

LIBERTY UNIVERSITY SCHOOL OF DIVINITY

Thesis

An Examination and Critique of the Compatibility and Coherence of Brian Leiter's Naturalized  
Jurisprudence with the American Legal Framework

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Thesis Defense

by

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## Introduction

An analysis of the legal codes and political mores within the nation's founding documents arguably reveals an understanding that there is some sort of objective morality to which human beings are obligated to adhere with respect to individual rights and duties.<sup>1</sup> In this light, I suggest the founding of the United States of America, and the legal system upon which it is built, appears to rest upon Judeo-Christian and biblical conceptions of morality and justice.<sup>2</sup> Currently, an effort by Brian Leiter to "naturalize jurisprudence" by imbuing the philosophy of law with a naturalist epistemology is underway. With an epistemology that may properly be construed as scientism,<sup>3</sup> Leiter's project arguably lacks the requisite ability to account for the nature of objective rights and duties that underpin the American founding and its enduring legal framework.

Perhaps more importantly, Leiter's version of a naturalized jurisprudence, I argue, is unable to adequately provide the epistemological requirements for apprehending binding moral obligations and citizen's rights. These same moral obligations are what provide the American legal structure a firm foundation by which to secure its citizens natural rights. In what follows, I set out a critique of Leiter's naturalized jurisprudence for apprehending and delineating objective morality as currently required within the American legal system. In this way, Leiter's naturalistic

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<sup>1</sup> *Declaration of Independence*. July 4, 1776. (accessed July 25, 2019); *Constitution of the United States*, September 17, 1787. (accessed July 25, 2019); Thomas G. West, *The Political Theory of the American Founding: Natural Rights, Public Policy, and the Moral Conditions of Freedom* (New York, NY: Cambridge University Press, 2018), 19-42. Francis J. Beckwith, *Politics for Christians: Statecraft as Soulcraft* (Downers Grove, IL: InterVarsity Press, 2010), 145-162.

<sup>2</sup> I use the term "legal system" to encompass the overarching political and legal frameworks of both the American founding, inclusive of the documents providing for the general structure of its operative government, and that which set the stage for the development of a legal framework from which American jurisprudence would be developed. Moreover, it pertains to the interaction of and with the governed and the governing, which, is delineated and staged by the structural framework of the founding.

<sup>3</sup> J. P. Moreland, *Scientism and Secularism: Learning to Respond to a Dangerous Ideology* (Wheaton, IL: Crossway, 2018), 23; 26; 29-30.

epistemology, upon which his project depends, is arguably an inadequate method for arriving at the prescriptive notions of rights and duties. In contrast to Leiter's attempt to naturalize jurisprudence, I argue Christian theism is arguably a better source for objective morality. Moreover, it is the better source to undergird the structure of the American founding and an enduring legal understanding of rights and duties.

### Overview

I suggest that objective moral values and human rights, especially those pertaining to the innate value of human life as set forth in America's founding documents, are unlikely to be maintained under Leiter's naturalistic epistemology.<sup>4</sup> Leiter states that it is only empirically verifiable data that counts as knowledge—and “empirically” in a very narrow sense. Specifically, Leiter maintains that it is only the knowledge produced by the hard sciences that should guide legal theory and practice.<sup>5</sup> This is problematic. Should an individual, community, or nation accept a worldview constrained by an epistemology like Leiter's, they have accepted a method of knowledge attainment that, arguably, can only denote and delimit notions of what *is* the case relating to a state of affairs. The sciences, guided by this type of empiricism, are likely ill-equipped to illuminate what should be *normative* for human behavior and morality. Science, in this way, is descriptive in nature. It lacks the ability to be a prescriptive force for what *should* be the case and *why*.<sup>6</sup>

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<sup>4</sup> David Baggett and Jerry L. Walls, *God & Cosmos: Moral Truth and Human Meaning* (New York, NY: Oxford University Press, 2016). C. Stephen Evans, *God & Moral Obligation* (New York, NY: Oxford University Press, 2014). James Davison Hunter and Paul Nedelisky, *Science and the Good: The Tragic Quest for the Foundations of Morality* (New Haven, CT: Yale University Press, 2018).

<sup>5</sup> Brian Leiter, *Naturalizing Jurisprudence: Essays of American Legal Realism and Naturalism in Legal Philosophy* (New York, NY: Oxford University Press, 2011), 31; 34-35; 238-239; 273.

<sup>6</sup> J. P. Moreland, *Scientism and Secularism: Learning to Respond to a Dangerous Ideology* (Wheaton, IL: Crossway, 2018), 68; 156. Ian Hutchinson, *Can a Scientist Believe in Miracles? An MIT Professor Answers Questions on God and Science* (Downers Grove, IL: InterVarsity Press, 2018), 26; 85.

Consequently, the trend towards a naturalization of jurisprudence of Leiter's type will subvert the requisite foundations of the objective morality as set forth in the founding. Pertaining to morality, the pursuit of a wholly naturalized system of jurisprudence is likely to regress to the arbitrary moral whims of indeterminant judicial re-interpretation. This type of indeterminacy may or may not adhere to prior moral and legal precedent. Instead, it is likely to succumb to the prevailing cultural conceptions of morality come what may. This is likely to occur despite, in fact because of, the attempt to ground legal theory and practice in a moral epistemology based upon the hard sciences. Such a conception of Leiter's naturalized and morally subjective jurisprudence, I suggest, lacks the authority needed for administering critical legal principles such as equality, responsibility, punishment, and justice that are vital for the continuation of our legal structures.

#### Statement of Purpose

This thesis is an attempt to advance the interdisciplinary discussion between legal philosophers, moral philosophers, theologians, and other scholars navigating the connections between the empirical sciences and the realm of ethics as they come to bear on legal philosophy and practice. Moreover, it is intended that this thesis may help illuminate the importance of the central argument to the broader public as a whole. To this point, I suggest worldviews constructed upon the foundation of a naturalistic moral epistemology like Leiter's are deficient in explanatory scope and power pertaining to the pervasive notions of objectively binding morality and natural rights. Here, an analysis of Leiter's naturalized jurisprudence and the epistemology that informs it will be set forth along with a subsequent attempt to refute it. This thesis will argue that Leiter's naturalist metaphysic is unable to account for the objective moral obligations on which the American legal framework is predicated. Additionally, I attempt to show instead that a worldview based on Christian theism is a better hypothesis for explaining the existence of

objective moral obligations and citizens' rights that function at the heart of the American system of jurisprudence.

#### Statement of Importance of the Problem

The American legal system presupposes a significant array of objective rights and moral obligations which its citizens retain and are bound to by the very nature of their personal existence. These rights and obligations were arguably not created by the recording of the documents, but rather are a written acknowledgement and declaration of pre-existent realities. In this light, Leiter's attempt to naturalize the American legal system will subvert the very foundation upon which the system was built. The root cause of this subversion is that the natural sciences are *positivistic* in process and essence, in the sense that they are merely *descriptive* and cannot adequately function as a *normative* source of moral epistemology. In this way, a naturalized legal system, as Leiter envisions, is ill equipped to inform society of what *ought* or *ought not* be the case. Furthermore, Leiter's project is not able to inform us as to *why* one bears moral responsibility or blame for failing to uphold their moral duty.

Moreover, I suggest that such a system cannot ably wield the requisite moral authority necessary to secure its citizens rights. Here, Laurence Tribe recounts the notion that for many during the 17<sup>th</sup> and 18<sup>th</sup> centuries governmental authority existed to preserve the "natural law" that provided the foundation for the innate rights of personal liberty, personal security, and private property.<sup>7</sup> Tribe says that for many,

It mattered little whether a written constitution expressed these rights and the precise governmental limits they reflected; they were to be preserved because they comprised the central tenets of the unwritten constitution or social compact among the citizenry upon which the government itself was based. Common law and written constitutions expressed

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<sup>7</sup> Laurence H. Tribe, *American Constitutional Law: 2nd Edition* (Mineola, NY: The Foundation Press, Inc., 1988), 560.



and elaborated these notions, but did not create them; even the Magna Carta was thought but a constrained declaration of original, inherent, indefeasible natural rights.<sup>8</sup>

In this way, some schools of thought call for an abandonment of objective truth and morality.<sup>9</sup>

This abandonment is fueled in part by a naturalistic epistemology like Leiter's. This abandonment by some has cast a long shadow of doubt, if not outright rejection, of the notion of a universally binding objective morality in the minds of many thinkers. This view runs deeply counter to what are arguably the very same notions of objective morality conceived of in the natural law and inalienable rights recognized in the founding. The crux of the problem, then, given the aforementioned rejection of objective morality, is a likely abandonment of the sanctity of human life and the long held self-evident notion of human value and worth. I suggest that a naturalistic epistemology like Leiter's foregoes a critical notion pertaining to the very rights the legal system seeks to uphold.<sup>10</sup> By removing one of the most distinguishing characteristics between humanity and the rest of the created order, that of innate human value, Leiter's epistemology helps undercut the very system he seeks to improve.

Within a thoroughly naturalized system of jurisprudence as Leiter proposes, it is likely that a large degree of relativity of morality is engendered.<sup>11</sup> This subjective and relative nature is captured in its most extreme form by those that reject the existence of objective morality altogether like Nietzsche, Joyce, Mackie—and Leiter himself. In this way, good and evil, right

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<sup>8</sup> Ibid., 561.

<sup>9</sup> Michael Foucault, "Truth and Power," in *The Foucault Reader*, ed. Paul Rainbow (New York, NY: Pantheon, 1984). Douglas Groothuis, *Truth Decay: Defending Christianity Against the Challenges of Postmodernism* (Downers Grove, IL: InterVarsity Press, 2000). Richard Rorty, *Contingency, Irony, and Solidarity* (New York, NY: Cambridge University Press, 1989).

<sup>10</sup> Thomas G. West, *The Political Theory of the American Founding: Natural Rights, Public Policy, and the Moral Conditions of Freedom*.

<sup>11</sup> Brian Leiter, *Naturalizing Jurisprudence: Essays of American Legal Realism and Naturalism in Legal Philosophy*, 224-225; 255.

and wrong, on one popular construal, are relegated to nothing more than social constructs that may prove helpful in the survival and propagation of a species. Nonetheless, they remain relative or empty constructs subject to the changing whims of the society in which they are employed. Put differently, morality, for them, is nothing more than the creation of the human species.<sup>12</sup> If thinkers like Leiter are right then such a view will plausibly detract from the validity of the legal framework that arguably depends on such notions.

I suggest that Leiter's rejection of objective morality and insistence on a jurisprudence informed solely by a narrow scientific empiricism is ill-equipped to sustain the sorts of societal rights and duties America ostensibly values. Furthermore, I suggest that objective morality better explains citizens' enumerated rights and duties. In this way, Leiter's naturalized jurisprudence arguably produces a state of affairs inconsistent with the American legal framework. I argue such a realist understanding of morality is that which protects and upholds the natural rights of its people enshrined in the American legal system. Additionally, to lose this view is likely over time to have a degrading effect on such rights.

#### Statement of Position on the Problem

The fundamental notions undergirding the institution of the United States of America, according to the founding documents, rest largely upon truths that are held to be self-evident. A sober examination of the legal principles and political values within the nation's founding documents reveals an understanding that there is an objective morality to which human beings are beholden to adhere. I argue that the American legal structure essential depends on an

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<sup>12</sup> Richard Dawkins, *The God Delusion* (New York, NY: Mariner Books, 2008). Richard Joyce, *The Myth of Morality* (New York, NY: Cambridge University Press, 2007). J. L. Mackie, *Ethics: Inventing Right and Wrong* (New York, NY: Penguin Putman, Inc., 1990). Richard Rorty, *The Consequences of Pragmatism: Essays, 1972-1980* (Minneapolis, MN: University of Minnesota Press, 1982), xlii. Bertrand Russell, *Mysticism and Logic* (New York, NY: Barnes and Noble, 1917), 47-48.

objective morality based on a firm ontological foundation. Whereas the notions relating to the natural law and rights of citizens deeply resonate with clearly biblical conceptions of morality and justice, the variant of naturalistic thought that Leiter espouses is largely impotent in its quest to meet such ontological requirements. Thus, I maintain that the ontological foundation of morality provided by Christian theism better accounts for citizens' rights and duties as presupposed by the founding documents.

#### Limitations/Delimitations

The focus of this thesis is an exposition and critique of Leiter's project to naturalize jurisprudence. It will attempt to show that it fails as an effort to undergird the moral notions of our political and legal structure. Leiter's effort assumes the principles of jurisprudence can and should come solely from the empirical sciences, for reasons more pragmatic than epistemic. Leiter makes no effort to hide his epistemic naturalism throughout his writings. Leiter makes that notion explicit when he writes, "The real argument for embracing a scientific epistemology, however, is not itself epistemic but pragmatic: such an epistemology, as noted earlier, has *delivered the goods*."<sup>13</sup> His trust that a thoroughgoing naturalist epistemology is the only source of knowledge concerning morality is readily evident. I will argue that his variant of naturalism provides an inadequate foundation for many of the political and legal truths we as a society claim to hold. I also argue that Christian theism provides a better explanation for the objective rights and duties found in the American legal framework.

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<sup>13</sup> Brian Leiter, *Naturalizing Jurisprudence: Essays of American Legal Realism and Naturalism in Legal Philosophy*, 275.

## Chapter Summaries

This introduction has attempted to provide a cursory yet satisfactory treatment of the issue to be handled. At the forefront of the introduction is the very essence of the natural law and rights imbued in the founding documents and the requisite foundation from which those rights flow. Contrary to these objective rights and duties, Leiter adopts a naturalist moral epistemology as the only rational source of moral knowledge. I suggest that Leiter's view stands in tension with the notion of objective moral facts that are intrinsic to the founding. Moreover, in contrast, I argue that Christian theism better accounts for the objective morality and natural rights espoused by the founding and required by an enduring legal framework.

Chapter one sets the primary stage from which the central claims of this thesis is argued. Drawing heavily upon works by Thomas G. West, John Locke, Thomas Aquinas, C. S. Lewis, Jenna Ellis, and Francis J. Beckwith, among others, an analysis of the prevalence of natural law and natural rights within the founding American documents is set forth. These documents include the United States Constitution, The Declaration of Independence, The Declaration of Rights of Virginia, the Massachusetts Constitution, and other foundational documents. What this chapter will attempt to show is that the existence of these rights, which point to an objective and binding morality, is in need of a firm ontology and is an assumption pervasive within these documents and the communities that produced them. Moreover, these rights and moral obligations are central to the foundation and flourishing of the nation.

Chapter two begins the positive argument for the proposition that Christian theism provides an excellent explanation and foundation for the observed delineation of natural law and rights within the foundations of the American legal system. I advance the argument here that the moral epistemology and ontology likely required by such natural law and rights is deeply

consistent and coherent with the worldview as advanced by Christian theism. Especially relevant here is the unique value placed upon human life by God as his image bearers upon the earth. The ontology provided by the divine Creator demarcates human life as more valuable than the rest of the created order.

Chapter three sets forth the analysis of Leiter's attempt to naturalize jurisprudence in America beginning with the foundational metaphysical and epistemological presuppositions of Leiter's construal of naturalism. I articulate and assess Leiter's advancement of the superiority of the hard science to underwrite moral epistemology. The central argument of the chapter is a rebuttal of Leiter's effort as in tension with the founding notions of objective morality. Moreover, Leiter's project is existentially intractable in practice within a society that holds to objective notions of responsibility, blame, justice, and equality. A special focus will be upon Leiter's scientism as insufficient to provide the distinct moral epistemology supposed by the founding with an emphasis on the value and sanctity of human life as discrete from the rest of the known world.

I suggest the lack of a sufficient ontology in Leiter's view is what undermines objective moral values. Moreover, Leiter seems unable to provide a sufficient ontology to provide an adequate foundation for human worth and moral value. Leiter adopts his position as a given that morality has no ontology. In this way, Leiter's variant of naturalism is arguably a deficient as it pertains to the explanatory power necessary for a worldview to account for the pervasive notions of human value and objective morality. Such a proposition stands in stark contrast with the values advanced by the founding documents. Against such a backdrop, it is argued that Christian theism provides a better explanation for the objective morality inclusive of innate human worth imbued within and protected by the American legal structure.

