

A CHRISTIAN PERSPECTIVE ON JURISPRUDENCE

*Keynote at the Fifth Global Convocation of Christian Lawyers,
"Redeeming Law: Christian Calling and the Legal Profession,"
Washington, D.C., October, 2008*

MODERATOR: MICHAEL SCAPERLANDA

J. Budziszewski has his Ph.D. from Yale and has taught for many years at the University of Texas in the Government and Philosophy Departments. I want to mention three things about J. before he speaks. First, he was instrumental in introducing, or re-introducing, the concept of natural law to the Protestant Evangelical communities. Ten or eleven years ago he published a very influential book called *Written on the Heart: The Case for Natural Law*. Since then, he has written another half dozen or dozen books on the subject. Second, he is very influential in getting us to think about ways we can dialogue from within the natural law tradition with people who are hostile to the concept of natural law. He says that instead of being natural law theorists, we ought to be natural law doers, though I think that he would probably say it a little more eloquently than that. Third, recalling the panelists who spoke earlier about their experiences as law professors, I have come to know J. as someone who is very committed to his students. J. has spent some time in Phoenix, Arizona every summer working with law students from around the country in the Blackstone Fellowship. Every year I ask the students, "Who were some of your favorite speakers at Blackstone?" Invariably, J.'s name comes to the top of the list. When I ask them, "Why is he one of your favorite speakers?" there are always two reasons. One, the rich content of what he says, some of which he'll share with us today. The other is that he wants to engage, visit, and share his life with the students. The students enjoy his availability with them before and after their sessions. For J., it is not just an academic exercise but a life lived and shared. With that, I introduce and welcome J., and I ask that you also welcome him.

SPEAKER: DR. J. BUDZISZEWSKI¹

Although I wish to speak of global Christianity, I must begin with the part of the globe that I know best. The cultural situation of Western Christians is now more ambiguous than it has ever been since the conversion of Constantine. It seems too simple to say that we live in a *post-Christian* world. Many of our fellow citizens still call themselves Christians, at least on this side of the Atlantic, and our cultural institutions continue to bear the stigmata of their Christian origins. Yet, it also seems too simple to say that we live in a *Christian* world. Many of those who believe there is a God are simultaneously committed to premises that imply that whatever God there is, He couldn't matter. Meanwhile, the Christian vestiges in culture no longer radiate glory like the wounds of Christ; they have been bent into anti-Christian shapes. Equality, for example, once meant the equality of human dignity as made in the image of God, but now means the equality of moral equivalence among all ways of life. Liberty once meant liberty from slavery to passion, but now means that you may follow the cruel master of your desires wherever it leads. Ancient institutions such as marriage are being taken apart piece by legal piece. The mere teaching of Christian doctrine about sensitive subjects such as sexuality is increasingly redefined as "crimethink" and punished with fine and injunction. These developments are international in scope and proceeding rapidly even in countries with traditions of religious freedom, such as Canada, where the increasingly lawless behavior of so-called "human rights commissions" has been watched with such burning concern.

Outside the West, the situation may seem to be quite different. I think it is much more similar than we may at first perceive. In the first place, the Western culture war is an export product. It will not remain a phenomenon of the West. The culture war has already been substantially internationalized. In the second place, issues of poverty, economic inequity, and injustice to women and children, so much more urgent outside the West, can only become still worse if confusion continues to spread about the natural order of marriage and family, and that is just the sort of confusion that the culture war engenders. In the

¹ Departments of Government and Philosophy, University of Texas at Austin. Portions of this address are adapted from the author's most recent book, J. BUDZISZEWSKI, *THE LINE THROUGH THE HEART: NATURAL LAW AS FACT, THEORY, AND SIGN OF CONTRADICTION* (2009).

third place, the precariousness of the rule of law, so often considered only a non-Western problem, is increasingly a Western problem too. The rule of law presupposes respect for the dignity of the human person, as well as a conviction that the moral standards underlying law are discovered, not invented. How can respect for persons persist in a culture of abortion, euthanasia, and experimentation on human embryos, in which persons can be redefined as non-persons whenever we please? How can respect for transcendent moral standards persist under the “dictatorship of relativism?”

Finally, the official mistreatment of Christians is widely thought to be only a non-Western problem, but although it is certainly much more serious outside the West, we need to rethink this perception too. As we see from the Canadian example, persecution of Christians is not just something that takes place in Muslim states. It is beginning to spread in secularist states.

In such a world, how can we speak to our confused neighbors? I am not asking how we can discuss the gospel with them. I am asking how we can even discuss with them matters of everyday common concern, concern that we share with them as fellow citizens. I almost said, “matters of *ordinary* common concern,” but our common concerns are no longer so ordinary, are they? What's wrong with abortion? What's wrong with euthanasia? Why shouldn't we clone ourselves? What is so special about marriage, and why does it require a man and woman? What is so special about human life in the first place? Couldn't we harvest organs from people before they die? Couldn't we find cures for disease by experimenting on human embryos? Couldn't we cross human beings with pigs for research purposes? Couldn't we reinvent the family, and couldn't we re-invent humanity itself?

Notice that although I said, “fellow citizens,” we share these concerns with our neighbors not as citizens simply, but as citizens under a common code of law. I am speaking, therefore, not only of conversations struck up by chance in the supermarket, but also of the more specialized discourse of courts, legislatures, and administrative hearings. To speak of matters of common concern is inevitably to speak of the law – at least in part.

