other contexts. In so doing, this paper will inevitably start to define natural law.

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* LLB, Universidad Católica Argentina; MSt, Oxford; PhD, 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). This article is based on the author’s contribution to the Conference on ‘Ubuntu, Natural Law and Human Rights’. Special thanks go to Juan Carlos Riofrio, for the invitation to participate; and to Khalil Badbess, Ivy Mabelle, and Natalie Otieno, for their able editorial assistance. santiagolegarre@uca.edu.ar

I. 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.¹ 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,² is indeed new.

II. 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.

¹ Finnis J, *Natural law and natural rights*, 2nd ed, Oxford University Press, Oxford, 2011. Chapter II of the book is tellingly titled ‘Images and objections’. Tinture MK, ‘Positive law’s moral purpose(s): Towards a new consensus?’ 56 (1) *American Journal of Jurisprudence*, 2011, 183, 213: ‘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.’

² 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 Orrego C, ‘Natural law under other names: De nominibus non est disputandum’ 52 *American Journal of Jurisprudence*, 2007, 77 (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 Barnett R, ‘A law professor’s guide to natural law and natural rights’ 20 (5) *Harvard Journal of Law and Public Policy*, 1997, 655-656 (highlighting how natural law rhetoric is presently less mysterious than it used to be).

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’.³ These natural laws differ from what natural law means in this paper in that natural laws do not apply exclusively to human agents;⁴ 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.⁵ ‘Natural laws’ are in that sense inexorable—unlike, as shall be seen, the author’s natural law.⁶

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,⁷ what Mister Wong means is hardly related to what the author means by a

³ Zuckert observes that a scientific law of nature, such as gravity, cannot be disobeyed, but a moral law of nature can. Zuckert MP, ‘Do natural rights derive from natural law?’ 20 *Harvard Journal of Law and Public Policy*, 1997, 695, 715. Further, as explained by Orrego, ‘natural’ in ‘natural law’ ‘does not mean something related to the physical world, but rather to the rational world of human morality’. Orrego C, ‘The relevance of the central natural law tradition for cross-cultural comparison: Philosophical and systematic considerations’ 8 *American Journal of Comparative Law*, 2014, 26, 32.

⁴ The whole of these natural laws was called by the Theistic classics ‘eternal law’: the ‘hand’ of God governing everything—the author’s metaphor. Aquinas T, ‘Summa theologiae I–II’ in Pegis CA (ed) *Basic writings of Saint Thomas Aquinas Volume 1*, 1st ed, Random House, New York, 1944, q 91, 1 c (c. 1265). But confusingly enough, and given that ‘everything’ includes free persons, the part of that eternal law governing them was called by those classics, and by the author here, natural law (Pegis CA (ed) *Basic writings of Saint Thomas Aquinas Volume 1*, 1st ed, Random House, New York, 1944, q 91, 2 c).

⁵ 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.

⁶ Finnis J, *Natural law and natural rights*, 420-421.

⁷ Doctor Strange (Marvel Studios 2016).

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. 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.

Incidentally, the likes of Mister Wong typically add the particle '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'.⁸ This indication can be a small, trifling way to tell from scratch what the speaker or writer in question likely has in mind when he uses the expression. Along similar lines, those scholars who use the term 'natural law' in its classical, moral sense will never use in the moral context 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.⁹

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*!'.¹⁰ 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 Centre, Louisiana State University.¹¹ Judge O'Scannlain, of the Ninth Circuit put it neatly: 'There is . . .

⁸ See generally George RP, *In defense of natural law*, Oxford University Press, Oxford, 1999.

⁹ Aquinas T, 'Summa theologiae I–II', I–II, q 94, 2 c.

¹⁰ The lecture took place on November 21, 2016, and it was graciously sponsored by the American Constitution Society. Legarre S, Presentation on natural at Cornell Law School, Ithaca, 21 November 2016 — https://www.youtube.com/watch?v=3gFEcpwZOc0&list=PLj8_LAnn8CZc_fAIi3kaSkohn2V8ybGys [<https://perma.cc/A7Q2-82A9>] on 25 January 2023.