The conclusion offers a brief summary of all these issues. A closing suggestion will be made for further avenues of study. Additionally, a humble plea is proposed for Christian philosophers, legal scholars, politicians, and pastors to advance the argument that this great nation, if it is to remain great, must remain a *good* nation. In closing, I suggest that it is through the God of Christian theism that America is more likely to retain hope of being a good nation. Moreover, it is the existence of moral facts of good and evil, right and wrong which better coheres not with the naturalism advanced by Leiter, but with a generally theistic and specifically Christian worldview.

### **Thesis Statement**

The thesis attempts to provide a cogent recounting how an objective morality is central to the foundations of the American legal institution. It seeks to articulate the philosophical implausibility of Leiter's naturalism as a foundation for morality, specifically as it bears on legal philosophy and jurisprudence. Leiter's scientism will be shown as deficient in terms of explanatory power for certain moral truths and facts. Central to the argument of the thesis is an attempt to show the incongruence of Leiter's scientism with the founding. Moreover, it will be argued that Christian theism that provides a better explanation for the moral ontology and epistemology required by the founding of the American nation.

### **Method**

Following the example of Thomas G. West, the thesis set forth focuses part of its research upon the implicit and explicitly stated positions on objective morality as set forth in the founding documents of the American nation and its legal structures. In contrast with certain scholarship that tends to focus on the differences and quibbles between the founding fathers, West looks at the similarities, the most common and agreed upon normative assumptions found

in the official documents of the founding.<sup>14</sup> In this way, the founding fathers speak in the united voice with which the documents were signed.

Another important methodological aspect of note is that when exploring matters of metaphysical import there is, as far as certainty goes, bound to be philosophical disagreement over the nature and existence of metaphysical truths and realities. “But such is the way of philosophy” as William Rowe says.<sup>15</sup> In this way it is important to recall that the pursuit of truth and clarity of thought will, at times, require interaction with competing ideas and philosophies. Such an understanding strikes at the very crux of the issue this thesis attempts to explore, namely of the explanatory battle between the worldview of Leiter’s naturalism and that of Christian theism over the existence of the moral realities enshrined in the American legal institutions. This thesis adopts a position of moral realism; that is the ontological reality of moral truths independent of human thought, emotion, or practice. To avoid charges of circularity, note that the most important sense in which the thesis presupposes such realism is by arguing that the American legal system itself can be shown to assume it to be so. If it can be established that Christian theism better explains such realism than does Leiter’s naturalistic approach, the case of the thesis will have been made.

A final note on method concerns the exploration of Leiter’s epistemic naturalism. Leiter’s view is sometimes referred to as “scientism” in the relevant contemporary literature. Prior to the Enlightenment, the existence of moral truths or natural law and rights remained largely uncontested. However, with the ascendancy of science as the preferred source of knowledge within large swaths of the post Enlightenment intellectual milieu the supposition that naturalism

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<sup>14</sup> West, *The Political Theory of the American Founding*, 9-10.

<sup>15</sup> William L. Rowe, “The Problem of Evil and Varieties of Atheism,” in *The Problem of Evil*, eds. Marilyn McCord Adams and Robert Merrihew Adams (New York, NY: Oxford University Press, Inc., 1990), 137.

can provide the only reliable source of epistemological foundations about the world continues to gain traction. It is this supposition that is central to the legal philosophy of Brian Leiter, a leading advocate for the naturalization of jurisprudence, and that this thesis analyzes and attempts to show exists in tension with the legal institutions established by America's founders.

#### Data Collection

As this thesis is a philosophical exploration of metaphysical and theological issues the research is largely theoretical in nature. It curates, peruses, and surveys a myriad of primary and secondary sources. These sources include federal and state charters, constitutions and declarations, books and journal articles analyzing the same, as well as primary and secondary sources germane to legal, sociobiological, theological, moral ontology and epistemology, and political philosophy. Nearly all book sources have been purchased while journal articles and founding documents have been attained through online databases via Liberty's research portals.

#### Data Analysis

The nature of philosophical and qualitative analysis merits a distinction in kind from empirically based quantitative analysis. Such a distinction is at the heart of the debate which this thesis seeks to advance. When dealing with metaphysical matters the issue of worldview plays a necessary role as it is impossible to analyze information and data without basic underlying assumptions about how the world operates. Therefore, this thesis adopts a position of moral realism inclusive of metaphysically objective truth. Furthermore, this moral realism is based upon the God of Christian theism for its ontological foundation. This position is adopted due to the research indicating the aforementioned suppositions are in line with those of the founding. Consequently, I argue that Christian theism provides a more natural and effective explanation of such realism when contrasted with Leiter's naturalistic epistemology.



## **Chapter 1: Objective Morality and Natural Law as Fundamental to the American Legal**

### **Structure**

A position of moral realism is not only germane to the present study, but lies at the very center of analyzing Leiter's proposal. The type of natural law theory operative here can be understood primarily through three central tenets. First, it is ontologically rooted in the God of Christian theism. Second, it is accessible to all humanity through reason, conscience, social learning, special revelation, intuition, or otherwise. Finally, its transcendent nature provides for the equality of all persons in all locations for all time. Natural law theory thus construed seems to be in accord with the beliefs of the founders as revealed by the founding documents.

A key element linking natural law and man-made law includes the understanding that objective morality is central to the American legal framework and jurisprudence. Moreover, there is a distinction to be drawn between various iterations of human legal systems and the natural law itself. This notion is made clear by noting that "the difference between the rule of law and other ways of organizing power can only be drawn in terms of the fundamental moral conceptions at the heart of a legal system."<sup>16</sup> This chapter will proceed by delineating a conception of what constitutes natural law and its bearing on the founding legal framework. This is undertaken specifically with regard to how natural law is understood by the founding fathers. Then broached is how such an axiologically objective moral law is ontologically grounded in God generally and the God of Christian theism more particularly. A consequence of this grounding is a deontic account of duties and rights, as expressed in and required for a proper understanding of the American legal framework. It will also be shown that the founders' reliance

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<sup>16</sup> David Dyzenhaus, Sophia Reibetanz Moreau, and Arthur Ripstein, *Law and Morality: Readings in Legal Philosophy: 3<sup>rd</sup> Edition* (Toronto: University of Toronto Press, 2014), 3.

on natural law for constructing the formation of the nation and its enduring legal structure is held in uncomfortable tension with Leiter's effort to naturalize American jurisprudence.

The first aspect of the natural law theory relevant here is that it finds its ontological mooring in God. Baggett and Walls assert that "since it is God's very nature and no arbitrary decision of his that thus constitutes the standard of morality, only things consonant with God's nature could be morally good."<sup>17</sup> Thus, the conclusion that, "God and the ultimate Good are ontologically inseparable"<sup>18</sup> helps pave the way for a natural law conception of morality that is essentially good. This notion, as Baggett and Walls observe has a, "venerable history within Christianity"<sup>19</sup> as they delimit a host of philosophical and theological Christian traditions that hold fast to the inseparable nature of morality and God's nature.

Leo Strauss and Joseph Cropsey, however, take a different path of analysis regarding natural law as they trace the essence of the understanding of "nature" back to Socrates and his philosophical predecessors. Strauss and Cropsey note, however, that Socrates was the one to develop the distinction more fully. They observe the importance of the notion of nature as an essence which allows Plato and Aristotle to develop what is now understood as classical political philosophy noting,<sup>20</sup>

one may say that the law, the human law, thus proves to point to a divine law, *precisely because it is not identical with the divine or natural law*, it is not unqualifiedly true or just; only natural right, justice itself, the "idea" or "form" of justice in unqualifiedly just. (emphasis mine).<sup>21</sup>

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<sup>17</sup> David Baggett and Jerry L. Walls, *Good God: The Theistic Foundations of Morality* (New York, NY: Oxford University, Press, Inc., 2011), 93.

<sup>18</sup> *Ibid.*, 92.

<sup>19</sup> *Ibid.*

<sup>20</sup> Leo Strauss and Joseph Cropsey, *History of Political Philosophy: Third Edition*, eds. Leo Strauss and Joseph Cropsey (Chicago, IL: The University of Chicago Press, 1987), 2.

<sup>21</sup> *Ibid.*, 5.

Such a distinction between the law of nature and the laws of man, and building upon the classical political philosophy of Plato and Aristotle, may be seen in the thought of Cicero who writes,

*If Nature does not endorse our law, all virtue will be thrown to the winds. For what except nature can inspire us....but if laws are to be made by popular demand, official decrees or judicial decisions, then it might become right to rob, commit adultery, or bear false witness, wherever such acts were approved by the votes and decisions of the multitude. If the ideas and desires of foolish men can subvert Nature by a simple vote, can they not compel us to treat evil and harmful actions henceforth as good and helpful? If a law can make justice the fruit of wrongdoing, cannot the same law make good come from evil? It is only Nature's precepts that teach us to distinguish between a good law and a bad (emphasis mine).*<sup>22</sup>

For Cicero, the law of nature was the arbiter of the good and the just; whether this law was written or unwritten,<sup>23</sup> it was understood by all people at all times, due to their ability to reflect and reason, in accord with the divine mind. The law of nature, for Cicero, was rightly rooted in God,<sup>24</sup> thus securing its firm ontological foundation and authoritative position. As a natural outflow of this ontological mooring Cicero expounds on the notion of good and evil as prescribed by the law of nature:

Goodness is not just a matter of opinion—what idea is more absurd than that? Since then we distinguish good from evil by its nature, and since these qualities are fundamental in Nature, surely by similar logic we may discriminate and judge between what is honorable and what is base according to Nature.<sup>25</sup>

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<sup>22</sup> Cicero, "On the Laws (De Legibus)," in *Selected Works of Cicero* (Roslyn, NY: Walter J. Black, Inc., 1948), 238.

<sup>23</sup> *Ibid.*, 237.

<sup>24</sup> To be sure, Cicero was not a Christian theist; nonetheless, an understanding of what God requires by divine law, or the law of nature, as previously shown, could be known through general revelation, conscience, intuition, or other means of promulgation.

<sup>25</sup> Cicero, "On the Laws (De Legibus)," 239.

Given such an understanding of the law of nature, moored in the divine, it may become clearer to see why Cicero ascribes to the law of nature the role of illuminating right and wrong action. Cicero asks in rhetorical fashion, “can we praise or blame anyone at all, if we disregard the rule of nature, which distinguishes between praiseworthy and blameworthy acts?”<sup>26</sup> What may be seen in Cicero, then, is both an epistemological and ontological conception of the law of nature. This conception is a precursor to later thinkers.

In undertaking an elucidation of natural law, Thomas Aquinas asserts that natural law logically flows from eternal law; that which is grounded in God himself. Aquinas’ influence on natural law theory should not be understated. Ernest L. Fortin asserts, “Aquinas has generally come to be regarded as the classic exponent of the natural law theory in the Western world.”<sup>27</sup> Moreover, Fortin observes a confluence of natural law with classical political philosophy as previously noted by Strauss, Cropsey, Baggett and Walls, stating “Aquinas’s natural law doctrine constitutes a prime example on the moral and political level of the Thomistic synthesis between biblical faith and Aristotelian philosophy.”<sup>28</sup>

Regarding the ontology of natural law, Aquinas writes, “the plan of governance of the world existing in God as ruler of the universe has the nature of law. And since God’s reason conceives eternally, as Prov 8:23 says, not temporally, we need to say that such law is eternal.”<sup>29</sup> Moreover, Aquinas observes “the eternal conception of God’s law has the nature of an eternal

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<sup>26</sup> *Ibid.*, 241.

<sup>27</sup> Ernest L. Fortin, “St Thomas Aquinas,” in *History of Political Philosophy: Third Edition*, eds. Leo Strauss and Joseph Cropsey (Chicago, IL: The University of Chicago Press, 1987), 253.

<sup>28</sup> *Ibid.*, 268.

<sup>29</sup> Thomas Aquinas, *On Law, Morality, and Politics, 2<sup>nd</sup> Edition*, trans. Richard J. Regan, eds. William P. Baumgarth and Richard J. Regan (Indianapolis, IN: Hackett Publishing Company, Inc., 2002), 16.

law insofar as he orders that law to the governance of the world he foreknows.” In this way, the laws governing the universe, including the moral law, exist necessarily as part of God’s perfect ontology. To this point, Aquinas notes, “But the end of God’s governance is God himself, and his law is indistinguishable from himself.”<sup>30</sup> In accord with this ontology of the eternal law, and its availability to us both through reason and revelation, Aquinas insists, “it is clear that the natural law is simply rational creatures sharing in the eternal law.”<sup>31</sup> That this eternal law is anchored in the God of Christianity, because his “perfection and supreme ontological status”<sup>32</sup> is supposed by a litany of eminent thinkers throughout the ages. These philosophers include Augustine, Aquinas, Kant, Locke, Paley, Lewis and a host of the U. S. Founders. One may ask, why should such not be the case? To this point, Baggett and Walls write, “God seems to be a natural stopping point indeed, a being whose existence is necessary, the One who is, in fact, the very ground of everything. If anyone or anything is entitled to be a legitimate stopping point, is this not it?”<sup>33</sup>

It is in this way that Jenna Ellis suggests natural law, as understood by the founders, should be more aptly termed “Divine law.” Ellis writes, “Divine Law, commonly referred to as natural law, is the principle that scientific and moral law is fixed, ordained by God, and discoverable by man.”<sup>34</sup> Moreover, Ellis asserts that the terminology of Divine Law “specifically recognizes universal moral authority of an Author, Originator, and Creator of the Law and

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<sup>30</sup> Ibid., 17.

<sup>31</sup> Ibid., 18.

<sup>32</sup> Baggett and Walls, *God & Cosmos: Moral Truth and Human Meaning*, 56.

<sup>33</sup> Ibid., 44.

<sup>34</sup> Jenna Ellis, *The Legal Basis for a Moral Constitution* (Bloomington, IN: WestBow Press, a division of Thomas Nelson and Zondervan, 2015), 41.

therefore encompasses both recognized discoverable areas of law: science and morality.”<sup>35</sup> For the sake of simplicity, however, locutions of “natural law” will be used here. This retention comes with the recognition that many of the writers whose work factors into this thesis would be comfortable employing such a term. What may be seen, then, is that many of the founders understand natural law and rights as rooted in the God of Christian theism. During his *Second Treatise of Government*, John Locke, who was vastly influential on the political thought of colonial America and the subsequent founding, writes,

The obligations of the law of nature cease not in society, but only in many cases are drawn closer, and have by human laws known penalties annexed to them, to enforce their observation. *Thus the law of nature stands as an eternal rule to all men*, legislators as well as others. The rules that they make for other men's actions, must, as well as their own and other men's actions, *be conformable to the law of nature, i.e. to the will of God*, of which that is a declaration, and the *fundamental law of nature* being the preservation of mankind, no human sanction can be good, or valid against it (emphasis mine).<sup>36</sup>

The second component in need of clarity regarding this natural law theory is that of epistemic access. That is, the ability for all humanity to know what is required of them by morality. This access may be through reason, conscience, social learning, special revelation, intuition, or otherwise. A few points on natural law, especially as it pertains to moral knowledge are in order. Baggett and Walls assert that natural law theory contains within it plausible means by which human beings can ascertain moral knowledge. They suggest that, “thoroughgoing theistic natural law theists tend to believe that God has manifested his moral law by writing it into our nature as human beings and in other aspects of his ordered creation as well.”<sup>37</sup> They add, “The epistemic power of natural law makes sense of conscience and moral intuitions, while

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<sup>35</sup> Ibid., 41-42.

<sup>36</sup> John Locke, *The First and Second Treatises of Government* (San Bernadino, CA: Pantianos Classics, 2019), 121.

<sup>37</sup> David Baggett and Jerry L. Walls, *Good God: The Theistic Foundations of Morality*, 164.

providing a better alternative to saying that these are the main or only way in which we acquire moral knowledge.<sup>38</sup> Certainly, Christian theologians may point to Scripture as one such means of bolstering the previous point. Concerning a divinely rooted natural law, the Apostle Paul writes,

what may be known about God is plain to them, because God has made it plain to them. For since the creation of the world God's invisible qualities—his eternal power and divine nature—have been clearly seen, being understood from what has been made, so that people are without excuse (Romans 1:19-20).

Paul continues developing the general revelation of natural law thought in the next chapter stating,

Indeed, when Gentiles, who do not have the law, do by nature things required by the law, they are a law for themselves, even though they do not have the law. They show that the requirements of the law are written on their hearts, their consciences also bearing witness, and their thoughts sometimes accusing them and at other times even defending them (Romans 2:14-15).