Therefore I ask again – in such a world, how can we speak about matters of common concern, in particular, the law? Some Christians, especially Evangelicals, respond by quoting the words of the epistle to the Hebrews, “For the word of God is living and active, sharper than any two-edged sword, piercing to the division of soul and spirit, of

joints and marrow, and discerning the thoughts and intentions of the heart.”² They wrongly infer from this passage that we must always be hitting our neighbors over the head with Holy Scripture. I am not one of those who think that we must never mention the writings and traditions of our faith, but “all Bible, all the time” is more like a way to end a conversation than a way to begin it.

Therefore I ask yet again – how in such a world can we speak? Another set of Christians, including many Christian lawyers, responds with a despairing shrug. “So long as the law is concerned,” they say, “that which is living and active and sharper than any two-edged sword is not the word of God, but the latest fashionable deliverance of the European Parliament or the *Harvard Law Review*. Legal discourse and Christian discourse are separate, unequal, and incommensurable. By all means be an advocate, but do not imagine that what you want to say as a Christian can ever be translated into professional language.” But this view cannot be right either. It leaves us in the dishonest position of manipulating the language of the law for purposes that are alien to it.

My answer runs like this: Contrary to the first view, the Bible does not teach that we should begin every public conversation with the Bible. In fact, it teaches the opposite. Contrary to the second view, neither is it the view of the faith that the language of the faith and the language of the culture, including the professional culture, could ever be *wholly* incommensurable. So long as we are still speaking with human beings, so long as they still bear the image of God – which cannot be lost – there will be a point of contact, a common ground. It will be a slippery common ground, wet with the dew of evasion and subterfuge, but it *will* be a common ground.

Consider the example of St. Paul. When he spoke with Jews and Christians, he did quote Scripture, because they knew and believed it already. When he broached Christian topics with pagans, he proceeded differently. Why appeal to things the pagans didn't know and didn't yet believe? Instead he appealed to things they did know and believed already. On one occasion he quoted their poetry: “Yet he is not far from each one of us, for ‘in him we live and move and have our being.’”³ On another he talked about the weather, of rains and fruitful seasons, invoking his listeners' sense of gratitude to someone, they knew not whom.⁴ On the occasion when he quoted their poets, he also com-

² *Hebrews* 4:12 (Revised Standard Version).

³ *Acts* 17:27-28 (Revised Standard Version).

⁴ *See Acts* 14:17 (Revised Standard Version).

mented on their secret sense that their idols could not save, for he had seen their altar inscribed "to an unknown god."⁵ As you know, Paul did not hold back the truth of the faith, but he found ways to express biblical truth apart from the Bible itself. In this way he aroused an appetite for the word of God which could be satisfied later among those who were really serious.

Amazingly, one of the things that Paul says the pagans know already is the *law*. Not the biblical law, but what Western jurisprudence used to call the natural law. As he remarks in the Epistle to the Romans,

[I]t is not the hearers of the law who are righteous before God, but the doers of the law who will be justified. When Gentiles who have not the law do by nature what the law requires, they are a law to themselves, even though they do not have the law. They show that what the law requires is written on their hearts, while their conscience also bears witness and their conflicting thoughts accuse or perhaps excuse them on that day when, according to my gospel, God judges the secrets of men by Christ Jesus.⁶

Fancy that! What the law requires is written on their hearts (on the hearts of pagans, mind you). Needless to say, St. Paul is not a New Ager or an intuitionist who thinks that in order to discern what to do in the most difficult situations we need only "listen to our feelings," as the fictional Obi-Wan Kenobi idiotically recommends to Luke Skywalker as he is closing in on the enemy spaceship. In fact, St. Paul is not speaking of feelings at all; he is speaking of conscience, which is a matter of *knowledge*, latent knowledge, so deeply worked into the core of human identity that it can be said to be "written" there.

Obviously this knowledge has its limits. In the first place it is *latent*; to know something is not the same as to know that one knows it. In the second place it is quite general; the knowledge that I ought to do unto others what I would have them do to me doesn't in itself instruct me in what I ought to want. In the third place, it can all too easily be perverted and deflected on its journey from the depths of the ocean of conscience to the shoreline of decision. Yet *something* is swimming down there, and something big. The man who tells himself the lie, "I didn't do wrong, because the creep I killed only got what was coming to him," at least knows deep down the wrong of taking innocent hu-

⁵ Acts 17:23 (Revised Standard Version).

⁶ Romans 2:13-16 (Revised Standard Version).

man life. Rationalization is the homage paid by sin to guilty knowledge.

I warned you that the common ground is slippery. Now you see what I meant. This fact cuts both ways, doesn't it? A permanent advantage of evil is that it can lie, but a permanent advantage of good is that evil *must* lie, and the only soil in which a lie can put down roots is the moral truth itself. We must learn the surgical art of disentangling the strands of each rationalization from the underlying truths that they infest. Nobody defends cruelty as such, but many defend false compassion. Nobody defends death as such, but many defend false views of life. In each case we must distinguish the truth from the counterfeit.

Considering the limitations of conscience: Is the law written on the heart the *only* source of knowledge about the law? To put it another way: In speaking about law, is conscience our *only* point of contact with nonbelievers? The answer is no.

Natural law tradition recognizes at least three other sources. Each source is also recognized by the Bible and Christian tradition. I will not deceive you. Each of these three is as slippery as conscience, but each of them is also as real. The fact that they are slippery makes them difficult to use. The fact that they are real at least gives us something to use. I like to call these sources, along with conscience, "witnesses," as a memorial of St. Paul's remark to the pagans of Lystra that although, in times past, God allowed the gentile nations to walk in their own ways, even then, "He did not leave Himself without witness."⁷ The context shows that St. Paul is not speaking of human witnesses, but of impersonal testimonies built into the very pattern of God's creation and providence. To be sure, these witnesses are wordless. The same thing might be said of them that the psalmist says of the heavens, "There is no speech, nor are there words; their voice is not heard; yet their voice goes out through all the earth, and their words to the end of the world."⁸

Conscience, the first witness, is a feature of the design of the created practical intellect.⁹ To speak of design brings us to the second witness, the evident "designedness" of things in general. Don't we perceive immediately that nature requires an explanation beyond itself – that the things in nature are indeed designed – that design requires per-

⁷ *Acts* 14:17 (Revised Standard Version).