¹¹ The lecture took place on January 24, 2017, and it was graciously sponsored by the Eric Voegelin Institute. Legarre S, 'Natural law and constitutional law', Lecture presented at Paul M. Hebert Law Center, Baton Rouge, Louisiana, 24 January 2017 — https://www.youtube.com/watch?v=hRMo1sSSIJw&index=2&list=PLj8_LAnn8CZc_fAIi3kaSkohn2V8ybGys [<https://perma.cc/ADN8-VXDF>] on 25 June 2016.

a widespread view that the natural law is parochial, specifically, Catholic.¹² The ‘widespread view’, though wrong, is quite understandable. Some of the contents of natural law morality overlap with those of Christian morality.¹³ Furthermore, some of the writers in the natural law tradition have held that the Ten Commandments contain a summary version of natural law;¹⁴ 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’.¹⁵

That some of the contents of two different normative orders coincide, however, does not make them one and 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 mainly, and certainly initially, Jewish.¹⁶ Furthermore, important Jewish scholars argue that natural law is significantly present in the Old Testament, even if under different names.¹⁷ 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.¹⁸ 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

¹² O’Scannlain DF, ‘The natural law in the American tradition’ 79 *Fordham Law Review*, 2011, 1513, 1514.

¹³ Aquinas T, ‘Summa theologiae I–II’, I–II, q 94, 6 c.

¹⁴ Finnis J, *Natural law and natural rights*, 101.

¹⁵ See generally Finnis J, *Aquinas: Moral, political, and legal theory*, Oxford University Press, Oxford, 1998.

¹⁶ *Exodus* 20:1–17, New Jerusalem Bible —

<https://www.biblegateway.com/passage/?search=Exodus%2020%3A1-17&version=NIV> on 25 June 2023.

¹⁷ Novak D, *Natural law in Judaism*, Cambridge University Press, Cambridge, 1987, 31–61. The author is no scholar of Judaism but has written on the subject. See Legarre S, ‘Natural law in Judaism revisited’ 82 *Prudentia Iuris*, 2016, 239, 240–244.

¹⁸ Finnis J, *Natural law and natural rights*, 88.

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’.¹⁹ 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.²⁰ 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 too 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.²¹ In this respect, natural law is closer to Catholic 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.²² 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.²³ Case in point, the obligation of attending Mass on Sunday and of fasting during Lent are clear instances of religious duties that are

¹⁹ *Romans* 2:14–15, New Jerusalem Bible — <https://www.bibliacatolica.com.br/new-jerusalem-bible/romans/2/> on 25 June 2023.

²⁰ 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 juriconsults; then passing from the Stoic sages to the Fathers of the Church.’ Kirk R, ‘Natural law and the Constitution of the United States’ 69 *Notre Dame Law Review*, 1993, 1035, 1036.

²¹ Finnis J, *Natural law and natural rights*, 420-421.

²² Finnis J, *Aquinas: Moral, political, and legal theory*, 226.

²³ For an example, see *Matthew* 6:1–2, New Jerusalem Bible.

not in and of themselves moral, natural law obligations insofar as their direct source is the Church's authority and not reason.²⁴

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.²⁵ 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.²⁶ When the theory was revived during the *Lochner* era,²⁷ disguised as substantive due process jurisprudence,²⁸ and revived again with the Warren Court and in more recent cases, too,²⁹ it triggered similar criticisms of resurrecting natural law.³⁰ In

²⁴ 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. See The Holy See, *Catechism of the Catholic Church*, n.2042 — http://www.vatican.va/archive/ENG0015/___P75.HTM on 28 February 2018; and — <https://perma.cc/69K8-9LMP> on 28 February 2018.

The fifth precept, 'You shall observe the prescribed days of fasting and abstinence', ensures the times of asceticism and penance which prepare us for the liturgical feasts; they help us acquire mastery over our instincts and freedom of heart. The Holy See, *Catechism of the Catholic Church*, n.2043 — http://www.vatican.va/archive/ENG0015/___P75.HTM on 28 February 2018; and — <https://perma.cc/69K8-9LMP> on 28 February 2018.