What may be seen through the writings of Paul is that whatever mechanism by which the natural law is promulgated, it is to some degree deducible by reason or intuition, and marked by feelings of conscience. For thinkers like William Paley, natural law found harmony with a Thomist perspective in that it was apprehensible, in large part, by way of reason. Paley notes, "Moral philosophy, morality, ethics, casuistry, natural law, mean all the same things; namely, that science which teaches men their duty and the reasons of it."<sup>39</sup> Paley continues,

As the will of God is our rule; to inquire what is our duty, or what we are obliged to do, in any instance, is, in effect, to inquire what is the will of God in that instance? *Which consequently becomes the whole business of morality.* Now there are two methods of coming at the will of God on any point: I. By his express declarations, when they are to be had, and which must be sought for in Scripture. II. By what we can discover of his

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<sup>38</sup> Ibid., 165.

<sup>39</sup> William Paley, *The Principles of Moral and Political Philosophy* (Indianapolis, IN: Liberty Fund, Inc., 2002), 1.

designs and dispositions from his works, or, as we usually call it, *the light of nature* (emphasis mine).<sup>40</sup>

The light of nature, for Paley, is simply another way of referring to natural law. Here, Paley has denoted two primary ways by which human kind comes to know the law of nature. Specifically, how humanity gains epistemic access to what is required of them by morality; namely, direct or special revelation. Secondly they come to know it by reason and discovery. Baggett and Walls concur regarding the essence of natural law epistemology noting,

Natural law theory is epistemologically significant, for the natural laws provide those principles of practical rationality by which our actions are reasonable or unreasonable...natural laws are both prescriptively binding on us as well as universally knowable by nature.<sup>41</sup>

The significance of the epistemology of natural law coincides with its ontology. Because of its ontology, its roots in ultimate reality, natural law necessarily carries the requisite authority and ability to enlighten us to the constitution of our moral duties and obligations. These features of natural law find accord with our human nature and responsibility as the image bearers of God. In this way, Baggett and Walls suggest, “natural laws direct us toward the good, which provides us reasons to act, since the good is what brings to perfection the natures that we have been given.”<sup>42</sup>

The final point concerning integral aspects of natural law is that it makes good sense of the essential moral equality of all persons. That the natural law is applicable to all human kind, Aquinas states, “the natural law regarding general first principles is the same for all persons both as to the principles’ rectitude and as to knowledge of them.”<sup>43</sup> This universality of human nature

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<sup>40</sup> Ibid., 37-38.

<sup>41</sup> David Baggett and Jerry L. Walls, *Good God*, 163-164.

<sup>42</sup> Ibid., 164.

<sup>43</sup> Aquinas, *On Law, Morality, and Politics*, 47.



and the applicability of the law of nature may be traced to the fact that, created as the image bearers of God, humankind has a special place among the contingent natural order. Most importantly, because humanity bears the stamp of the image of God, human life is unique and distinct from the rest of creation. In this way, all humanity is on equal footing by means of their nature or essence.

For Locke such human equality is the foundation of civil society. Locke insists, “the first and fundamental natural law...is the preservation of society.”<sup>44</sup> Regarding Locke’s position, Robert A. Goldwin notes, “The connection between the law of nature and the desire for self-preservation is profound.” Additionally, Goldwin suggests that in obliging this law of nature, “men are assured that in pursuing that desire they are also fulfilling their obligation to God and nature.”<sup>45</sup> This is the case for Locke because society is comprised of individuals marked by the image of God and subject to no other rule than the divinely instantiated natural law. Regarding this point Locke asserts all of humanity is equal noting that we exist in

A state also of equality, wherein all the power and jurisdiction is reciprocal, no one having more than another, there being nothing more evident, than that creatures of the same species and rank, promiscuously born to all the same advantages of nature, and the use of the same faculties, *should also be equal amongst another* without subordination or subjection, *unless the lord and master* of them all should, *by any manifest declaration of his will*, set one above another, and confer on him, by any evident and clear appointment, an undoubted right to dominion and sovereignty (emphasis mine).<sup>46</sup>

Christian theists typically advocate the idea that the existence of an objective morality ultimately guides us to and is rooted within a profounder and more fundamental reality than the material universe alone. This notion, then, works to make clear the firm ontological foundation

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<sup>44</sup> John Locke, *First and Second Treatises of Government*, 120.

<sup>45</sup> Robert A. Goldwin, “John Locke,” *History of Political Philosophy: Third Edition*, eds. Leo Strauss and Joseph Cropsey (Chicago, IL: The University of Chicago Press, 1987), 483.

<sup>46</sup> Locke, *First and Second Treatises of Government*, 78.

for morality, a foundation necessary for preserving the full rationality of moral obligation and action. Certainly pertinent to the theory of natural law Baggett and Walls write,

The claim is that, in a practical way, we have to believe that morality makes sense, that it's deeply rooted on solid foundations, and that the context we live in is thoroughly moral after all, if we are going to remain adequately committed to morality.<sup>47</sup>

This commitment to morality, to each other and civil society, is essential to understanding the founding of the American legal framework. This framework has, as a central feature, a robust understanding of the innate value of human life. That this understanding is accessible and discernible to all is another distinguishing feature of natural law. Moreover, that natural law applies to all persons, irrespective of their individual spatio-temporal location, helps pave the way for the understanding of equality inherent in the laws of nature. These components were readily understood by Locke, whose thinking, as noted, was tremendously influential on the American colonists and the founding fathers. For this reason, Goldwin notes, "John Locke has been called America's philosopher, our king in the only way a philosopher has ever been king of a great nation."<sup>48</sup> Locke assuredly would have bristled at the suggestion, but his importance cannot be overstated when it bears on understanding the prominence of natural law theory on the founding. Let's now turn to the fundamental role of natural rights and the law of nature in the founding.

#### Natural Law and Natural Rights in the Founding Documents

The historical case is strong that a robust concept of a divinely inspired natural law is imbued within America's founding documents and enduring legal structure. Locke's influence on the inclusion of the concept of natural law is undeniable. As West notes, "the colonists quoted

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<sup>47</sup> Baggett and Walls, *Good God*, 14.

<sup>48</sup> Robert A. Goldwin, "John Locke," *History of Political Philosophy: Third Edition*, 510.

Locke more often than any other political writer during the fertile period of political thought leading up to the break with Britain, from 1760 to 1775.”<sup>49</sup> Furthermore, the idea of a transcendent natural law was not only influential, but wholly integral to the founders’ political thought. This helps to answer a question that lies at the heart of legal moralism. That is, which standard of morality is to be used? Popular morality, or critical morality, that is, the version of morality thought to be singularly correct?<sup>50</sup> To this point, West writes, “The natural rights doctrine—including the concepts of equality, *the laws of nature*, and the social compact basis of government—is the core of the founders’ political theory (emphasis mine).”<sup>51</sup> Moreover, West contends that “the founders’ consensus documents point to natural rights and the laws of nature as the lens through which politics is understood.”<sup>52</sup> I suggest that the founders’ belief in the inalienable rights bestowed upon mankind are securely linked to the divine authority to which they appeal, the same authority which promulgates and underwrites the law constructed for a new nation.

In his extensive analysis of the founders’ consensus documents, West asserts that the Founders demonstrated their collective belief that the law of nature and natural rights were understood as a real feature of the created universe.<sup>53</sup> These consensus documents include the Declaration of Independence, the Constitution of the United States, and the *Federalist Papers*, in addition to myriad state constitutions and bill of rights. Comparing the founders and Cicero,

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<sup>49</sup> West, 11.

<sup>50</sup> Michael D. Bayles, "Legislating Morality," *Wayne Law Review* 22, no. 3 (March 1976): 762.

<sup>51</sup> West, 19.

<sup>52</sup> *Ibid.*, 4.

<sup>53</sup> *Ibid.*, 12.

Harry M. Hubbell notes the pivotal role the law of nature played in the founding of America. Hubbell writes, “to the laws of Nature and Nature’s God,” thirteen colonies, some eighteen hundred years later, were to appeal against the injustices of the rule of their king, George III and such an appeal was anchored in the Law of Nature as set in place by Almighty God.”<sup>54</sup>

Given the understanding that natural law depends upon a divine ontology for its authoritative position, Ellis makes the case that the founders directed the language employed in the Declaration of Independence to reflect that position explicitly. Ellis states, “This ‘Great Complaint’ begins by drawing its authority from a law even greater than the supreme law and ruler of England—Divine Law’s fixed, unchanging, discoverable law.”<sup>55</sup> These appeals to natural law, rooted in God, make more sense in light of context. Ellis highlights the purposeful inclusion of God and natural law language in the Declaration of Independence,

*which the Laws of Nature and of Nature’s God entitle them....We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights....appealing to the Supreme Judge of the world....and for the support of this Declaration, with a firm reliance on the protection of divine Providence.*<sup>56</sup>

Summarizing the language used explicitly for the purpose of defining the authority to which the founders appealed, Ellis writes, “We can see clearly that Divine Law is the authority and legal basis for American sovereignty and everything that came after.”<sup>57</sup> Ellis’s assertion is bolstered by founding father John Adams avowal that the signing of the Declaration will be cause for perpetual commemoration and celebration. Adams reflects that it ought to be “commemorated as

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<sup>54</sup> Harry M. Hubbell, *Selected Works of Cicero* (Roslyn, NY: Walter J. Black, Inc., 1948), 217.

<sup>55</sup> Jenna Ellis, *The Legal Basis for a Moral Constitution*, 78.

<sup>56</sup> Declaration of Independence.

<sup>57</sup> Ellis, *The Legal Basis for a Moral Constitution*, 79.

the day of deliverance by solemn acts of devotion to God Almighty.”<sup>58</sup> The very verbiage of the Articles of Confederation, which “established a framework that legally established the union of the states while allowing each state to retain its sovereignty”<sup>59</sup> employs an entreaty to “the Great Governor of the World” in the “year of our Lord one thousand seven hundred and seventy-eight” as the basis upon which they form the union.<sup>60</sup> What comes after the Declaration of Independence and the Articles of Confederation, of course, is the United States Constitution. Concerning the Constitution Ellis asserts, “The U. S. Constitution only has its legitimate authority as Supreme Law *because* of the Declaration of Independence. The Declaration of Independence only had its legitimacy because of the authority of Divine Law.”<sup>61</sup> Ellis continues making the case for a divinely rooted founding noting,

The five lawyers we have previously identified as comprising the Declaration Committee (Jefferson, Adams, Franklin, Sherman, and Livingston) knew that in order for the Declaration of Independence to have any legal authority to go against England’s then-current authority, it must appeal to a *higher* legal authority.<sup>62</sup>

It was this higher authority, the natural law, to which the founders appealed. In this way all governmental authority is necessarily derivative. Ellis suggests as much:

These lawyers knew that all governments are under the authority of Divine Law and that it is God, not any man-made government, who gives fundamental rights to mankind. A government only has the power and authority that Divine Law gives it.<sup>63</sup>

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<sup>58</sup> John Adams, “Adams Explains Why We Celebrate the Fourth of July, Sort Of,” in *The Patriots Reference: Documents, Speeches, and Sermons that Compose the American Soul*, eds. Joel L. Miller and Kristen Parrish (Nashville, TN: Nelson Books, 2014), 163.

<sup>59</sup> Joel L. Miller and Kristen Parrish, “Intro to The Articles of Confederation (1777),” in *The Patriots Reference: Documents, Speeches, and Sermons that Compose the American Soul*, eds. Joel L. Miller and Kristen Parrish (Nashville, TN: Nelson Books, 2014), 174.

<sup>60</sup> “The Articles of Confederation (1777),” in *The Patriots Reference: Documents, Speeches, and Sermons that Compose the American Soul*, eds. Joel L. Miller and Kristen Parrish (Nashville, TN: Nelson Books, 2014), 187.

<sup>61</sup> Ellis, 82.

<sup>62</sup> *Ibid*, 84.

<sup>63</sup> *Ibid*.

The same notion espoused by Ellis in the previous passage can be traced back in natural law theory from Aquinas to Cicero, and from Plato to Aristotle. Namely, there is a distinction between the laws made by humankind and the natural law. The latter is that which guides, directs, and judges between what is fundamentally right and fundamentally wrong. Contrasted with contingent human law natural law is delineated through and based in God's perfect ontology.

Moreover, because of the moral properties found in the law of nature there are timeless principles concerning human action. West calls attention to this by observing the fact that the founders' most central governing claim was that "there are certain truths that can reliably guide political life in all times and places."<sup>64</sup> Given such an understanding, it becomes clearer that the Constitution of the United States, and the legal system later constructed on it, was to have an enduring nature. While times, circumstances, and events inevitably change, the bedrock moral principles which undergird the nation's political structure do not. The Constitution was erected, in part, to help preserve these principles—principles rooted in the law of nature and the inalienable rights which it entails.

Turning to the idea of natural rights as an extension of the law of nature, West asserts that, for the founders, natural rights flow from the natural law. West writes that the "founding documents frequently recognize the laws of nature as the ground of natural rights."<sup>65</sup> Moreover, that the right to life and liberty that derive from the natural law is paramount for a body politic. Arguably it is the natural law that provides the moral basis from which these rights are secured.

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<sup>64</sup> West, 13.

<sup>65</sup> *Ibid.*, 37.

Germane to this notion, West notes that the founding documents used “natural law as defining the moral limits of the natural right to liberty.”<sup>66</sup> Here the distinction between natural law and natural rights is made clear: “natural rights are just claims against others, while the laws of nature are rules of just conduct that all are obliged to obey.”<sup>67</sup> While there is a distinction between natural law and natural rights, West notes, “rights and duties always go together for the founders.”<sup>68</sup> Such is the case due to the belief by the founders that the natural law is morally binding and obligatory.

For the founders, it was the divinely rooted, authoritative, and pragmatic governing principles found in natural law that they sought to include in the nation’s legal framework. West summarizes this notion:

If moral laws are not commands, they are only suggestions. Thus the founders presented rational arguments regarding the usefulness of natural rights while supporting teachings like divine will and the moral sense to give their arguments weight. If we could ask them whether their arguments are ultimately grounded in the sacred or in the useful, in virtue or advantage, they would probably reply, “both.”<sup>69</sup>

Such a notion coheres nicely with the idea that natural law performs as a function of the character of the God in whose image we’re made. It makes good sense that moral laws would be both rooted in reality and intrinsically right, as well as eminently practicable and of pragmatic value over the long term. Along such lines, West suggests that the founders, through their consensus documents, readily recognized three primary ways in which the moral law carries an obligatory character. Foremost is “the argument from divine authority; the claim that the laws of

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<sup>66</sup> Ibid.

<sup>67</sup> Ibid., 5.

<sup>68</sup> Ibid.

<sup>69</sup> Ibid., 95.

nature are binding because they come from God's will."<sup>70</sup> The second way in which the founders understood natural law and rights is with regard to the essence of humanity. The founders understood human beings as "endowed by nature with a moral sense, a conscience, an inborn awareness of right and wrong."<sup>71</sup> In this way, human beings, by virtue of their essence are essentially equal, since the whole of humankind possesses this moral sense. The third way in which the founders understood the law of nature to be morally binding is the connection between natural rights and well-being. The notion of well-being pertains to the citizens' happiness. Referring to the essential link between human rights and well-being, The Continental Congress writes of the issue in 1774 observing, "These are the rights, *without which a people cannot be free and happy*, and under the protecting and encouraging influence of which these colonies have hitherto so *amazingly flourished and increased* (emphasis mine)."<sup>72</sup>

The founders' reliance on natural law can also be seen outside their consensus federal documents as makes clear a perusal of the founders' personal writings and official state level documents. West provides a detailed list of state constitutions, for which he notes "sixteen out of seventeen constitutions or fundamental state documents contain natural rights language or the equivalent."<sup>73</sup> An extended quote by West summarizing this critical inclusion of natural rights language and their importance on the equality of human life is in order

By adding the language of rights to that of "born free and equal" these documents affirm that the original equality is not only a fact, but a fact pregnant with moral weight. This is why the rights are called "inalienable" (Declaration of Independence), "inherent" (Virginia Bill of Rights), "natural (Massachusetts Bill of Rights), or "natural inherent, and inalienable" (Pennsylvania, Vermont, New Hampshire, and Ohio Bill of Rights).

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<sup>70</sup> Ibid., 85.

<sup>71</sup> Ibid.

<sup>72</sup> Continental Congress, October 26, 1774, in *Founder's Constitution*, 5:63.

<sup>73</sup> West, 26.