⁸ *Psalms* 19:3-4 (Revised Standard Version).

⁹ See ST. THOMAS AQUINAS, *SUMMA THEOLOGICA* I, Q. 79, ART. 13 (Fathers of the Dominican Province trans., New Advent 2008) (1274), available at www.newadvent.org/summa.

sonal agency? Working out the logic of these perceptions is one of the tasks of philosophy, but the perceptions themselves are pre-philosophical. St. Paul alludes to them when he says that the reality of God and of some of His qualities have been known "since the creation of the world," having been "clearly perceived in the things that have been made."¹⁰ It might be thought that although the perception of the "designedness" of things does something for the knowledge of God, it does nothing for *moral* knowledge. On the contrary, it does at least three things for moral knowledge. In the first place it vindicates the first witness we spoke about, for if conscience is designed as a witness to moral truth by a God who knows what He is doing, then its witness to this truth is reliable. The witness of "designedness" confirms something else, too – that we have duties not only to neighbor but to God Himself, to whom we owe the very possibility of the experience of *anything* good. Finally, it informs us that just as conscience is a feature of our design, so the rest of us is designed; we are a canvass for God's purposes, a parchment of His meanings.

That leads us to the third witness: the *details*, the *particulars* of our own, human design. Design is obvious, not just in our bodies, but across the whole range of human powers and capacities. The function of fear is to warn; of minds, to deliberate and know; of anger, to prepare for the protection of endangered goods. Everything in us has a purpose; everything is for something. A power is well-used when it is used for that purpose and according to that design. Nor is this just about the functions of things. As I have already suggested and as natural lawyers are coming to realize more deeply, it is also about the meanings of things. Our very bodies have a language of their own. They say things by what we do with them. Bone speaks to bone, organ to organ, skin to skin. A smile means something friendly. You cannot give that meaning to a slap in the face. You can use a kiss to betray, but only because the kiss, in itself, means something else. Conjugal sex means self-giving, making one flesh out of two.

I know what some of you are thinking. The second and third witnesses concern design, but modern science has debunked teleology. We cannot ascertain purposes in things, and even if we could, an *is* does not entail an *ought*. Let me briefly reply to both objections.

As to the first objection, consider the power of breathing. When we say that its purpose is to oxygenate the blood, are we making it up? Plainly not. This purpose isn't in the eye of the beholder; it is an infer-

¹⁰ *Romans* 1:20 (Revised Standard Version).

ence from the design of the lungs. In the first place, breathing *does* oxygenate the blood; in the second place, apart from the oxygenation of blood there is no way to explain why the power to breathe should have developed.¹¹

As to the second objection, if the purpose of eyes is that they see, then eyes that see well are good eyes, and eyes that see poorly are poor ones. Given their purpose, this is what it *means* for eyes to be good. Moreover, good is to be pursued; the appropriateness of pursuing it is what it means for anything to be good. Therefore, the appropriate thing to do with poor eyes is try to turn them into good ones. If it really were impossible to derive an "ought" from the "is" of the human design, then the practice of medicine would make no sense. Natural law theory has contemptuously been called "metaphysical biology"; so be it, for biology needs metaphysics too. But we are speaking of more than biology. In exactly the same way that we infer that the purpose of the eyes is to see and the purpose of breathing is to oxygenate the blood, we can infer the purpose of the capacity for anger, the purpose of the power of reasoning, the purpose of sexual union, and so on.

The fourth witness to natural law is the natural consequences of its violation. Those who cut themselves bleed. Those who betray their friends are betrayed by their friends. Those who abandon their children have no one to stroke their brows when they are old. Those who travel from bed to bed lose the capacity for intimacy and trust. Especially interesting are the *noetic* penalties for violation, the ones concerning knowledge. Those who suppress their moral knowledge become even stupider than they had intended. We see that the ancient principle, "God is not mocked, for whatever a man sows, that will he also reap,"¹² is sewn into the fabric of experience.

Allow me to digress for just a moment. In calling natural consequences one of the witnesses, I am not endorsing the so-called consequentialist view that the penalty for violation is what *makes* the wrong act wrong. It would be wrong even without unwanted consequences, but the consequences serve as a teacher and as a form of discipline. Viewed in this way, the most intriguing thing about the natural conse-

¹¹ I adapt these two conditions from ROBERT C. KOONS, *REALISM REGAINED: AN EXACT THEORY OF CAUSATION, TELEOLOGY, AND THE MIND* (2000). The change lies in the second of the two conditions: Rather than requiring that the fact that P brings about Q be part of the *efficient cause* of P, I say that it must be part of the *explanation* of P, leaving open the possibility that final cause is a fundamental and irreducible category of explanation, a possibility which Koons also now accepts (personal communication).

¹² See *Galatians 6:7* (Revised Standard Version).

quences of things is that they point to the natural purposes and meanings of things. The natural link between sex and pregnancy, for example, is not just a brute fact to be circumvented by latex rubber; rather it declares that sex serves the *meaning* of self-giving and the *purpose* of procreation, of having and raising children in the love and fear of God.