²⁵ 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.' Bravin J, 'Gorsuch has strong tie to proponent of morality-based "natural law"' The Wall Street Journal, 15 March 2017 — <https://www.wsj.com/articles/gorsuch-has-strong-tie-to-proponent-of-morality-based-natural-law-1489610561> on 25 June 2023.

²⁶ Alford RP, 'In search of a theory for constitutional comparativism' 52 *UCLA Law Review*, 2005, 639, 660–63 (citing Supreme Court decisions from the early years relying on 'natural law' concepts at the expense of the written constitution); see also, Pojanowski JA and Walsh KC, 'Enduring originalism' 105 *The Georgetown Law Journal*, 2016, 97, 118. (Many associate natural law with things like Justice Chase's purportedly antiformal opinion in *Calder v. Bull* (1798), The Supreme Court of the United States).

²⁷ Justice Black, dissenting in *Griswold v. Connecticut* (1965), The Supreme Court of the United States, 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)].'

²⁸ It has sometimes been labeled 'natural law due process philosophy' or 'natural law due process theory'. See Black J's dissenting opinion in *Griswold v. Connecticut* (1965), The Supreme Court of the United States.

²⁹ For examples, from *Griswold* onwards, see Alford RP, *In search of a theory for constitutional comparativism*, 667–73.

a nutshell, 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.³¹

But this natural law jurisprudence is not the natural law this paper contemplates. Indeed, as Professor Roger Alford has remarked, some versions of natural law jurisprudence as constitutional theory are compatible with a certain relativism that denies moral truth.³² 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.³³ Unlike natural law jurisprudence, which favours the use of natural law by judges ‘to strike down all state laws which they think are unwise, dangerous, or irrational’³⁴ and seems to invoke a ‘mysterious and uncertain natural law concept as a reason for striking down . . . state law’,³⁵ 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.

³⁰ 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 v. Connecticut* (1965), The Supreme Court of the United States, 516.

³¹ Posner R, ‘No thanks, we already have our own laws’ *Legal Affairs*, July/August 2004 — 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> on 25 June 2023.

³² Alford RP, ‘Roper v. Simmons and our constitution in international equipoise’ 53(1) *UCLA Law Review*, 2005, 19.

³³ See Legarre S, ‘A new natural law reading of the constitution’ 78 *Louisiana Law Review*, 2018, 877 and Legarre S, ‘H.L.A. Hart and the making of the new natural law theory’ 8 *Jurisprudence*, 2016, 82.

³⁴ See Black J’s dissenting opinion in *Griswold v. Connecticut* (1965), The Supreme Court of the United States, 517. Along similar lines, and also noting the Lochnerian roots of this jurisprudence, see Justice Stewart’s dissent in the same case; *Griswold v. Connecticut* (1965), The Supreme Court of the United States, 528.

³⁵ *Griswold v. Connecticut* (1965), The Supreme Court of the United States, 522.

III. Conclusion

As stated in the Introduction to this paper, natural law requires an explanation. But first it was useful to explain what natural law *is not*. It was made clear, hopefully that ‘natural law’ has a meaning different from what it means in three different contexts in which the expression sometimes is used.

First, natural law in this paper does not mean ‘the laws of nature’. The classical term for those would be ‘eternal law’ (not ‘natural law’). Eternal law differs from what natural law means in this paper in that eternal law does not apply exclusively to human agents; instead, natural law as understood in this paper applies only to persons.

Second, natural law is not Christian morality. Yes, they may overlap at times, but natural law resorts to reason only while Christian morality appeals to faith and revelation—and the same would be true of any other religion-based morality.

Third and last, natural law should be differentiated from so-called ‘natural law jurisprudence’. While the latter is a theory of interpretation of the United States Constitution, the former is a universal notion.

Clarifying the distinctions just summarised should be an apt way to move forward toward a clearer understanding of natural law.