Another variant, “the indelible rights of mankind,” is found in the Georgia resolutions of 1774. This numerical disparity suggests that statements of natural rights are practically more important than statements of equality. That is because the idea of natural rights makes explicit the significance of equality as a moral guide.”<sup>74; 75</sup>

Founding father Benjamin Franklin explicitly pointed to these state constitutions for those individuals seeking to come to America and “who desire to understand the state of government in America, would do well to read the Constitutions of the several states, and the Articles of Confederation that bind the whole together for general purposes, under the direction of the one assembly called the Congress.”<sup>76</sup>

Regarding individual founders and those influential on them, the power to govern the affairs of men, according to Thomas Paine, “can only belong to God.”<sup>77</sup> For example, Alexander Hamilton writes of the Law of Nature that it “is indispensably obligatory upon all mankind, prior to any human institution whatever...Hence, in a state of nature, no man had any moral power to deprive another of his life, limbs, property, or liberty” and “upon this law, depend the natural

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<sup>74</sup> Ibid.

<sup>75</sup> To be sure, at the time of the founding the notion of equality for all people was ruefully stained by the institution of slavery. It is helpful to understand founders such as Washington, though a slaveholder, desired to see the practice abolished by the legislature. Regarding abolition Washington writes, “I can only say, that there is not a man living, who wishes more sincerely than I do to see a plan adopted for the abolition of it” and regarding this abolition he writes that this “evil exists which requires a remedy.” See Washington’s April 12, 1786 letter to Robert Morris for his sentiments and desires on the institution. More generally, it should be acknowledged that the founders in certain respects didn’t see fully implemented the implications of some of their putative convictions. Some would excuse them, of course, because of the profound difficulties of practicably taking on the challenge of ending slavery at the same time as their emancipation from England, but, whatever the reason or rationalization, their claims about essential equality required that in time the hideous practice of slavery would need to be addressed and abolished.

<sup>76</sup> Benjamin Franklin, “Advice for Those Coming to America (1784)” in *The Patriots Reference: Documents, Speeches, and Sermons that Compose the American Soul*, eds. Joel L. Miller and Kristen Parrish (Nashville, TN: Nelson Books, 2014), 211.

<sup>77</sup> Thomas Paine, “The Times That Try Men’s Souls,” in *The Patriots Reference: Documents, Speeches, and Sermons that Compose the American Soul*, eds. Joel L. Miller and Kristen Parrish (Nashville, TN: Nelson Books, 2014), 136.

rights of mankind.”<sup>78</sup> The Resolutions of the House of Representatives of Massachusetts, Oct. 29, 1765 declare, “there are certain essential rights...which are founded in the law of God and nature, and are the common rights of mankind” and “no law of society can, consistent with the law of God and nature, divest the people of those rights.”<sup>79</sup> Thomas Jefferson notes in his *1774 Summary View of the Rights of British America* that, “The God who gave us life gave us liberty at the same time; the hand of force may destroy, but cannot disjoin them.”<sup>80</sup> When George Washington sought to retire from his military career, he wrote a letter to the Governors of the several states and closed with a truly moving prayer for the newly founded nation:

I now make it my earnest prayer, that God would have you, in the state over which you preside, in his holy protection....that he would incline the hearts of the citizens to entertain a brotherly affection and love for one another; for their fellow citizens of the United States at Large, and particularly for their brethren who have served in the field; and, finally, that he would most graciously be pleased to dispose us all to do justice, to love mercy, and to demean ourselves with the charity, humility, and pacific temper of the mind, which were the characteristics of the Divine Author of our blessed religion; without an humble imitation of whose example, in these things, we can never hope to be a happy Nation.<sup>81</sup>

What may be gleaned through a review of writings contemporary to the founders, and those individuals who were influential on the political thought of the nation, is a widespread acknowledgment of and appeal to the God of Christian theism in thanksgiving, supplication, and for the grounding of their revolutionary efforts.

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<sup>78</sup> Alexander Hamilton, *Farmer Refuted*, in *The Papers of Alexander Hamilton*, ed. Harold C. Syrett (New York, NY: Columbia University Press, 1961-79), 1:87-88.

<sup>79</sup> The Resolutions of the House of Representatives of Massachusetts, Oct. 29, 1765 in *Founders' Constitution*, 1:629.

<sup>80</sup> Thomas Jefferson, *1774 Summary View of the Rights of British America*, in *Writings*, ed. Merrill D. Peterson (New York, NY: Library of America, 1984), 121-122.

<sup>81</sup> George Washington, “General Washington’s Circular Letter to the Governors of Each of the States,” in *The Patriots Reference: Documents, Speeches, and Sermons that Compose the American Soul*, eds. Joel L. Miller and Kristen Parrish (Nashville, TN: Nelson Books, 2014), 200-201.

## **Chapter 2. Christian Theism as a Plausible Moral Foundation for the American Legal System**

The insight provided by Bastiat, that humankind makes laws to preserve and protect that which is endowed by God, namely *life* and the inalienable rights that coincide with such, strikes at the heart of and purpose for the American project.<sup>82</sup> To this point, a sure-footed attempt has been made to show that the American founding and its enduring legal structure rests on a transcendent natural law imbued within all creation by God's divine will. It will be argued that the founders well understood the fact that in order to separate themselves from England's tyranny they must appeal to a higher source of authority, in this case the *highest* source of authority possible: God himself.

The founders had judged the rule of King George III as unjust and, as a result, sought to dissolve the ties that bound them in the creation of a new nation. In order to do so, there must have been a comparative standard by which the former rule was found unjust and by which to establish a new government for a new nation. Beckwith writes that "it is by the moral law that we judge governments and written laws as either just or unjust."<sup>83</sup> The founders clearly deemed their previous temporal sovereign, by its declarations and actions, as unjust. Thus, they appealed to the law of nature and the God that anchors it for their independence, freedom, and liberty. Their appeal to the law of nature and nature's God is an appeal to a foundation that definitively grounds the objective rights they sought to secure for all citizens in an enduring fashion. In this way, Moreland's assertion that "the existence of objective values makes far more sense if there is

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<sup>82</sup> Frederic Bastiat, *The Law* (USA: Creative Commons, 2013), 2.

<sup>83</sup> Francis J. Beckwith, *Politics for Christians: Statecraft as Soulcraft*, 159.

an objective Lawgiver than if there is not” is highly pertinent.<sup>84</sup> Thus, the founders based their nascent nation on something authoritative, timeless, and immutable; something true and just. For the founders this was the law of nature and nature’s God. I suggest the God to which they appealed is the God of Christian theism most particularly, although some elements of Deistic belief were also present.<sup>85</sup>

Why might the founders appeal to the God of Christianity as the foundation of the natural law? Why would such a foundation help secure the natural rights they sought to delineate and protect? Arguably, because objective morality and natural law appear to fit so well within a Christian worldview. Given Christian theism, morality comfortably coheres with the way reality is truly structured. Given the nation’s founding on an objective morality, and rights based on it, a few pertinent questions arise. First, does Christian theism offer an explanatory account of objective morality in alignment with the legal framework set in place by the founders? Second, which worldview better accounts for the existence of objective moral obligations, rights, and duties presupposed by the American legal structure, Christianity or Leiter’s version of naturalism? This chapter will identify the strengths of a Christian account of moral realism and its alignment with the founding.

Classical theism broadly, and Christian theism specifically, provide a robust explanatory account of what Baggett and Walls deem the “set of salient facts requiring explanation” regarding “important moral realities.”<sup>86</sup> These moral realities suggested by Baggett and Walls align well with those set forth by the founders. The existence of moral facts and moral

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<sup>84</sup> Moreland, 75.

<sup>85</sup> David L. Holmes, *The Faiths of the Founding Fathers* (Oxford: Oxford University Press, 2006), 39-51.

<sup>86</sup> Baggett and Walls, *God & Cosmos*, 15.

knowledge are of special interest regarding the legal structure put in place by the founders.<sup>87</sup> A focus on moral facts inclusive of “objective, prescriptively binding moral duties, objective moral values” and “ascriptions of moral responsibility” is especially relevant.<sup>88</sup> Specifically, the Christian case regarding the intrinsic value of human beings as pertinent to the legal framework is noteworthy. A Christian conception of morality also renders belief in objective and binding morality a fully rational endeavor.

The founders’ focus on protecting life, along with the rights and duties germane to human flourishing, is an explicit focus of the legal framework they constructed. Moreover, the founders’ insistence is predicated on its being *good* to do so. Put differently, the legal framework presupposed a robust notion of moral goodness at its core. How might the founders account for their conception of goodness? This is an axiological question of moral value.

The starting point for a discussion of moral values pertains to the issue of moral facts: “primarily facts about moral goodness and rightness, values and duties.”<sup>89</sup> How these facts come to bear upon the question of human rights, dignity, and worth are of the utmost importance. Baggett and Walls, surveying certain ideas of C. Stephen Evans and Nicholas Wolterstorff, Angus Menuge and Mark Linville, recount the notion that “belief in the value of human beings undergirds the conviction that we possess ‘natural rights’ as humans.”<sup>90</sup> Certainly the founders believed in these natural rights. They declared their independence and subsequently fought a war to preserve them. Whether or not human beings actually have inherent value and dignity is

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<sup>87</sup> Ibid.

<sup>88</sup> Ibid., 16.

<sup>89</sup> Ibid., 113.

<sup>90</sup> Ibid., 117.

critically important to a proper understanding of the founding and the enduring legal structure that seeks to protect these rights.

The idea of goodness as a proper foundation for understanding moral facts and value in light of the founding aligns well with Christian theism. On a theistic system, “Goodness did not emerge and come to be, but was the starting point.”<sup>91</sup> Mark D. Linville writes, “according to the theist, then, God is personal and is the source of all value so that the value of personhood is found in the fact that the metaphysically, axiologically, and explanatorily ultimate Being is a person.”<sup>92</sup> It is this ultimate Being that was, for Anselm, “a being than which nothing greater can be conceived” in his ontological argument for God.<sup>93</sup> Finding agreement with the Anselmian tradition William Lane Craig notes, “the Good is determined paradigmatically by God’s own character.”<sup>94</sup> Goodness, by this thinking, is a property thought to be something which a Being of such a nature would instantiate necessarily. However, it is within Christianity that goodness is not simply a property possessed by God. The “is of identity” is operative in addition to the “is of predication”; God is good, perfectly and necessarily, but is also *the* good, in some significant sense. Pointing to a rich history within Christianity that suggests God *is* the ultimate Good, Baggett and Walls note, “Thomists, Anselmians, theistic Platonists, and theistic activists,

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<sup>91</sup> *Ibid.*, 306.

<sup>92</sup> Mark D. Linville, “The Moral Argument,” in *The Blackwell Companion to Natural Theology* eds. William Lane Craig and J. P. Moreland (Oxford: Wiley-Blackwell, 2012), 443.

<sup>93</sup> Anselm, “Proslogion” in *Anselm of Canterbury: The Major Works including Monologion, Proslogion, and Why God Became Man*, eds. Brian Davies and G. R. Evans (New York, NY: Oxford University Press, 2008), 87-90.

<sup>94</sup> William Lane Craig, “The Most Gruesome of Guests,” in *Is Goodness without God Good Enough? A Debate on Faith, Secularism, and Ethics*, eds. Robert K. Garcia and Nathan L. King (New York, NY: Rowman and Littlefield Publishers, Inc., 2009), 168-169. A worthwhile exploration for another occasion would be to spell out ways in which the Trinitarian conception of Christianity’s conception of God’s nature might help illumine this suggestion.

including such contemporary analytic philosophers as Alvin Plantinga and Robert Adams, all concur that on a Christian understanding of reality, God and the ultimate Good are ontologically inseparable.”<sup>95</sup> In this tradition God is the very locus, the metaphysical center, the central archetype or paradigm, for the Christian conception of goodness, at least on a theistic Platonic or ultimately a Thomistic reading Goodness and goodness are ontologically inseparable, even if they remain conceptually distinct in certain respects. Thus the starting point for goodness on such a view is God himself; the Creator of the universe.

Regarding an argument for theism, Baggett and Walls write, “Our abductive approach starts with such moral facts as the intrinsic value of human beings as something in need of explanation.”<sup>96</sup> Human beings, according to Christianity, are made in the image of God (Gen. 1:27). That human beings bear the image of God is what sets us apart from the rest of the created order. Linville expounds this notion writing, “On a Judeo-Christian worldview, *human* personal dignity, though intrinsic, is derivative. The value of human persons is found in the fact that, as bearers of the *imago dei*, they bear a significant resemblance to God in their very personhood.”<sup>97</sup> That the God of Christian theism is held to be a personal being and the ground of goodness is, in part, “what puts a proper end to the search for more adequate moral foundations.”<sup>98</sup> This is the case for Baggett and Walls as they suggest God is “a real beginning and foundation to all else, a real locus of value, a primordial good of unsurpassable value.”<sup>99</sup>

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<sup>95</sup> Baggett and Walls, *Good God*, 92.

<sup>96</sup> Baggett and Walls, *God & Cosmos*, 285.

<sup>97</sup> Mark D. Linville, “The Moral Argument,” in *The Blackwell Companion to Natural Theology*, 444-445.

<sup>98</sup> Baggett and Walls, *God & Cosmos*, 286.

<sup>99</sup> *Ibid.*

Such a divinely derivative conception of human worth leads to the conclusion that, “historically speaking, there is little doubt that religious perspectives on the human condition and nature of the world were instrumental in the formation of convictions about basic human rights.”<sup>100</sup> Timothy Samuel Shaw bolsters this idea by noting that the way the majority of the world now thinks about morality may be traced back to the teachings of Christ. For Shaw much of what the world understands as moral progress did not occur until Christianity became widespread.<sup>101</sup> The notions of the intrinsic goodness of God and the innate value of human beings is at the very center of the Christian teaching. Christianity therefore offers both a tenable account for grounding goodness as well as for explaining why human beings possess intrinsic worth. Both of these Christian ideals align well, and arguably support, the framework erected by the founders.

Due to the notions within Christianity that human beings are intrinsically valuable and God is the ground of goodness, moral obligations make good sense. Recall, for the founders, rights and duties always went together. In philosophy this often goes by the name of the “correlative hypothesis.” In this light, objective moral obligations, in terms of citizens’ duties, are important moral evidence in need of close attentiveness and an adequate explanation. “Questions about intrinsic goods, human rights, and binding obligations are vital to answering the further questions of whether what one is intended for is good to do.”<sup>102</sup> For the founders,

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<sup>100</sup> Ibid., 117.

<sup>101</sup> Timothy Samuel Shaw, *Christianity and Freedom: Volume 1: Historical Perspectives*, eds. Timothy Samuel Shaw and Allen D. Hertzke (New York, NY: Cambridge University Press, 2016), 22-23; 28-29. In various places Paul Copan has argued in similar ways, adding a historical dimension to the task of moral apologetics. To use the nomenclature of Baggett and Walls, such historical developments reveal a social dimension of the performative variant of the moral argument(s).

<sup>102</sup> Baggett and Walls, *God & Cosmos*, 289.



upholding one's duties, that is one's obligations, is a good thing to do. In this way an account of moral obligations "needs to rest on the foundation of a theory of the good."<sup>103</sup>

Evans suggests that a natural law theory may provide the ground of goodness required for moral obligations. Evans writes, "one might argue that a transcendent law-giver, a divine being who has genuine authority, is necessary to have genuine moral obligations."<sup>104</sup> Evans continues, "Some theory of the good must be presupposed, however, since an important part of what makes God's commands binding is that God is himself essentially good and thus his commands are directed to the good."<sup>105</sup> For Evans, then, the commands that rest in God's own nature are what create our moral obligations.<sup>106</sup> These moral obligation are essentially relational to the ultimate Good. Evans writes,

if God exists and is a genuine person, then the relation between creature and creator is a genuine social relation, and like other such relations, carries with it distinctive obligations. On the theistic conception of God, God is essentially good and loving; he has created human persons and given them every good they have, including their very existence. He has also given them the potential for the greatest possible good, an eternal life characterized by friendship with God and others who are friends of God and therefore love the good.<sup>107</sup>

Obligations that rest on an ontological theory of the good such as natural law also reflect the requirement for moral transformation. The need to close the moral gap, the gap that "exists between our best efforts to live the moral life and the moral demand itself."<sup>108</sup> Evans notes that it

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<sup>103</sup> Ibid., 287.

<sup>104</sup> Evans, 20.

<sup>105</sup> Ibid., 26.

<sup>106</sup> Ibid., 62.

<sup>107</sup> Ibid., 28.