Everything that I have said so far supposes a connection between law and morality so close that an evil law is not truly law at all, but, as St. Augustine wrote, an act of violence. This view is hardly fashionable today. First, let us consider the liberal objection that law should not "enforce morality." Like all errors, this claim derives its plausibility from a grain of truth. The grain of truth in it is that not every sin should be punished by the government as a crime. On the other hand, if the notion that law should not enforce morality means that the enacted law should be morally *neutral*, it is not even coherent. Try to think of a law that is not based on a moral idea. You can't. The law that sets speed limits is based on the moral idea that we ought to have regard for the safety of our neighbors; the law punishing murder is based on the moral idea that innocent blood may not be shed; and the law permitting abortion is based on the moral idea that innocent blood *may* be shed if the victim is still in the womb. A law may be based on a *false* moral idea, but inevitably it is based on a moral idea. If this is the case, it is hard to see what is wrong with scrutinizing the laws to make sure that the moral ideas upon which they are based are true. Even pagans should understand that.

The positivist objection is that morality simply has nothing to do with the definition of law – that although we may object to an evil law, the fact that it is evil does not prevent it from being *law*. One kind of legal positivist defines law as the will of the sovereign of the country in question. Another defines it as a social convention of the country in question. Both definitions misconstrue what is asked for. They treat the question, "What is law?," as asking, "*What qualifies an enactment as belonging to our own system of enactments?*" It so happens that neither definition actually succeeds in answering that question,¹³ but that is neither here nor there. What matters is that when the natural lawyer asks "What is law?" he is trying to answer the entirely different

¹³ The first definition suffers from circularity, because we must consult the sovereign to recognize the law, but then consult the law to recognize the sovereign. The second definition suffers from infinite regress, for it deems a law valid if it is conventionally *accepted as valid*. By substitution of terms, we find that it is valid if it is conventionally *accepted as conventionally accepted as conventionally accepted as (ad infinitum)*.

question: "What qualifies an enactment as a rule and measure of human action?" Genuinely human action is based on reasons, not merely impulse, so its norm must be rational too. This norm must serve the common good because it is a rule and measure for all, not just for some. It must be enacted by public authority; otherwise, instead of giving rise to a moral duty, it will only give rise to an inconvenient circumstance (a sanction), which cautious people will keep in mind. Finally, the norm must be promulgated, because what is not known cannot be followed.¹⁴ Although an enactment that contrary to one or more of these conditions may belong to our system of enactments, it will not suffice as a rule and measure of human action.

By the way, does natural law satisfy this classical definition of law? Evidently so. All four conditions are satisfied. Consider the natural law forbidding murder. It is not an arbitrary whim, but a rule which the mind can grasp as right. It serves not some special interest, but the universal good. Its author has care of the universe, for He created it.¹⁵ It is not a secret rule, for He has so arranged His creation that every rational being knows about it. So it is that when we speak of natural "law," we are not merely dropping into metaphors. It *is* law. Apart from it, the decrees of the powerful are not truly law, but only enacted frauds.

I turn now to my final theme. At this point I kneel and confess to you that my earlier metaphor, comparing the natural law to a slippery common ground, is an understatement. Yes, natural law is a fact, a feature of the world, having to do with the constitution of the human person, and behind that with the constitution of created reality as a whole. But it is not *just* a fact. It is also a sign of contradiction. It exasperates; it offends; it enrages. *We don't want to hear* of the natural law. On the one hand, we cannot fully ignore it because its ABCs are written on our hearts. On the other hand, we resist the inscription and the letters burn.

¹⁴ I am following Thomas Aquinas, who explains law as an ordinance of reason, for the common good, made by public authority, and promulgated. ST. THOMAS AQUINAS, SUMMA THEOLOGICA, I-II, Q. 90, ART. 4 (Fathers of the Dominican Province trans., New Advent 2008) (1274), *available at* www.newadvent.org/summa.

¹⁵ This statement is not intended as shorthand for an account in which nature is normative because God commands that it be normative (and could have commanded that it not be). Rather, the created good is normative because it is rooted in the uncreated God who created it. For all we know, God could have created a different nature, but He could not have willed that we dishonor or disregard the structures of good contained in the nature that He did, in fact, create.

Here begins a terrible game. The crisis of natural law in our time owes partly to the deepening intensity of the game, but partly to the fact that we ignore it. We persist in taking pretended moral ignorance at face value, in lawyering and philosophizing as though the problem of moral failure were merely cognitive. We suppose that when the opinionators of our time repudiate God, celebrate the destruction of life, and rejoice in sexual debasement, they simply do not know any better. We imagine that if only we present them with airtight arguments, they will change their minds. We may in time change their minds, but if we do, it will take more than that. There is such a thing as motivated error. Indeed the problem is graver still.

Consider the first witness, conscience. You cannot kill it, but you can bury it. That may sound better, but in a way, it is worse. Like a man who is buried alive, conscience kicks against the walls of its tomb. The defiant intellect – which is that tomb – therefore fortifies the walls. A single example will suffice. We *can't not know* the wrong of deliberately taking innocent human life. The appalling thing is that we make use of this knowledge even in order to defy it. The arguments for abortion amount to claiming either that the act is not deliberate, or that it is not a taking, or that the unborn child is not innocent, not human, or not alive. A moment, please, Not innocent? Yes, even that. There is no limit to what can be denied. Legal scholar Eileen L. McDonagh calls the unborn child a “private party”¹⁶ who uses “violence [to] coerce [the woman] to be pregnant against her will.”¹⁷ It is “objectively at fault for causing pregnancy.”¹⁸ The woman has a “right to consent to a relationship with this intruder, [and is entitled to] the use of deadly force to stop it, [even if it] acquires the highly charged label of ‘baby.’”¹⁹ “Some might suggest,” she says, “that the solution to coercive pregnancy is simply for the woman to wait until the fetus is born, at which point its coercive imposition of pregnancy will cease,”²⁰ but “this type of reasoning is akin to suggesting that a woman being raped should wait until the rape is over rather than stopping the rapist.”²¹

¹⁶ EILEEN L. MCDONAGH, *BREAKING THE ABORTION DEADLOCK: FROM CHOICE TO CONSENT* 6 (1996).

¹⁷ *Id.* at 176.

¹⁸ *Id.* at 36.

¹⁹ *Id.* at 188.

²⁰ *Id.* at 11.

²¹ *Id.* at 11-12.

What is one to make of such an argument? It is hard to know whether it is more horrible or more absurd. The difficulty is not that it cannot be rationally answered, for it can. Rather, the difficulty is that in order to find it plausible in the first place, a person must already be beyond or very nearly beyond argument. The level of self-deception required is stupendous. Nor is this rare, for there are many such "arguments-beyond-argument." Physician Warren M. Hern, M.D. has written a learned article explaining that pregnancy is "an illness requiring medical supervision," which "may be treated by evacuation of the uterine contents," but "has an excellent prognosis for complete, spontaneous recovery if managed under careful medical supervision." If you can believe it, the article was published in a journal called *Family Planning Perspectives*.²²

The scandal of natural law is acute because of the suicidal proclivity of our time to deny the obvious, a proclivity, by the way, which itself cries out for explanation. We have reached that day that Chesterton foresaw when he wrote:

Everything will be denied. Everything will become a creed . . .
Fires will be kindled to testify that two and two make four.
Swords will be drawn to prove that leaves are green in summer
. . . We shall be of those who have seen and yet have believed.²³

The circumstance of living during an acute phase of the scandal makes it especially important that we not let the wool be pulled over our own eyes. Having agreed that there is a common ground, we must not agree that the definition of "common ground" is "what everyone concedes" or "what no one denies." There is nothing that everyone concedes; there is nothing that no one denies. We must be willing to be bold.

The scandal is also chronic. Natural law is a sign of contradiction, not merely incidentally because of the times, but essentially because of all times. One reason for this is the Fall. Our condition contradicts our constitution; our state is out of joint with our nature. The natural law scandalizes us because our actual inclinations are at war with our natural inclinations, because our hearts are riddled with desires that oppose their deepest longings, because we demand to have happiness on terms that make happiness impossible.

²² Warren M. Hern, *Is Pregnancy Really Normal?*, 5 FAM. PLAN. PERSPECTIVES., Jan. 1971, 5, at 9, available at <http://www.drhern.com/fulltext/ preg/paper.htm>.

²³ GILBERT K. CHESTERTON, *HERETICS* 305 (12th ed. 1905).

To understand the scandal at an even deeper level, natural law is a sign of contradiction because Christ the Redeemer is a sign of contradiction. Yes, we can and must find ways to make ourselves comprehensible to those who do not share the insights of revelation, but this does not mean that we can do so without mentioning these insights. As I said, St. Paul did not begin every conversation with the insights of the faith, but neither did he banish them from his conversation. Nature presupposes supernature, and the present disorders of human nature merely stun and dismay the mind when contemplated apart from the graces of creation and redemption. For this reason, a truly adequate understanding of nature's malaise requires some hint, some glimpse, some trace of its supernatural remedy.

How awful such reflections are for those of us who crave the approval of our professional colleagues – me in academia, you in law. The timid flesh crawls at the thought of their skeptical glance. Yet, in the long run, there is no other way to make headway. How could we expect natural law to be plausible to those whose human nature experiences only its humiliation, and not its rising again?

The intellectual and professional method of our day is minimalist. It assumes that people can consider propositions about reality only in small doses, one dry pill at a time. I suggest that at least sometimes, the very opposite is true. The reason the pill goes down so hard is that it is *only* a pill – for the mind, like the stomach, desires a meal. Just as some foods are digestible only in combination with other foods, so also some ideas are plausible only in combination with other ideas. In order to stand firm they must have context, as the single stone requires the arch. So let us not worry about scandal, but go ahead and do the scandalous, unminimalist and unsecularist thing.

Let us not seek to provoke the rage of fallen nature, but let us not be intimidated by it either. Let us dare to speak of the natural law. Let us dare to invoke its four witnesses. We are called to a mode of professional and legal practice that assumes the moral law which no one else dares to avouch and that poses the questions which no one else dares to ask. We are called to a public apologetics that connects the dots of our fragmented moral consciousness and reminds people of what deep down they know already. We are called to a civic rhetoric that dissipates smokescreens and disperses self-deceptions. There are no such professional practices – public apologetics and civic rhetoric – today. We are charged to found them.

The charge is too high for us, for we are a stunted generation. Even so, there is no one else to do it. If we neglect it, the next generation will be even shorter. If we lack the courage of our convictions, others

will have the courage of their lack thereof. So let us try. Perhaps God will again choose

[w]hat is foolish in the world to shame the wise, ... what is weak in the world to shame the strong, ... what is low and despised in the world, even things that are not, to bring to nothing things that are, so that no human being might boast in the presence of God.²⁴

Thank you.

MODERATOR: MICHAEL SCAPERLANDA

Okay, we have a few minutes for questions.

AUDIENCE MEMBER 1:

At the risk of sounding a little bit like a minimalist, I would like to know if you could give a one-sentence definition of rule of natural law. I have a second question, too. You say there is no such thing as an amoral law, yet I want to offer the idea of “efficiency” as a counterexample. April 15th is tax day, can you give me a moral reason for that?