<sup>108</sup> Baggett and Walls, *God & Cosmos*, 216.

is in Christian thought the moral law helps us “see how much we need to be transformed.”<sup>109</sup> The founders would have seen the process of closing the moral gap as one of exercising virtue—the fulfillment of one’s duties and obligations in accord with God’s commands and the divine law.<sup>110</sup> The exercise of morality, inclusive of practicing virtue “for the Christian, is all about relationship, first and foremost with God, and the secondarily with others.”<sup>111</sup> Evans summarizes the relational connection between a conception of the good and moral obligations and duties noting

if God gives human persons some commands that apply to their relation to all humans, then they will have moral obligations to all humans....if we assume as Judaism and Christianity do, that all humans are made in God’s image....God’s commands must be directed to the good, since God is essentially good and loving....It thus makes sense that God would command humans to love God himself, who is supremely good, and all human persons who share in the divine image, and thus must also be good in some deep way. Thus the command to love our neighbors as ourselves, common to Judaism and Christianity, understood in such a way that all human persons are our neighbors, is precisely what one would expect from a good and loving God who creates all humans in his image.<sup>112</sup>

In this way, Christianity offers a rational account of moral duty and moral obligations, the same type of obligations and rights on which the founding is predicated.

Christian theism readily offers such an account of the good as noted above. Moreover, for obligations and duties to be binding, they need an account of their prescriptive authority.

“Theism—entailing a loving, perfect God who commands, who knows us better than we know ourselves, who know truly what is in our ultimate best interest, and who desire the best for us—

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<sup>109</sup> Evans, 87.

<sup>110</sup> Baggett and Walls, *God & Cosmos*, 218; Evans, 80-86.

<sup>111</sup> Baggett and Walls, *Good God*, 186.

<sup>112</sup> Evans, 32.

can, we submit, most effectively provide it,” according to Baggett and Walls.<sup>113</sup> The founders would certainly agree. A divinely rooted natural law theory would carry with it the authority necessary to make moral obligations binding. It would also set the citizens’ rights and duties on a firm foundation. In this way, Christian theism readily aligns with the founding ideals of objective moral obligations, rights, and duties.

Christianity offers a strong foundation for the existence of moral value and moral obligation. But is morality itself a rational endeavor? Whether morality is rational is arguably a question concerning the ultimate status of reality. Christian theists espouse the view that morality is anchored to a reality deeper than the physical universe alone. Morality points us to something much more foundational. To this point, Christianity asserts there is a more robust foundation for maintaining rational belief in the deeply existential nature of morality. It is argued that Christian theism offers a more robust and surer ontological footing—the same foundation that bolsters rational assent to the moral enterprise broadly, and to the American legal framework more specifically. Moreland writes that if

Those who accept the existence of natural moral law (that there is an objective moral law rooted in the creation that can be known without using the Bible); the irreducibly mental nature of consciousness; natural, equal human rights; or the fact that human flourishing follows from certain biblically mandated ethical and religious practices; then the truth of Christian theism provides a good explanation of these phenomena. And this fact can provide some degree of confirmation for Christian Theism.<sup>114</sup>

The appeal to the God of Christianity as the explanation for the existence of morality is based on rational grounds when all the pertinent evidence is weighed. Instead of basing morality

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<sup>113</sup> Baggett and Walls, *God & Cosmos*, 290

<sup>114</sup> Moreland, 181.

on the contingent ontology and epistemology of humanity Christian theism supposes the ontological foundation is in none other than the Creator of the universe.

It was to this particular Creator that the founders arguably appealed. The Declaration of Independence plainly grounds its appeal in “the Laws of Nature and of Nature's God” that certain truths are “self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness.” It makes good sense then that the founders would make an appeal to an authoritative source readily understood by the majority of the new nation. Conversely, it strains credulity to think the founders would base the fledgling nation in a divine source not widely known nor revered.

Peter Marshall and David Manuel observe that “One nation under God” was the “political as well as the spiritual legacy of the Great Awakening. All of America had now in some measure experienced the scriptural truth that in Christ, all men and women are brothers and sisters.”<sup>115</sup> While freedom of religion was revered and practiced, the spiritual milieu at the time leading up to the founding was thoroughly Christian. Marshall and Manuel relay the sentiment expressed by a British governor in correspondence to the English King: “If you ask an American, who is his master? He will tell you he has none, nor any governor but Jesus Christ.”<sup>116</sup> Moreover, they document the rallying cry “of America though the Committees of Correspondence: ‘No king but King Jesus!’”<sup>117</sup> The buildup to the revolutionary founding is captured succinctly in the sentiments of Jonathan Mayhew through a sermon delivered in 1750:

We may safely assert these two thing, in general, without undermining civil government: One is, that no civil rulers are to be obeyed when they enjoin things inconsistent with the

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<sup>115</sup> Peter Marshall and David Manuel, *The Light and the Glory: God's Plan for America 1492-1793* (Grand Rapids, MI: Revell, a division of Baker Publishing Group, 2009), 310.

<sup>116</sup> *Ibid.*, 324.

<sup>117</sup> *Ibid.*

word and commands of God. All disobedience in such case is lawful and glorious; particularly if people refuse to comply with any legal establishment of religion, because it is a gross perversion and corruption of a pure and divine religion brought from God to man by the Son of God himself, the only head of the Christian church. All commands running counter to the revealed will of God are null or void; and disobedience to them is not a crime, but a duty.<sup>118</sup>

Though their beliefs were not purely homogenous there is widespread evidence that many of the founders shared the common Protestant faith of their countrymen. Alf J. Mapp, Jr. relays that Thomas Jefferson, in his own words, was “content to submit to the will of the God of Jesus, and our God.”<sup>119</sup> Mapp, Jr. writes of Patrick Henry, “He tried to convert some of his associates to Christianity, read the Bible each morning, was disturbed to learn that some people supposed him a Deist.”<sup>120</sup> Alexander Hamilton in his later years became “intensely reverent.” Mapp, Jr. notes of Hamilton, “He never had the opportunity to execute his plans for a national organization of Christians to elect like-minded men to political office...to circulate Christian-oriented publications commenting on current events.”<sup>121</sup> David L. Holmes expresses clearly that founders Samuel Adams, Elias Boudinot, and John Jay held orthodox Christian views.<sup>122</sup>

The Continental Congress, in the *Declaration of Taking up Arms*, appealed “before God and the world” to the “Divine Author” and “Creator” for “Divine favor” that “his Providence” would converge in “a humble confidence in the mercies of the supreme and impartial *Judge and*

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<sup>118</sup> “Rev. Jonathan Mayhew Defends Civil Resistance,” in *The Patriots Reference, Documents, Speeches, and Sermons that Compose the American Soul*, eds. Joel L. Miller and Kristen Parrish (Nashville, TN: Nelson Books, 2014), 40.

<sup>119</sup> Alf J. Mapp, Jr., *The Faiths of Our Fathers: What America’s Founders Really Believed* (New York, NY: Fall River Press, 2006), 19.

<sup>120</sup> *Ibid.*, 95

<sup>121</sup> *Ibid.* 109.

<sup>122</sup> David L. Holmes, *The Faiths of the Founding Fathers*, 143-160.

*Ruler* of the universe (emphasis mine).”<sup>123</sup> In closing their declaration the Continental Congress made it known that “we most devoutly implore *his divine goodness* to protect us happily through this great conflict (emphasis mine).”<sup>124</sup> Such wording does not reflect the Deistic conception of a disinterested and uninvolved creator. Rather, it is in great alignment with the Christian understanding of an intimately involved, good, and just Sovereign. The Virginia Declaration of Rights from May 15, 1776 closes its delineation of the equal rights of the citizens with an exhortation “that it is the mutual duty of all to practice Christian forbearance, love, and charity toward each other.”<sup>125</sup> The articles of Confederation closes with a declaration that “it hath pleased the *Great Governor of the World to incline the hearts* of the legislatures we respectively represent in congress, to approve of, and to authorize us to ratify the said articles....*in the year of our Lord* one thousand seven hundred and seventy-eight (emphasis mine).”<sup>126</sup> Finally, during President Washington’s first inaugural address he presents

fervent supplication to that Almighty Being who rules over the Universe....rendering this homage to the Great Author of every public and private good....since we ought to be no less persuaded that the propitious smiles of Heaven, can never be expected on a nation that disregards the enteral rules of order and rights, which Heaven itself has ordained.<sup>127</sup>

Many of the official state and confederate documents and public addresses appeal to a personal, active, good, and supreme God—the same type of God proclaimed in Christian theism. In this way we can see there is strong evidence to suppose the founders based their appeal to divine

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<sup>123</sup> Journals of the Continental Congress, 1774-1789, II, 140-57.

<sup>124</sup> Ibid.

<sup>125</sup> Declaration of Rights, in *The Patriots Reference*, 123-127.

<sup>126</sup> Articles of Confederation, in *The Patriots Reference*, 187.

<sup>127</sup> George Washington, “The First Inaugural Address of George Washington,” in *The Patriots Reference: Documents, Speeches, and Sermons that Compose the American Soul*, eds. Joel L. Miller and Kristen Parrish (Nashville, TN: Nelson Books, 2014), 297-299.

authority in the God of Christianity. Furthermore, this appeal is one that the majority of the inhabitants of the new nation would have widely given their approving assent.

The moral argument for the existence of God is powerful and has a long and impressive history of formulations as chronicled masterfully in *The Moral Argument*.<sup>128</sup> Moreover, the moral argument for the existence of the Christian God is formidable as well. And, if Christian theism is *true* then the ultimate ground of explanation for morality is found in a morally perfect Being. Here the Christian conception for morality is multifaceted and comprehensive, offering lucid axiological and deontic accounts of morality in such a manner as to see how and why morality wields prescriptively binding authority over human beings. Moreover, the existence of transcendent and objective morality may be derived abductively as a more cogent explanation for the facts existentially observed. Lastly, morality presents itself in a teleological manner; it appears to be instantiated in the fundamental framework of the universe by way of purposeful design.<sup>129</sup> This coherence of the relevant components of morality is that which guided Mavrodes to submit that morality ultimately “makes sense.” That is, morality as a fully rational enterprise points to a much more profound and meaningful reality, namely, the God of Christianity.<sup>130</sup>

In closing, I suggest a belief in objective morality may be rationally held as justified knowledge. The founders’ belief in natural law comports with this view.<sup>131</sup> Such a view allows for one to answer in the affirmative that Christianity does provide a robust ontological

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<sup>128</sup> David Baggett and Jerry L. Walls, *The Moral Argument: A History* (New York, NY: Oxford University Press, 2019).

<sup>129</sup> Baggett and Walls, *God & Cosmos*, 274-275.

<sup>130</sup> George I. Mavrodes, “Religion and the Queerness of Morality,” 586.

<sup>131</sup> Norman L. Geisler and Frank Turek, *I Don’t Have Enough Faith to Be an Atheist* (Wheaton, IL: Crossway, 2004), 170.

foundation for morality and reason to think morality is indeed a fully rational enterprise. Additionally, Christian theism stands ready to offer an ontological account of ultimate goodness. It also helps explain why the protection of human life, through objective moral obligation and duty, is unequivocally good, and objective morality and natural rights are deeply consistent and richly resonant with a Christian worldview. Christianity coheres well with the founders' insistence that protecting innately valuable human life, and the rights commensurate with that life, was something morally good and necessary to do. In this way, Christianity appears to be a plausible worldview for grounding the legal framework constructed by the founders.

### **Chapter 3. Analysis and Critique of Leiter's Naturalization of Jurisprudence**

“Nature is morally blind, without values. It churns along following its own laws, not caring who or what gets in its way.”<sup>132</sup>

#### On Jurisprudence, Law, and Morality

The connection between law, morality, and jurisprudence is widely debated. That a connection exists is central to my argument. To be sure, these are matters of tremendous philosophical import. Moreover, this connection matters on a very pragmatic level. It affects our lives in very direct ways. Jurisprudence, put succinctly, is, according to Michael S. Moore, “the philosophy of law.”<sup>133</sup> Here, Leiter agrees with Moore, writing that “Jurisprudence—as the study of philosophical problems about law...elucidates and perhaps critiques or revises the methods used by lawyers and judges to “discover” legal conclusions and examines the ontological

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<sup>132</sup> Harold Kushner, *When Bad Things Happen to Good People* (New York, NY: Schocken Books, 2001), 81.

<sup>133</sup> Michael S. Moore, "Four Reflections on Law and Morality," *William and Mary Law Review* 48, no. 5 (April 2007), 1525.



commitments actually manifest in the law or that *ought* to be part of our conception of the law.”<sup>134</sup>

What is of interesting note in Leiter’s description of jurisprudence is a tacit admission that this philosophical exercise includes considerations of what *ought* to be in the law. The conclusion that may be drawn here is that the law is derivative in some respect. Put differently, the law depends on something deeper and more fundamental than mere human experience. In this way, the law is, as Jenna Ellis puts it, “an expression of what society values and its morality.”<sup>135</sup> Human-made law, then, is a contingent existential feature.

That law is derivative from morality is an assumption Fletcher notes. “The most common assumption of all, which is *the most nourishing influence for law, is found in morality*. If law is rooted in morality, it will flourish; *if it comes disengaged* from the nurturing source, it will wither into a hulk of arbitrary rules” (emphasis mine).<sup>136</sup> Here, Fletcher makes explicit a notion central to the argument of this thesis in that law derives its normative content from morality. Ellis drives home the points about the dependence of legality on morality: “we cannot escape the fact that law is therefore always inherently moral.”<sup>137</sup> Fletcher’s insight makes pressing questions raised by Leiter’s effort to naturalize jurisprudence. That is, an attempt to displace morality traditionally conceived with a morality derived from Leiter’s epistemic naturalism.

Leiter’s method is ill equipped to perform the normative task for which it is marshaled. The assertions of Fletcher and Ellis stand in stark contrast to Leiter’s position when he says, “I

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<sup>134</sup> Brian Leiter, *Naturalizing Jurisprudence*, 84.

<sup>135</sup> Ellis, xxvi.

<sup>136</sup> George P. Fletcher, "Meaning of Morality," *Notre Dame Law Review* 64, no. 5 (1989) 805.

<sup>137</sup> Ellis, xxvi.

argue that there is no reason to think moral facts are part of the best causal explanation of experience.”<sup>138</sup> Contra Leiter, Moore concludes with an explicit understanding that morality is foundational to the law: “it is morality in the law that makes law worthy of our intelligence and our interest. It is the morality in the law that makes the philosophy of law truly philosophical.”<sup>139</sup>

### Leiter’s Naturalist Epistemology and Jurisprudence

Michael Farris observes that “One’s foundational assumptions about God and man influence one’s philosophy of law and government.”<sup>140</sup> Farris continues, “All law has a foundation that dramatically influences the ultimate content and contours of the legal system that is built thereon.”<sup>141</sup> Given this understanding it is essential to note the epistemological position assumed by those, like Leiter, that seek to naturalize jurisprudence, that is, to view legal philosophy through a naturalistic moral epistemology. The foundations of Leiter’s worldview and epistemology are thoroughly naturalistic. For Leiter this is an improvement over a metaphysically broader conception of reality. Hunter and Nedelisky, summarizing the position taken by Leiter and others in support of such a project, note, “those who argue that science is or should be the foundation for morality are generally making an epistemological claim about the superiority of science over other forms of knowledge.”<sup>142</sup> Moreover, Hunter and Nedelisky state:

While the new science of morality presses onward, the idea of morality—as a mind-independent reality—has lost plausibility for the new moral scientist. *They no longer believe such a thing exists.* Thus when they say they are investigating morality scientifically, they now mean something different from what most people in the past have

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<sup>138</sup> Leiter, *Naturalizing Jurisprudence*, 7.

<sup>139</sup> Michael S. Moore, “Four Reflections on Law and Morality,” 1569.

<sup>140</sup> Michael Farris, “Foreword,” in *The Legal Basis for a Moral Constitution*, by Jenna Ellis (WestBow Press, a division of Thomas Nelson & Zondervan, 2015), xix.

<sup>141</sup> *Ibid.*, xxviii.