BUDZISZEWSKI:

I don't think I can give you a one-sentence definition of natural law, but I think I can give you a quick one. The foundational principles of good and evil – the moral basics, shall we say – are not only knowable, but, in a certain sense, known. Thomas Aquinas remarked that they are the same for all, not only as to rectitude but as to knowledge.²⁵ That means they are not only right for everyone, but at some level known to everyone. So in other words, if you think the only reason you know murder is wrong is that your parents taught you or that you've read it in the Bible, you're mistaken. No doubt they *did* teach you, and you *have* read it in the Bible – but the reason these teachers were believable is that you were able to see for yourself that what they were telling you about murder was really true. As C.S. Lewis pointed out, it's the same with arithmetic.

Then what is natural law? Natural law is all of these moral basics, together with their implications. We may be ignorant about some of the remote implications, but even then we aren't helpless because the

²⁴ 1 *Corinthians* 1:27-29 (Revised Standard Version).

²⁵ AQUINAS, *supra* note 14, at Q. 94, ART. 4.

order of creation provides enough information to work them out. That was why I discussed the four witnesses.

As to your second question, all sorts of moral principles are built into taxation. Some taxes are based on the moral idea that those who receive benefit should give something in return. Others are based on the idea that the rich and poor have duties to each other. Not even the economic concept of Pareto optimality, or “efficiency,” to which you refer, is morally neutral. In the first place, to praise Pareto optimality is to suppose that it is better for everyone to be better off than for some to be better off and others to be worse. In the second place, if you are going to employ the notion of Pareto efficiency, you are going to have to specify what it *means* for a person to be “better off.” Suppose you say that “better off” means “better off in the person’s own estimation” – and that’s why you leave things to the market, where people decide for themselves whether to enter into transactions. Have you escaped from moral judgment? Of course not. You have merely committed yourself to the moral view that it is good for a person to get what he *esteems* as good -- to get what he *wants*. Your criterion of good is the satisfaction of desire. That may be a true moral idea or a false moral idea, but it’s certainly a moral idea.

AUDIENCE MEMBER 1:

I specifically meant the idea of April 15th.

BUDZISZEWSKI:

I see. Very well, why April 15th? The legal decision to make taxes payable on April 15th is something like the legal decision to have everyone drive on the right side of the road. The natural law does not tell you that it couldn’t be the 16th, and it doesn’t tell you that it couldn’t be the left. But a distinction is necessary.

When the natural law tradition says that every just law is “derived” from the natural law, it doesn’t mean that every just law is derived by “conclusion,” short for “conclusion from premises,” where only one answer is possible. Others are derived in a different way, by “determination,” short for “determination of generalities,” where more than one answer is possible. Think of it this way. Prudent application of the natural law may not tell you that the left is the very best side of the road for driving, but it does tell you that the common good requires picking a side and making it stick. You may think this conclusion is morally neutral, but it isn’t; the underlying moral principle that dictates it is that we ought to have regard for the safety of our neighbors.

As to *which* side to have people drive on, the legislator just has to pin it down, fill in the blanks. And so it is with the day on which taxes will be due. Public order requires picking one and making it stick. That's "determination of generalities."

AUDIENCE MEMBER 2:

I have a two-pronged question. The first is a concern with everything that you have said about the four witnesses that seem to presuppose the ability of an individual to understand certain things. I would like you to address that because it seems to me that what it brings you back to is nothing but morality. If a man has this ability, the man therefore stands outside an arena where he can enter this neutral ground.

BUDZISZEWSKI:

I am not sure whether I understand what you are asking. I have not claimed that the natural law is a neutral ground. I have claimed that it is a *common* ground. These two sorts of claims are sharply different. Someone may obstinately refuse to stand on the common ground, some people do and that shows that it isn't neutral. I would say that a great deal of contemporary liberal jurisprudence is based on confusing the idea of a common ground with the idea of a neutral ground. That is a fallacy. There is no such thing as neutrality.

AUDIENCE MEMBER 2:

So then you make no distinction between natural revelation and natural theology?

BUDZISZEWSKI:

I'm still not sure what you are asking. Certainly the expression "natural theology" carries baggage. Some people take it to mean that faith in revelation is excluded, and perhaps that is what you are concerned about, but I don't exclude faith in revelation.

To prevent misunderstanding, let me define my own terms. Theologians sometimes use the expression "special revelation" for what God has revealed to the community of faith. He gave us His Word. He came among us in person. He did things among us. They use another expression, "general revelation," for what God has revealed not just to the community of faith, but to everyone. If God had not given us

minds that could recognize the structure of reality, and if He had not made the structure of reality concordant with the mind, then we wouldn't be able to know anything. We wouldn't even know that equals added to equals are equal, or that we shouldn't gratuitously harm our neighbors. But He did arrange His creation that way; consequently, we can know these things. *All* human beings can know. Among the things which the created intellect is able to work out are the reality of God, and His most basic moral requirements. These are knowable not just to the community of faith, but to everyone; although, of course, we might cover our eyes with our hands.

AUDIENCE MEMBER 2:

But my question was not to distinguish between two types of revelation but between revelation and theology.

BUDZISZEWSKI:

What is your question? What are you asking?

AUDIENCE MEMBER 2:

I am saying, am I right to conclude that you do not distinguish between the two? I guess in a roundabout way you answered it by not answering.

BUDZISZEWSKI:

If I didn't answer, it's because I don't understand you. Are you asking whether general revelation is the same as what some people call natural theology, as I thought you were at the beginning? I agree that there is a difference between whether God reveals something and whether one accepts that revelation. I also agree that special revelation includes a number of important things that general revelation doesn't. General revelation by itself is not enough. Yes, of course, I am a Christian. I am not a Deist or a Stoic.

AUDIENCE MEMBER 3:

I want you to relate the discussion to the Kafkaesque problems that we are facing now. We know that the whole world is in turmoil as a result of the so-called financial crisis. Here we learn about the new effort by Congress to use seven hundred billion dollars, or whatever

this plan is, to bail companies out, and we are also told that the average American would not have supported such a plan because the money seems to be used only to prop up corrupt financiers at Wall Street. How would you address this from the natural law point of view? This is something of serious concern to me. We see the emergence of judicial dominance, rule of the judiciary, to such an extent that courts seem to be dictating the solutions to almost everything problem. Take for example South Africa, where not too long ago the Supreme Court said that gay “marriage” is now virtually acceptable. To the entire nation, this is anathema. I suppose you can say the same thing about the Supreme Court here. How on earth is this justified if we are proclaiming that there is something known as natural law?

BUDZISZEWSKI:

I am no economist, so let me take your second question first. It is interesting that you should raise the question of judicial usurpation of powers that rightly belong to the legislature. Some judicial conservatives mistakenly believe that if you embrace natural law, then you must be in favor of judicial usurpation. The idea seems to be that if we acknowledge that there is a real right and wrong, then of course a judge is entirely within his rights to overturn any legislative enactment that he wishes to overturn – just because *in his view* it is wrong – because *in his view* it is contrary to natural law. Actually, this doesn’t follow. We have to distinguish between two different questions: whether a legislative enactment violates the natural law, and who in the Constitutional order has the authority to declare that this is the case. We assign the responsibility to make laws to the legislator; the legislator has to be mindful of the natural law in order to figure out what laws to make. Does that mean that a judge may not consult the natural law? No, but normally, the judge consults the natural law not in order to figure out what laws to make, but to figure out what those laws mean.

My favorite example comes from Charlie Rice, who points out that the 1932 Restatement of Contracts included a provision which declared, I am paraphrasing, that a contract is binding if and only if failure to carry out the terms of the contract would produce injustice. Now suppose language like that were in statutory law. It isn’t self-defining. The judge has to consult the natural law in order to figure out what on earth “injustice” means. So the legislator consults natural law in one way, and the judge consults it in another. Now is this the only possible way to allocate responsibilities between legislators and judges? No. If

natural law is real, then certainly we should want our constitutional system to be designed in such a way as to make the natural law as effective as possible. But how to do that – how to allocate responsibilities among courts, legislatures, and other parties – is a matter of prudence.

Your other question concerned the financial crisis. There is a distinction between principle and prudence here too. The natural law does not tell you, “This is what you should do about the financial crisis.” It only directs your attention to the basic moral principles and to the basic principles of prudence connected with them. A fundamental principle of distributive justice is to give to each what is due to him, so obviously, people should be commended for acting well and punished for acting recklessly. A fundamental maxim of prudence connected with this is: “Do not supply incentives for irresponsible behavior.” Where such incentives exist, one must try to remove them.

Can a natural law philosopher advise us that such principles and maxims should be followed? Sure. Can he tell advise us as to the best way to follow them? That is another kettle of fish.

To return to your example, did some of the changes in financial regulations during the Nineties produce incentives for irresponsibility? I would say, yes. As I understand the matter, Congress actually *required* that a certain proportion of mortgages be to people whom financial institutions on their own would have considered bad risks, but I cannot claim that this conclusion of mine is a pure deduction from the first principles of natural law. It is a judgment of prudence, based on my own very faulty understanding of economics.

Your mention of the foolish decision of the South African court suggests that you may have had still another issue in mind. If the natural law really is knowable, then how is it even *possible* for human beings to be so foolish as those judges? The answer, I think, is that we *make* ourselves foolish. As my talk insisted, although there is such a thing as honest error, our deepest errors are not honest; they are motivated. The problem is not that we are ignorant, but that we rebel against our knowledge. Lest that knowledge accuse us, we expend enormous amounts of energy trying to convince ourselves, and others, that we don’t know what we really do. An entire career, an entire theory of jurisprudence, the collapse of an entire civilization may be driven by this desire. The important thing to remember is that it derives its intensity not from what we don’t know, but from what we do know and wish that we didn’t.

APPENDIX

ANNOTATED BIBLIOGRAPHY*

Books and Pamphlets

C.S. LEWIS, *THE ABOLITION OF MAN* (2001) (1943).

Lewis admonishes the use of science to deflate the idea of natural law: universal and objective good and bad actions. He opines that despite the existence of such universal values, children still need to be taught what those proper values are through education.

DARWIN'S NEMESIS (William A. Dembsky ed., 2006).

This work is a collection of writings by scientists and philosophers which question the validity of Darwinian theory by juxtaposing it to the intelligent design movement.

GILBERT KEITH CHESTERTON, *HERETICS* (1905), *reprinted in* GILBERT KEITH CHESTERTON, *THE COLLECTED WORKS OF G.K. CHESTERTON* (1986).

Chesterton's extended debates with the intellectual trends in his day are reflected in the modern "culture wars."

J. BUDZISZEWSKI, *THE REVENGE OF CONSCIENCE: POLITICS AND THE FALL OF MAN* (1999).

Budziszewski argues that the three great troubles of public life are all results of the Fall. One of our troubles is plain and practical: We do wrong. The second is intellectual: We not only misbehave but msthink, not only do wrong but call it right. The third is strategic, for the second affects our efforts to cope with the first; our toils to rectify sin are themselves twisted by sin, our labors to shed light on iniquity are themselves darkened by iniquity.

J. BUDZISZEWSKI, *WHAT WE CAN'T NOT KNOW* (2003).

Budziszewski writes with two purposes. The first is to bolster the confidence of plain people in the rational foundations of their common moral sense. The second goal is to present the explanation in such a way that those who think and write about the common

* This Annotated Bibliography was compiled by the editorial staff of the Regent Journal of International Law.

truths can achieve a firmer alliance in their defense. This is an excellent source for an introductory explanation of the topic discussed in the speech.