<sup>142</sup> James Davison Hunter and Spencer Nedelisky, *Science and the Good: The Tragic Quest for the Foundations of Morality*, 9.

meant by it and what most people today still mean by it. In place of moral goodness, *they substitute the merely useful*, which is something science can discover. Despite using the language of morality, they embrace a view that, in its net effect, amounts to moral nihilism. With this turn, the new moral science, for all its recent fanfare, has produced a world picture that simply cannot bear the weight of the wide ranging moral burdens of our time (emphasis mine).<sup>143</sup>

Leiter explicitly denies the existence of moral facts, yet continues to utilize prescriptive language in an evaluative way about what *should* be done. Hunter and Nedelisky's charge surely applies to Leiter. This observation is pertinent to understanding Leiter's overall project to naturalize jurisprudence along with its implications. Leiter's effort, his protestations notwithstanding, seems to be in tension with the understanding of morality as understood by the founders and the enduring American legal framework.

According to Leiter, philosophy, and more specifically, jurisprudence has been late to welcome naturalism in full stride. Leiter observes a recent turn in the tide, noting that "Naturalism is a familiar development in recent philosophy: indeed, it would not be wrong to say that it is the distinctive development in philosophy over the last thirty years."<sup>144</sup> The import of this development in philosophy, for Leiter, cannot be overstated. Yet, he laments the relative insularity of jurisprudence from naturalistic thought. This is perhaps due to its deep history and connection with the more metaphysically robust conception of natural law. According to Leiter:

What really bears noticing here is that while every area of philosophy—metaethics, philosophy of language, epistemology, etc.—has undergone a naturalistic turn over the last quarter century, Anglo-American legal philosophy has remained untouched by these intellectual developments.<sup>145</sup>

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<sup>143</sup> Ibid., xv.

<sup>144</sup> Leiter, 31.

<sup>145</sup> Ibid., 33.

Thus, the recent turn towards a naturalization of jurisprudence is a positive development, including his construal of naturalism that vitiates the prospects of a practicable moral realism. For Leiter it is a vast improvement over and above the moral realist's conception of ultimate reality. Regarding naturalistic epistemology Leiter suggests:

Naturalism in philosophy is always first a methodological view to the effect that philosophical theorizing should be continuous with empirical inquiry in the sciences.... The naturalist...rejects the idea that there could be a "first philosophy," a philosophical solution to problems that proceeds *a priori*—that is prior to any experience.<sup>146</sup>

In this way, only an epistemology guided by and founded upon the hard sciences will suffice for Leiter. To this point Leiter states:

Philosophers who have taken the naturalistic turn reject the idea of philosophy as a purely *a priori* discipline, whose methods and results are antecedent to—indeed stand above and adjudicate among—the claims of science; philosophy for the naturalist is rather a discipline whose methods and answers must be continuous with (perhaps supplanted by) scientific inquiry.<sup>147</sup>

This portion of Leiter's epistemology makes plain his adherence to methodological naturalism— itself a philosophical presupposition and commitment to a view about ultimate reality. Leiter attempts to outline the ways in which analytic philosophy provides little insight into real epistemology noting:

Philosophers long thought that some truths were *necessary* while others were contingent; in the twentieth century, under the influence of logical positivism, this was taken to be the distinction between those statements that were "true in virtue of meaning" (hence *necessarily* true) and those that were "true in virtue of fact" (hence only *contingently* true). The former "analytic truths" were the proper domain of philosophy; the latter "synthetic" truths the proper domain of empirical science.<sup>148</sup>

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<sup>146</sup> Ibid., 34.

<sup>147</sup> Ibid., 137-138.

<sup>148</sup> Ibid., 176.

For Leiter, however, the aforementioned conceptions of philosophy are a distinction without a difference. Leiter continues:

Without a domain of analytic truths—truths that are *a priori* and hold in virtue of meaning—it becomes unclear what special domain of expertise for philosophical reflection remains. If all claims are, in principle, revisable in light of empirical evidence, then would not all questions fall to empirical science? Philosophy would be out of business, except perhaps as the abstract, reflective branch of empirical science.<sup>149</sup>

Leiter then makes his preferred epistemological approach clear through what he deems “the Naturalist Method” as follows:

*Substantive Thesis.* With respect to questions about *what there is* and *what we can know*, we have nothing better to go on than successful scientific theory.

*Methodological Thesis.* Insofar as philosophy is concerned with what there is and what we can know, it must operate as the abstract branch of successful scientific theory.

The moral naturalists draw from this history that the only sound reason to prefer one metaphysical or epistemological picture over another is not because it seems intuitively obvious (think of Kant and the Euclidean structure of space) but *because it earns its place by facilitating successful a posteriori theories of the world* (emphasis mine).<sup>150</sup>

Regarding the issue of law’s essential properties, Leiter asserts the answer to the primary question is now especially lucid: “in figuring out what there (essentially) is, should we turn to morality or to science? I think the answer is clear.”<sup>151</sup>

Here Leiter makes a philosophical assumption about how philosophical inquiry and philosophizing *should* go. Moreover he assigns to the hard sciences a task for which it is not well suited, namely, determining what is proper or fitting. Put differently, it suggests what *should* be done, a moral inflection, to be sure. Leiter continues:

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<sup>149</sup> Ibid.

<sup>150</sup> Ibid., 180.

<sup>151</sup> Ibid., 181.

Methodological naturalists, then, construct philosophical theories that are continuous with the science either in virtue of their dependence upon the actual results of scientific method in different domains or in virtue of their employment and emulation of distinctively scientific ways of looking at and explaining things.<sup>152</sup>

What the elucidation of Leiter's epistemological position reveals are his ontological commitments about the way ultimate reality is actually constituted. Moreland describes such a view as saying that "something is true, rationally justified or known if and only if it is a scientific claim that has been successfully tested...that there are no truths that can be known apart from appropriately certified scientific claims...that science is the very paradigm of truth and rationality,"<sup>153</sup> but then points out that this itself is merely an *a priori* philosophical commitment. It is not the result of rationally or pragmatically guided *a posteriori* success, contrary to Leiter's alleged methodology. Philosophy isn't being set to the side, but simply smuggled in, either unwittingly or disingenuously—and a poor philosophy of science at that.

For Leiter, the empirical inquiry and discovery of the hard sciences, and only these sciences, reveal what human kind may deem knowledge, which itself is a philosophical commitment, not a deliverance of science. As such comes to bear on the law and morality, Leiter's epistemological position tries to show us "where we can locate law and morality within a naturalistic picture of the world."<sup>154</sup> Given his preferred methodological naturalism we "defer to whatever ontology and epistemology falls out of successful scientific practice."<sup>155</sup> However, it appears to be the case that science simply isn't up to the epistemic task that Leiter suggests.

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<sup>152</sup> Ibid., 35.

<sup>153</sup> J. P. Moreland, *Scientism and Secularism: Learning to Respond to a Dangerous Ideology*, 29.

<sup>154</sup> Leiter, 3.

<sup>155</sup> Ibid., 4.

Moreland would agree with Hunter and Nedelisky as they provide a keen insight into the likely thrust of Leiter's presuppositions and overall goal, noting:

Today's moral scientists no longer look to science to discover moral truths, for they believe there is nothing there to discover. As they see it, there are no such things as prescriptive moral or ethical norms; there are no moral "oughts" or obligations; there is no ethical good, bad, or objective value of any kind. Their view is, ironically—in its net effect, a kind of moral or ethical nihilism...what is more, the new moral science habitually uses the language of morality and moral prescription.<sup>156</sup>

How does such an epistemology and naturalistic worldview reflect upon the issue of morality within the law? Leiter does admit that if moral properties *do figure* into the best explanatory account of the world, then they "earn their ontological rights." This is due to the *philosophical supposition* that "only properties that figure in the best explanation of experience are *real* properties."<sup>157</sup> After noting how influential such a position has been in philosophy, Leiter follows this admission with a claim that is as bold as it is trenchant. Leiter declares that "no one has actually made the case that moral realism requires: namely, that moral facts really will figure in the best explanatory picture of the world."<sup>158</sup> This raises a natural question which Leiter anticipates, but offers no explanatory attempt, nor answer. That is, what is the "best" explanatory account of the whole existential experience?<sup>159</sup>

Leiter does, however, hash out a thoughtful and cogent mode of inquiry concerning how one theory may provide a better explanation than another. Leiter offers this method in contrast with that of moral explanations traditionally conceived. Leiter's method of inquiry is marked by both *consilience*, that is how much a theory explains, and with *simplicity* concerning the number

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<sup>156</sup> Hunter and Nedelisky, *Science and the Good*, 21.

<sup>157</sup> Leiter, 203.

<sup>158</sup> *Ibid.*

<sup>159</sup> *Ibid.*, 204.

of assumptions upon which the theory is constructed.<sup>160</sup> Leiter summarizes the crux of the issue as he sees it for moral realists pertaining to moral ontology and epistemology by noting

Many moral realists—particularly those concerned to vindicate the explanatory power of moral properties—moral inquiry and moral epistemology should be continuous with scientific inquiry and scientific epistemology, it seems fair to expect that moral explanations should satisfy the criteria that inform theory-choice criteria.<sup>161</sup>

What may be noted in Leiter’s analysis of moral epistemology is an imposition of metaphysical naturalism upon a discussion where science itself offers little insight. For Leiter, scientific empiricism, that which he is attempting to show as the sole mode of knowledge production, is assumed to be the canon by which the acquisition of what counts as knowledge is measured. To this point, there is little in the way of scientific epistemology that provides insight into questions of *normative* import regarding propositions of moral value. Leiter’s conclusions about a naturalistic epistemology seems in *a priori* fashion to require an ontological grounding to attain the status of the normative. That is, a grounding for what *ought* to be the case. Leiter assumes science can provide this.

Despite rejecting moral realism outright, Leiter tenders a few “naturalistic explanations” for moral “facts,” in line with evolutionary-psychoanalytical accounts.<sup>162</sup> These help explain “moral belief and judgment” by appeal to the *deterministic forces* operative in one or more of the special sciences (psychology, physiology, biology, etc.). Leiter takes the liberty to assume that these evolutionary-psychoanalytical accounts work.”<sup>163</sup> From this point, Leiter is ready to pose

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<sup>160</sup> Ibid., 205.

<sup>161</sup> Ibid.

<sup>162</sup> Ibid., 206-210.

<sup>163</sup> Ibid., 210-211.



the comparative question by asking “which are better explanations, moral explanations or naturalistic explanations?”<sup>164</sup>

Leiter declares naturalistic explanations the victor by way of adhering more closely to the criteria of consilience and simplicity. For Leiter, moral explanations suffer from what he calls the “problem of explanatory narrowness.”<sup>165</sup> He asserts they are “too neatly tailored to only one sort of explanandum—what I am calling the moral phenomena—for us to think that moral properties are real (explanatory) properties.”<sup>166</sup> This conclusion, for Leiter, lies at the heart of his overall argument concerning morality and jurisprudence. Namely, moral properties, as understood by many moral realists, are not real properties. Nor do they figure into the fabric of ultimate reality as many moral realists suppose. Because moral properties are not real in the sense that many moral realists and certainly many Christian theists suppose, they consequently lack explanatory power. Due to this they are unable to provide a basis for the practice of jurisprudence.

Leiter makes his case explicit in a broad fashion by stating, “I think we will be hard pressed to find anyone doing serious explanatory work with moral facts.”<sup>167</sup> Leiter continues his dismissal of moral realism literature suggesting that it “often makes much of the ‘folk’ explanatory theories, but, as the comparison with naturalistic theories suggests, it is doubtful that the folk theories will make it into our best account of the world.”<sup>168</sup>

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<sup>164</sup> Ibid., 211.

<sup>165</sup> Ibid., 206.

<sup>166</sup> Ibid., 211.

<sup>167</sup> Ibid., 217.

<sup>168</sup> Ibid.

Leiter notes that his argument against moral realism on the ground of its “explanatory impotence” does not “necessarily rule out moral realism.”<sup>169</sup> Rather, moral realism simply suffers from a burden that it cannot bear. That is, it lacks the explanatory power to figure into the best account of the world when contrasted to naturalistic theories regarding moral properties. Leiter thus declares victory for naturalism, noting that “If I am right...moral realism will have been refuted on explanatory grounds. Perhaps we may, with greater confidence, join Nietzsche in saying that when it comes to ethics, ‘it is a swindle to talk of ‘truth’ in this field.’”<sup>170</sup>

Leiter’s development and delineation of his naturalistic epistemology is thorough, and in many respects impressive. Yet, it must be noted that despite his dubious refutation of foundationalism he proceeds in a manner of begging the question.<sup>171</sup> Leiter begins by asserting as a starting point that which he seeks to prove true. By declaring that moral properties must conform to the requirements of material science is to declare as fact two issues that are far from settled. First, Leiter assumes something which science itself cannot show to be the case. Second, he assumes scientific epistemology is the ultimate arbiter of knowledge. Leiter’s assumptions succumb to a charge of self-referential validation. Here, Leiter begs the question.

The objection, however, has no warrant for Leiter. This is so because “science is the highest tribunal *because science works*.”<sup>172</sup> Leiter attempts to bolster such a claim by writing that “the real argument for embracing a scientific epistemology, however, is not itself epistemic but pragmatic: such an epistemology, as noted earlier, *has delivered the goods*.”<sup>173</sup> According to

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<sup>169</sup> Ibid., 223.

<sup>170</sup> Ibid., 224.

<sup>171</sup> Ibid., 117; 150-151.

<sup>172</sup> Ibid., 117.

<sup>173</sup> Ibid., 275.

Leiter science “as an *a posteriori* matter... has earned its claim to be a guide to the real and the unreal by depopulating our world of gods and witches and ethers, and substituting a picture of the world and how it works of immense practical value.”<sup>174</sup>

Despite Leiter’s repeated epistemic assertions regarding the beneficence of epistemological naturalism to the realm of the knowable and real it seems likely that his position is self-refuting from the very beginning. Moreland notes Leiter’s view is self-defeating that “the only knowledge or rationally justified beliefs we can have about reality are those that have been certified by (especially) the hard sciences.”<sup>175</sup> Moreland critiques Leiter’s epistemic position that “only what is testable by science can be true” as self-refuting and consequently incoherent. This is the case because it makes a truth claim that itself cannot be tested by science, nor can ever be tested and subsequently verified by science.<sup>176</sup> In this regard Leiter’s epistemology is not the result of the hard sciences. Rather, it is an *a priori* philosophical commitment that only what science can empirically demonstrate is true (or at least rational to believe). Leiter’s moral pragmatism is hindered in such a way that Moore considers it to be crippled by “its many well-charted difficulties in ethics,”<sup>177</sup> so much so that it could not be a valid basis for law.<sup>178</sup>

#### Discussion of the Metaphysics and Epistemology of Leiter’s Naturalism

Leiter’s epistemology raises numerous questions, foremost among them, concerning matters of the law and jurisprudence, is whether Leiter’s view coheres with objective morality as

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<sup>174</sup> Ibid., 238.

<sup>175</sup> J. P. Moreland, *Scientism and Secularism*, 49.

<sup>176</sup> Ibid., 50-51.

<sup>177</sup> Michael S. Moore, "Four Reflections on Law and Morality," 1568.

<sup>178</sup> Ibid.

understood by those adhering to a type of natural law theory? Leiter himself recognizes this concern observing:

The demand to find a place for moral facts within a scientific epistemology is neither arbitrary nor *a priori*, but simply the natural question to ask given the *a posteriori* success of science. It is not that moral claims are simply exempt from a scientific epistemology because they do not involve causal claims; it is, rather, that (crudely speaking) *causal power* has shown itself over the past few centuries to be the best-going indicia of the knowable and real, and therefore it is natural to subject any putative fact to this test. *Given that we have a useful guide to the true and real already in hand—namely, science and its epistemic norms—why not see...whether they can answer our best-going criteria of the knowable and the real* (emphasis mine).<sup>179</sup>

Leiter assumes the position that science warrants the lone position for determining knowledge and truth because it excels at the task of exploration and discovery for which it is properly conceived. For Leiter it is science alone that can inform us to what *ought* to be the case concerning human action and behavior. Leiter anticipates an objection of circularity and asserts:

The question is begged only if we grant...the false assumption that the demand for conformity to a scientific epistemology is really an arbitrary, *a priori* demand...the only tenable guide to the real and the unreal is science, and the epistemological standards we have inherited from successful scientific practices...a scientific epistemology—predicated on such seemingly simple notions and “evidence matters” (theories must answer to experience, not simply authority)—is one of the most precious legacies of the Enlightenment, a legacy under attack from those corners of the academy where bad philosophy reigns supreme.<sup>180</sup>

Despite a thorough effort to assert the non-question-begging nature of Leiter’s epistemology, his attempt has made it no less clear how or why his position does not beg the question. Despite his repeated insistence that science has done an exceptional job explaining natural mechanisms, the objection stands. Might Leiter be right? Can science deliver a normative moral epistemology?

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<sup>179</sup> Leiter, 238-239.

<sup>180</sup> Ibid., 273.

I suggest the natural sciences are able to offer little in the way of normative moral theory. Moreover, a normative theory of morality is exactly that which is required to underpin the American legal framework as envisaged, designed, and implemented by the founders. To this point, Leiter mounts a firm disagreement noting of science and its epistemological advances that

What has been distinctive of the growth of science in the twentieth-century has not been its tendency to “bracket” domains of the human experience, but rather to expand its coverage or subsume them. In the normative domain one need only think of the psychoanalytic accounts of morality and moral motivation at the dawn of the twentieth century or the evolutionary accounts that now dominate scientific study of normative experience at the dawn of the twenty-first. This expansion of science and scientific epistemology is, indeed, the predictable consequence of its practical success in its original domains of application.<sup>181</sup>

Assuredly there are a litany of thinkers who agree with Leiter’s assertions, and it is part of Leiter’s project to integrate the naturalistic and evolutionary views into the epistemology and ontology of jurisprudence.

In a seminal essay on the evolutionary building blocks of morality, J. C. Flack and F. B. M. de Waal demonstrate several behaviors in primates that are analogous to human moral behavior. These include calculated reciprocity, conflict resolution, empathy, sympathy, and consolation.<sup>182</sup> Finding agreement with Flack and de Waal, I. S. Bernstein observes,

the basis of human morality may be found in the behavior of those animals most similar to ourselves. Evolutionary theory and biological continuity support such a position. Surely, if morality has a biological basis, its rudiments must be present in the behavior of non-human primates.<sup>183</sup>

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<sup>181</sup> Ibid., 274.

<sup>182</sup> J. C. Flack and F. B. M. de Waal, “Any Animal Whatever: Darwinian Building Blocks of Morality in Monkeys and Apes” in *Evolutionary Origins of Morality: Cross-Disciplinary Perspectives*, ed. Leonard D. Katz (Bowling Green, OH: Imprint Academic, 2002), 1-29.

<sup>183</sup> I. S. Bernstein, “The Law of Parsimony Prevails: Missing Premises Allow Any Conclusion,” in *Evolutionary Origins of Morality: Cross-Disciplinary Perspectives*, ed. Leonard D. Katz (Bowling Green, OH: Imprint Academic, 2002), 33.

These findings and assertions coincide with Robin Bradley Kar's discussion on morality and law that "morality and law are instead animated largely by obligata, which are distinctive portfolios of psychological phenomena that come together."<sup>184</sup> Kar continues, "obligata constitute our sense of obligation and thereby breathe life into our moral and legal practices. Their structure is the deep structure of law and morality."<sup>185</sup> This is the case for Kar due to the notion that "our moral and legal judgments supervene on natural facts because there are natural facts—about what moral and legal rules would conduce to all our objective individual interests in the right way—that partly explain the shape that morality and law take in our lives."<sup>186</sup> Despite Kar's provisional agreement with Leiter, Flack and de Waal ultimately summarize the attempts in the literature to locate morality in the natural as follows: "Much of the literature assumed that the world was waiting for biologists to point out what is normal and natural, hence being adopted as ideal. Attempts to derive ethical norms from nature, however, are highly questionable."<sup>187</sup> Flack and de Waal's conclusion is buttressed by Ian Hutchinson's delineation of evolutionary mechanisms and the purported normative role of science:

Evolutionism in effect simply reiterates that naturalism offers no meaning, no objective reasons to justify morality, and no explanation of where things ultimately come from. Evolutionism's answers offer mechanisms for how current moral opinions might have arisen, but not justifications for why one should accept and practice them. That is what is meant when one says that science can address how but not why."<sup>188</sup>

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<sup>184</sup> Robin Bradley Kar, "The Deep Structure of Law and Morality," *Texas Law Review* 84, no. 4 (March 2006): 941.

<sup>185</sup> *Ibid.*, 879.

<sup>186</sup> *Ibid.*, 942.

<sup>187</sup> J. C. Flak and F. B. M. de Waal, "Any Animal Whatever: Darwinian Building Blocks of Morality in Monkeys and Apes" in *Evolutionary Origins of Morality: Cross-Disciplinary Perspectives*, 23.

<sup>188</sup> Ian Hutchinson, *Can a Scientist Believe in Miracles?*, 26.

What may be seen in Flack and de Waal's claim is that an attempt to locate objective morality in nature is a dubious endeavor. Furthermore, it stands in tension to Leiter's project for naturalizing jurisprudence. It is unlikely that the physical sciences are now or ever going to have normative prescriptions about the way human beings *ought* to behave. Despite Leiter's insistence otherwise, it is plausible that a normative moral theory derived from the physical sciences is unlikely, and that appearances to the contrary involve subtle sleights of hand.

Leiter's naturalistic epistemology intends to communicate something very different when speaking of morality and pragmatism from traditional construals. Pertinent to this point, Hunter and Nedelisky write,

In the end, the utilitarianism that...new moral scientists advocate isn't driven by the greater value of some outcomes over others—this isn't the utilitarianism of Mill or Sidgwick or any other moral realist. Rather, it is driven by what *people happen to value* at the time (and maximizing this), rather than *what is intrinsically valuable*.<sup>189</sup>

It is for this reason that Hutchinson states that “science's contribution to questions of meaning is practically zero.”<sup>190</sup>

Leiter's assertions regarding the epistemic superiority of methodological naturalism are intended to mean that we are to take the deliverances of science regarding normative morality as brute facts about the nature of ultimate reality. In this view, it is hard to see how reliance upon *a posteriori* results of the physical sciences is not merely a kicking of the question of moral ontology down the road. Or perhaps by the wayside altogether. The pertinent questions raised here are as follows: Why should there be reason to suggest the natural sciences have a

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<sup>189</sup> Hunter and Nedelisky, *Science and the Good*, 187.

<sup>190</sup> Ian Hutchinson, *Can A Scientist Believe in Miracles?*, 28.

preferential status in the discovery of the true and real? Furthermore, how can we know there are no other facts than those revealed by the hard sciences? Especially facts concerning moral truth?

Despite these questions, Leiter stands resolute in his assertions regarding the need for moral guidance. “Unless there are Naturalistically objective facts to which the discourse must answer we will often be unable to make sense of better and worse ways of reasoning.”<sup>191</sup> This acknowledgment provides a segue for Leiter to articulate what he deems the best concept of law available. It is that which “gives us the best account of how the world works.”<sup>192</sup> Regarding the constitution and contours of the law, as informed by a naturalistic epistemology, Leiter continues:

at the same time, these social scientific approaches give us a picture of courts which fits them into *a broader naturalistic conception of the world in which deterministic causes rule, and in which volitional agency plays little or no explanatory role*. Thus what commends these accounts is that they effect an explanatory unification of legal phenomena with the other phenomena constituting the natural world which science has already mastered (emphasis mine).<sup>193</sup>

Here Leiter’s reasoning continues to reflect his particular utilitarian and pragmatic bent that flows from his naturalism. Leiter’s preferred worldview is arguably incapable of assessing what is better or worse without devolving into existential criteria subject to quantifiable extrapolation. Science, it is argued, says nothing of values. It is silent pertaining to what is better or worse. Science remains mute regarding normative discussions around what is morally obligatory, blameworthy, or praiseworthy. Rather, as Hunter and Nedelisky observe, Leiter’s

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<sup>191</sup> Leiter, 247.

<sup>192</sup> Ibid., 134.

<sup>193</sup> Ibid., 135.



epistemic naturalism and subsequent pragmatism inevitably succumb to contemporary social preferences or power structures:

Without any real ethical standards, we look to social objectives as guides. The project, then, is about how science and technology can help us achieve these social goals....The problem is that these social objectives are, in the end, morally arbitrary, reflecting either fluctuating social tastes or the whims of those in power.<sup>194</sup>

Hunter and Nedelisky continue their analysis of a naturalist like Leiter's moral project by observing that

The best recent science has provided insight into the nonevaluative elements of morality and offered suggestive possibilities about its claims on human experience. *But it has given us nothing remotely close to an empirical foundation for morality*—nothing close to an “ought” from and “is” (emphasis mine).<sup>195</sup>

The reason why such is the case, according to J. P. Moreland, is that science is “descriptive, not prescriptive; science attempts to describe what *is* the case, but it cannot prescribe what *ought* to be the case.”<sup>196</sup> Leiter seems to recognize a relevant and potentially deficient aspect of his epistemology as it stands in contrast to that of the moral realist when he notes:

Yes, moral positions are susceptible to reasons in the familiar sense that people are typically responsive to the demands of logical consistency and factual accuracy; but once *these* are exhausted there is nothing left but brute and opposed evaluative attitudes or tastes. At that point, we have left the space of reasons behind.<sup>197</sup>

This elucidation reveals Leiter's ontological commitment to a variety of naturalism. Should naturalism prove true, then Leiter's point likely stands. However, if there is a divine or natural law reason it will converge in agreement with the natural law moored in God. Gerard M. Verschuuren bolsters such a notion regarding the Thomistic synthesis of reason and faith in that

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<sup>194</sup> Hunter and Nedelisky, 21.

<sup>195</sup> Hunter and Nedelisky, 139.

<sup>196</sup> Moreland, 156.

<sup>197</sup> Leiter, 254-255.

all truth is God's truth. Consequently, what may be known or abductively understood through reason cannot stand in opposition to that which is understood by faith. The inverse of such also rings true. What can be known through the faculties of faith will never be in discord with that which is known through reason.<sup>198</sup>

Leiter sets up a false dichotomy between the discoveries of science and the philosophical position of moral realists and Christian theists, but only by wrongly conflating science and scientism, overlooking his own philosophical commitments, and failing to recognize that science can't bridge the descriptive and prescriptive in the realm of ethics. Leiter says only science can show us what is true and real. Christian theists and moral realists assert there is a harmony between the two means of inquiry and discovery; indeed, Alvin Plantinga has argued that where the real conflict lies is between science and naturalism. The impact of an actual dichotomy between science and moral realism, if it were to hold true, would pose a genuine problem regarding the issue of law and morality as understood by the founders. In this way, contra Leiter, a naturalistic epistemology is incapable of underwriting the morality and innate value of human life contained within the founding documents and the enduring American legal structure.

#### Description and Analysis of Leiter's Project and its Impact on Jurisprudence

The link between morality, law, and jurisprudence is inextricable for many legal philosophers. Sylviane Colombo writes in the *Denning Law Journal*,

The problem of the morality of law goes to the heart of the philosophy of law. Essentially it revolves around the questions or whether law has intrinsic morality, of whether moral criteria can be excluded from the concept of order, and of the nature of the authority of the law.<sup>199</sup>

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<sup>198</sup> Gerard M. Verschuuren, *Aquinas and Modern Science: A New Synthesis of Faith and Reason* (Kettering, OH: Angelico Press, 2016), 22.

<sup>199</sup> Sylviane Colombo, "Good Faith: The Law and Morality," *Denning Law Journal* 8 (1993), 51.

Gabriela Mentoi and Oana Nesteriuc assert, “The starting point when studying law is always morality as the two phenomenon are in a tight connection.”<sup>200</sup> Moreover, Matthew H. Kramer notes that “law is by no means a non-moral phenomenon.”<sup>201</sup> Leiter, and those that ascribe to the Legal Realist and Positivist schools of thought, must demur. Leiter claims fealty to the school of thought of the Legal Realists. However, he acknowledges its confluence with that of the Positivists regarding the separability of law and morality. Leiter notes that the “realist arguments for the indeterminacy of law—arguments central to the whole Realist enterprise—depend crucially on their tacit Hard Positivism.”<sup>202</sup> Positivism, it is noted, is the view that law and morality are not inextricably linked as those adhering to a natural law view suggest. Rather, as David Gray Carlson observes, “The most important idea in positivism is supposed to be the separation thesis—the assertion that law and morality are not necessarily connected.”<sup>203</sup> Kramer concurs in regard to positivism when he states:

If there is one doctrine distinctively associated with legal positivism, it is the separability of law and morality. Both in opposition to classical natural-law thinkers and in response to more recent theorists such as Lon Fuller and Ronald Dworkin, positivists have endeavored to impugn any number of ostensibly necessary connections between the legal domain and the moral domain.<sup>204</sup>

The separability thesis undoubtedly appeals to myriad jurists for reasons that are beyond the scope of this exposition. Nonetheless, some such reasons abound and must be noted. Colin P.

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<sup>200</sup> Gabriela Mentoi and Oana Nesteriuc, "Theoretical and Practical Convergences between Law and Morality," *European Journal of Law and Public Administration* 4, no. 2 (2017), 110.

<sup>201</sup> Matthew H. Kramer, "On the Separability of Law and Morality," *Canadian Journal of Law and Jurisprudence* 17, no. 2 (July 2004), 316.

<sup>202</sup> Leiter, 122.

<sup>203</sup> David Gray Carlson, "Hart avec Kant: On the Inseparability of Law and Morality," *Washington University Jurisprudence Review* 1 (2009), 27.

<sup>204</sup> Matthew H. Kramer, "On the Separability of Law and Morality," 315.

A. Jones suggests the separability thesis may arise because it is the case that “modern society has become too complex for individual morality to have a role in society's governance.”<sup>205</sup> Jones’s observation rests, in part, upon the notion that “law is a collective institution, whereas morality is primarily a matter of individual belief.”<sup>206</sup> This separation thesis is often pervasive in jurisprudence. While perhaps not fundamentally, such is often the case at least superficially, as Sylviane Colombo observes:

The American legal system often clings to the concept of the separation of law and morals—the one presumed to be a public concern, while the other strictly private. And yet it would be absurd to claim that the law does not have an implicit concept of morality; it often waives its own principles when these come up against another value system extrinsic to the court, but one that the latter recognizes as deserving priority.<sup>207</sup>

Moreover, Jones suggests that “as the role of law expands in society, the ability to make moral decisions becomes increasingly restricted to narrow, legally-defined parameters.”<sup>208</sup> Some Legal Realists and Positivists, like Leiter, prefer to keep any “knowledge” outside the scope of the natural sciences relegated to the category of the fictional. This is due, in part, to the aforementioned central tenet of the Legal Realist school of thought—the indeterminacy of law. In sum, the indeterminacy thesis holds that there are no single or unique correct answers to legal questions.<sup>209</sup> Lawrence B. Solum describes the indeterminacy thesis as such noting:

the existing body of legal doctrines—statutes, administrative regulations, and court decisions—permits a judge to justify any result she desires in any particular case. Put

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<sup>205</sup> Colin P. A. Jones, "Law and Morality in Evolutionary Competition (and Why Morality Loses)," *University of Florida Journal of Law & Public Policy* 15, no. 2 (Spring 2004), 293.

<sup>206</sup> *Ibid.*, 292.

<sup>207</sup> Sylviane Colombo, "Good Faith: The Law and Morality," 47-48.

<sup>208</sup> Colin P. A. Jones, "Law and Morality in Evolutionary Competition (and Why Morality Loses)," 289.

<sup>209</sup> Sercan Gurler, "The Problem of Legal Indeterminacy in Contemporary Legal Philosophy and Lawrence Solum's Approach to the Problem" *Annales XL*, N. 57, (2008), 38-40.

another way, the idea is that a competent adjudicator can square a decision in favor of either side in any given lawsuit with the existing body of legal rules.<sup>210</sup>

Leiter embraces the indeterminacy thesis as a useful tenet for the attempt to naturalize jurisprudence, observing that

*A normative theory that specifies what the anti-foundationalist concedes—namely, that there is more than one (though simply not any) judicial decision that can be justified on the basis of the class of legal reasons—must, in some measure, be a theory worth having.*<sup>211</sup>

Leiter's position on the issue becomes more lucid given insight into his recognition that in reality judicial decision making includes non-legal reasons. These include the influence of the individual judge's psychology and any coinciding moral "reasons" which he sees as "not objective." This understanding makes it all the more likely that some legal decisions are indeterminate and equivocal when contrasted with a causally determined naturalized jurisprudence.<sup>212</sup>

Contrasted with the view that there is one right answer to legal questions Leiter's naturalism and indeterminacy stand in tension. Solum adopts the former view, suggesting that a large portion of the law is determinate. This is the view that there is a very narrow range of possible decisions, if not one correct decision, that a judge may reach given the constraints of the body of laws. Solum notes that "it is pure nonsense to say that legal doctrine is completely indeterminate even with respect to very hard cases. Even in the hardest hard case, legal doctrine limits the court's options."<sup>213</sup>

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<sup>210</sup> Lawrence B. Solum, "On the Indeterminacy Crisis: Critiquing Critical Dogma," *University of Chicago Law Review* 54 (1987), 462.

<sup>211</sup> Leiter, 41.

<sup>212</sup> *Ibid.*, 42-43.

<sup>213</sup> Lawrence B. Solum, "On the Indeterminacy Crisis: Critiquing Critical Dogma," 493-494.

Regarding Solum's observation, if the law is truly indeterminate why make law in the first place? If law is truly so ambiguous as to be open to nearly any cunningly crafted interpretation by jurists then what is the point of calling it law? Is law not meant to guide, restrict, alter, and encourage behavior? Certainly the point and purpose of establishing law is the recognition that it "affects conduct in multifarious ways."<sup>214</sup> Surely law is not wholly indeterminate. Rather, observing the impetus for making law—the codification of morally acceptable norms, procedures, and prohibitions—should bolster the idea that law cannot be as indeterminate as Leiter suggests.

Moreover, there is a substantial body of legal scholarship bolstering the assertions of the natural lawyers that maintains there is an inevitable link between law and morality. Eminent legal philosopher Joseph Raz demurs from the central claim of legal positivism when he writes that "The separability thesis is...implausible...it is very likely that there is some necessary connection between law and morality, that every legal system in force has some moral merit or does some moral good even if it is also the cause of a great deal of moral evil."<sup>215</sup> Raz goes further, writing, "It is relevant to remember that all major traditions in Western political thought, including both the Aristotelian and the Hobbesian traditions, believed in such a connection."<sup>216</sup> That the connection between human law and morality is innate and insoluble is a notion that Gabriela Mento and Oana Nesteriuc state clearly. Mento and Nesteriuc observe the contingent nature of the relationship between antecedent morality and subsequent law. They note that "the

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<sup>214</sup> William A. Edmundson, "Are Law and Morality Distinct," *BYU Journal of Public Law* 4, no. 1 (1990), 44.

<sup>215</sup> Joseph Raz, *Ethics in the Public Domain: Essays in the Morality of Law and Politics* (Oxford: Clarendon Press, 1994), 211.

<sup>216</sup> *Ibid.*, 211.

inclusion of the moral principles in the civil norms emphasize the genesis character of the moral customs within the rules of law.<sup>217</sup> Mentoi and Nesteriuc continue the development of their thought by writing unequivocally: “we can, thus, state the fact that morality precedes the law as well as the fact that both of them have developed in a tight connection with one another.”<sup>218</sup>

In sum, Mentoi and Nesteriuc assert that not only is there an inexorable connection, but that “law is built on morality and (law) can function solely as a moral consequence of the state's involvement.”<sup>219</sup> This assertion coincides with the recognition that the inverse relationship between law and morality does not hold. William A. Edmundson states, “It is true that regulatory legal requirements do not generally *independently* constitute moral requirements.”<sup>220</sup> A cursory glance through world history reveals tremendously immoral behavior as fully legal. Chattel slavery, unabated abortion, the extermination of millions of Jewish people during the Holocaust, the horrors of the Russian gulags, and so on. Each of these practices and occurrences are, or were deemed legal. Yet they rile and rouse the deepest moral bristling within us. Rightfully so. This is because they are properly recognized, on a real and visceral level, as immoral. These instances are an example of the outgrowth of non-objective morality, or a morality derived by “what works” in the pragmatic sense Leiter proffers. Yet, the sobering reality is as Hunter and Nedelisky recount that “the shared values of social consensus can yield abhorrent results.”<sup>221</sup>

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<sup>217</sup> Gabriela Mentoi and Oana Nesteriuc, "Theoretical and Practical Convergences between Law and Morality," 117-118.

<sup>218</sup> *Ibid.*, 111.

<sup>219</sup> *Ibid.*, 117.

<sup>220</sup> William A. Edmundson, "Are Law and Morality Distinct," 50.

<sup>221</sup> Hunter and Nedelisky, 202.

Here's another way of putting the point. The indeterminacy of Leiter's positivism, scientism, and narrowly empirical epistemology might suggest anything from a relatively narrow range of practicable legal pronouncements to a vast range of such pronouncements. The way it jettisons robust moral realism, however, opens up the door to, and renders much more likely, the latter contingency. What is vitally needed to delimit legal interpretations are the binding constraints of integrity and consistency, justice and the nonnegotiable recognition of the value of human lives. Minus such objective and authoritative moral values, duties, and standards, the indeterminacy of his naturalized jurisprudence seems much more susceptible, over time, to the sorts of gross human rights abuses that our history is tragically far too littered with already. In the comfort of our times, as our culture continues to benefit from the momentum of the salutary moral effects of the Judeo-Christian tradition, it's easy to think we can hold on to all our moral advancements by eliminating the theistic and moral realist foundations on which they were built. But as David Bentley Hart and numerous others have argued persuasively, such a notion is worse than confused, and is based a particularly dangerous moral myopia and revisionist history.

Given such a recognition of the relationship between law, morality, and human behavior, Moore rightly asserts, "The law does pretty well *if it can induce its citizens to keep their moral obligations*, to observe the social minimum of living together. Virtue is largely beyond the crude instrument of legal sanction (emphasis mine)."<sup>222</sup> Furthermore, it is recognized that the law itself is often unable to induce or compel individuals to comply with that which morality requires. In this sense, it may be seen that morality points to a deeper reality and is more fundamental to life than law. David E. Grossman reflects on morality's foundational nature to the human experience asking in rhetorical fashion, "why would practitioners in the nation's court systems address the

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<sup>222</sup> Moore, "Four Reflections on Law and Morality," 1550.



issues of faith, law, and morality?"<sup>223</sup> Grossman then gives an explicit the answer: "I suggest that beneath life's practical realities lie intangibles of ineffable importance like *faith*, law, and *morality*, whose presence forms a sure bedrock for a nation, and whose absence leaves a country in chaos or tyranny (emphasis mine)."<sup>224</sup> Grossman's insight points to the foundational nature that morality plays in its role of guiding the development of law and jurisprudence.

It must be recognized, again, that what is legal need not be moral. Yet what is moral should be found at the very heart of the law. It is in this way that the founders and the contemporary proponents of natural law theory understand the ontological foundation from which human law derives. In the absence of objective goodness as the foundational mooring for morality, we are left with relativistic and self-referential depictions of mutable and alienable "moral" codes. Leiter asserts correctly that "to talk about 'objective' rightness and wrongness is to talk about metaphysical or ontological issues, about what properties the world contains quite apart from what we happen to know about them."<sup>225</sup> Yet, despite his rejection of moral realism Leiter curiously places his trust in a mode of inquiry that is arguably incapable of delivering that which he seeks. To this point, Hunter and Nedelisky posit a rebuke of the epistemic naturalist's moral project by observing:

There are good reasons why science has not given us moral answers. The history of these attempts, along with careful reflection on the nature of moral concepts, suggests that empirically detectable moral concepts must leave out too much of what morality really is, and moral concepts that capture the real phenomena aren't empirically detectable.<sup>226</sup>

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<sup>223</sup> David E. Grossmann, "Faith, Law, and Morality," *Juvenile and Family Court Journal* 47, no. 3 (Summer 1996), 1.

<sup>224</sup> Ibid.

<sup>225</sup> Leiter, 272.

<sup>226</sup> Hunter and Nedelisky, xiv-xv.

Such a recognition is one fundamental to the belief system of moral realists and Christian theists that includes God and the natural law that is ontologically moored in him. These realities are beyond the scope of the empirically testable. It isn't that science can't provide us with magnificently useful information about the world. It assuredly can and does. Rather, pertaining to morality, science is in all likelihood never going to be up to such a momentous task.

Leiter's Project in Tension with the Objective Morality Required by the American Legal System

What may be surmised, through the corpus of Leiter's writings, is the 'why' behind his undertaking of such a project. Leiter makes explicit what is required for a naturalized jurisprudence noting that "we seek *methodological continuity* with the natural and social science" because they "seek *causal explanations*" and they "look for regular law-like patterns."<sup>227</sup> For Leiter, it appears jurisprudence must be naturalized in order for the field and practice to come into harmony with the way the world really works. According to Leiter the world is a deterministic universe ruled by mechanistic physical laws which leave little, if any, room for the freedom of the human will or action.

His effort centers on an attempt to harmonize his preferred epistemological model with naturalistic and deterministic accounts of "morality" for non-volitional agents—that is, human beings that are largely, if not totally, *causally determined creatures*. In this way, a naturalized jurisprudence would allow, in a paradoxical manner, a certain level of judicial ambiguity (Leiter's indeterminacy thesis), in accord with a causally determined world. Given indeterminacy, Leiter's naturalized jurisprudence seeks to engender predictive and consequently normative decision making processes germane to the rendering of legal decisions. The success of such a project would help reconcile legal indeterminacy and causal determinism. It also assists

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<sup>227</sup> Leiter, 56.

the paradoxical flexibility of the legal realist case for indeterminacy, that is, the notion that there need be no single right answer to matters of legal judgment.

This piecemeal conception of ambiguous decision making by causally determined creatures poses a problem for the practice of law in a nation whose founding relies upon moral objectivity and the rule of law. Here, Ronald H. Nash and David W. Beck each independently note that “no thoroughgoing naturalist believes in free will”<sup>228</sup> and “since any form of naturalistic evolution denies human freedom, it must deny responsibility.”<sup>229</sup> The rejection of human autonomy and responsibility are two tenets of Leiter’s naturalism that make it hard to see how causally determined individuals can be held morally blameworthy in the traditional sense, nor legally punishable except in a pragmatic sense. Leiter neither explores nor offers insight into how this issue may be resolved. A consequence of such an approach is that Leiter’s naturalized jurisprudence mitigates the blameworthiness of unfree individuals. A broad scale acceptance of such a view would also provide an impetus for the social acceptance of morally wanting behavior by individuals because they are causally determined. It is hard to see how an agent that is causally determined can be held morally culpable for nearly anything. What then becomes a problem in the legal realm may well become an existential problem in the societal realm should a project like Leiter’s be tried at a societal level.

Is Leiter’s project plausible? The reconciliation of causal determinism with volitional human agency in the absence of normative moral facts regarding law is difficult indeed. In

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<sup>228</sup> Ronald H. Nash, “Miracles and Conceptual Systems,” in *In Defense of Miracles: A Comprehensive Case for God’s Action in History*, eds. R. Douglas Geivett and Gary R. Habermas (Downers Grove, IL: InterVarsity Press, 1997), 120.

<sup>229</sup> David W. Beck, “God’s Existence,” in *In Defense of Miracles: A Comprehensive Case for God’s Action in History*, eds. R. Douglas Geivett and Gary R. Habermas (Downers Grove, IL: InterVarsity Press, 1997), 161.

discussing the connection between judges involvement in considering cases before them, Moore notes,

Such explicit incorporation of morality by the obvious law poses problems for some kinds of *positivistic* theories of law....it is unquestionably true that judges in legal systems with obvious laws like ours *have to make some kind of moral decisions* in order to apply such laws to the cases before them (emphasis mine).<sup>230</sup>

Moore's reflection coincides well with a natural law theory. It also coheres jurisprudents like Raz, Mentoi, and Nesteriuc. More importantly, it agrees with those contained within the founding documents. In this light a rigorous case may be set forth that morality is antecedent to law. Consequently, law is not inseparable from morality. Instead it is derivative of morality in an indelible fashion. Put differently, the law and subsequent legal framework as implemented by the founders depends upon the law of nature and nature's God. The law and enduring legal structure are both historically and factually linked to and moored in morality properly conceived. Such a realization led Frederic Bastiat some seventy-four years after the American founding to write these words:

We hold from God the gift that, as far as we are concerned, contains all others, Life—physical, intellectual and moral life. But life cannot support itself. He who has bestowed it, has entrusted us with the care of supporting it, of developing it, and of perfecting it. To that end, He has provided us with a collection of wonderful faculties....Existence, faculties, assimilation—in other words, personality, liberty, property—this is man. It is of these three things that it may be said, apart from all demagogic subtlety, that they are anterior and superior to all human legislation. It is not because men have made laws that personality, liberty and property exist. On the contrary, it is because personality, liberty, and property exist beforehand that men make laws.<sup>231</sup>

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<sup>230</sup> Moore, 1528.

<sup>231</sup> Frederic Bastiat, *The Law*, 1-2.

## Conclusion

I argue in chapter one that moral values and obligations are recognized by the founders as antecedent to law of human origin. Rather than creating law in accord with prevailing societal customs the founders in the main looked to a divinely moored natural law from which they would construct a new legal framework and a new nation. The myriad appeals to “God,” “Creator,” “Nature’s God,” “the Law of Nature,” and “Nature’s God,” in the consensus documents and individual writings helps to show that the founders’ appeal was to a higher and divine authority. Their appeal to an authority that is timeless, immutable, all powerful, and personally interested in moral behavior is both pervasive and clear.

In chapter two it was argued that Christian theism in particular provides a strongly plausible moral ontology for a natural law theory of the founding. Nash suggests, “Christian theism insists on the existence of universal moral laws; the laws of morality must apply to all humans, regardless of when or where they have lived.”<sup>232</sup> Moreover, the truth of these laws exists irrespective of human thought or predilection, as Nash articulates, “They must also be objective in the sense that their truth is independent of human preference and desire.”<sup>233</sup> This objectivity, as the founders rightly understood, begins with the law of nature and nature’s God. In this way, Christian theism is arguably the proper grounding for the natural law to which the founders appealed.

Contrasted to a divinely anchored natural law, Leiter’s effort to naturalize jurisprudence was the focus in chapter three. Leiter sets out his claim that jurisprudence should be informed, regarding morality, by an epistemology that is purely scientific in nature. Leiter advocates for the

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<sup>232</sup> Ronald H. Nash, “Miracles and Conceptual Systems,” 118.

<sup>233</sup> Ibid.

explanatorily superior methodology of a scientifically derived moral epistemology because it “works” and has “delivered the goods.” Moreover, Leiter’s move to naturalize jurisprudence is due, in part, to make sense of the so-called indeterminacy of jurisprudence. Legal indeterminacy says that there is no singular right or correct answer to a case. So predictions of prospective rulings are to be based upon the findings of the hard sciences such as evolutionary biology, psychoanalysis, chemistry, and physics. Leiter’s project, it was argued, stands in patent tension with the objective moral obligations and duties built into America’s legal framework.

Further avenues of study are deep and broad in scope. The discussion concerning the link between legality and morality is alive and well within the legal literature. At the heart of such a debate lie the philosophical differences between the legal positivists and the natural lawyers. Both philosophical theologians and jurists would benefit from greater interaction with each other’s work in a way that might shed light on the connection between morality and law and its implications. Moreover, there exists a fruitful field of study regarding the individual religious and intellectual beliefs of the founders—along with that of the general populace for which they sought to build a government. To be sure, although much work here has been done, much more assuredly awaits. A final suggestion is for the continuance of the development of analytic philosophical arguments that morality is as moral realists suggest, namely, that morality is a real feature woven into the very fabric of ultimate reality. There is more to this world than the blind mechanistic forces observable and testable by the hard sciences. More cogent and persuasive arguments for this reality are needed not just in academia, but desperately at a popular level. Christian philosophers, legal scholars, pastors, politicians, and laypersons alike must strive with patience and perspicacity to spread the case that this most excellent nation, if her greatness is to be maintained, must retain her status as a *good* nation.

In sum, it has been argued that the founders' conception of man-made law depends on the natural law—that which is preexistent and flows from the source of goodness itself, the Supreme Creator and Judge of the Universe. In this way, it is both reasonable and plausible that the American founders believed that there is a natural law, rooted in God, which subsequently provides the foundation of natural rights expressed in the framework they established.<sup>234</sup> This position is at odds with a naturalized jurisprudence and a nation subsequently guided by the central tenets of Leiter's naturalized moral epistemology. The enduring legal framework and the innate sense of objective and binding morality, inclusive of the intrinsic value of human life, is fundamentally more congruent with a worldview as seen through the lens of Christian theism. Founding father John Quincy Adams captures the essence of the argument succinctly when he declares, "Our Constitution was made only for a moral and religious People. It is wholly inadequate to the government of any other."<sup>235</sup>

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<sup>234</sup> Beckwith, *Politics for Christians*, 39; 164.

<sup>235</sup> John Quincy Adams, *From John Adams to Massachusetts Militia*, 11 October 1798.

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