J. BUDZISZEWSKI, *THE LINE THROUGH THE HEART: NATURAL LAW AS FACT, THEORY, AND SIGN OF CONTRADICTION* (2009).

Natural law is a fact about human beings, and a theory that humbles itself before this fact. Yet it is something else as well—a sign of contradiction, something that exasperates, offends, and enrages. Threading a path among these various abysses, Budziszewski investigates a variety of topics in politics, ethics, theology, and law. Portions of Budziszewski's talk are adapted from this book.

JOHN LOCKE, *TWO TREATISES OF GOVERNMENT* (Peter Laslett ed., Cambridge Univ. Press 1988) (1690).

Locke posits that, in the state of nature, everyone has equal natural rights. He describes what natural rights are and explains that government is only legitimate if founded on the natural rights of its citizens.

MATTHEW H. KRAMER, *IN DEFENSE OF LEGAL POSITIVISM* 1- 21 (1991).

The central claim of legal positivism is that morality can be entirely separated from the law. Any effort to blend morality into the law will run aground as morality can never be universally agreeable and thus has no fixed position in a legal framework.

NATURAL LAW THEORY: CONTEMPORARY ESSAYS (Robert P. George, ed., 1994).

This book is a collection of essays written by leading natural law theorists. The essays cover natural law theory itself, its history, its relation to legal theory and rights, and its interaction with justice, formalism, and rationality.

PATRICK E. HUTCHINGS, *KANT ON ABSOLUTE VALUE* 132-57 (1972).

Kant forwarded a philosophy centered on the ideal that good is ineluctable, complete, infrangible, and irrefragable. Even happiness itself is, in Kant's view, merely incidental to the main point that good is absolute.

PAUL JOHNSTON, *THE CONTRADICTIONS OF MODERN MORAL PHILOSOPHY* 27-54 (1999).

Modern moral philosophy has mostly rejected the Aristotle and Kant ideals of absolute morality and has replaced absolutism with relativism. However, such a position is inevitably flawed because there must be a set of judgments common to everyone in order to have a system recognizing right and wrong, which serves to reintroduce some form of absolutism.

RAVI ZACHARIAS, *DELIVER US FROM EVIL* (1997).

Zacharias addresses how religion, the respect for human life, and the view of control over our lives intersect. Our society is increasingly rejecting the idea of absolutes, causing respect for the human person to be destroyed with devastating consequences.

RAVI ZACHARIAS, *SENSE AND SENSUALITY: JESUS TALKS TO OSCAR WILDE ON THE PURSUIT OF PLEASURE* (2002).

Zacharias addresses the life of Oscar Wilde – a life that was arguably enslaved to his own passions. The book delves into Wilde's life choices and how those choices eventually led to his demise.

RECOVERING SELF-EVIDENT TRUTHS, (Michael A. Scaperlanda & Teresa Stanton Collett eds., 2007).

This book is a collection of writings which seek to show that Christianity, particularly Catholicism, is still relevant in American law and culture today.

RUSSELL HITTINGER, *THE FIRST GRACE* (2003).

Hittinger writes that natural law in a post-Christian world still has an impact on many aspects of our lives, including natural rights, technology, religious liberty, assisted suicide, and others.

THOMAS AQUINAS, *TREATISE ON LAW: THE COMPLETE TEXT* (Alfred J. Freddoso trans., St. Augustine's Press, 2009) (1274).

The *Treatise on Law* (Summa Theologica I-I, Questions 90-108), is the *locus classicus* for the tradition of natural law. An older, public domain translation by the Fathers of the Dominican province, which is also very good, is available online at www.newadvent.org/summa.

THOMAS SOWELL, *BASIC ECONOMICS: A COMMON SENSE GUIDE TO THE ECONOMY* (2007).

Sowell presents a clear and concise expository on the general principles behind multiple economic theories, including capitalism, socialism, and feudalism. Utilizing readable language helpful to both the layman and expert, Sowell shows his reader how to critique economic policies in terms of the incentives they create rather than by the outcomes they promise.

WILLIAM BLACKSTONE, *1 COMMENTARIES* *354, *357.

Blackstone expounds on the connection between law written on our hearts and the common law of England. His writings significantly impacted Western jurisprudence.

WILLIAM DEMBSKI, *THE DESIGN INFERENCE: ELIMINATING CHANCE THROUGH SMALL PROBABILITIES* (1998).

Dembski uses nature as evidence of a designer and thoroughly discusses how natural law can be seen through the designed world.

Law Review Articles

Eileen L. McDonagh, *My Body, My Consent: Securing the Constitutional Right to Abortion Funding*, 62 *ALB. L. REV.* 1057 (1999).

The author takes the position that an unborn child is essentially a violent trespasser in the mother's body, and that the mother has the same rights to resist that aggression as would any homeowner threatened by a violent intruder.

Journal Articles

Warren M. Hern, *Why Are There So Many of Us?: Description and Diagnosis of a Planetary Ecopathological Process*, 12 *POPULATION & ENV'T* 9 (1990) available at <http://www.drhern.com/pdfs/whysomany.pdf>.

This is the first of many articles by Dr. Hern, an outspoken Colorado abortionist, in which he makes the case that humanity is a cancer on the planet.

Newspaper Articles

Sam Harris, *God's Dupes*, L.A. TIMES, Mar. 15, 2007, available at http://www.samharris.org/site/full_text/gods-dupes1/.

Harris criticizes religion and those who follow it, and admires the courage of a Congressman who has openly said he does not believe in the existence of God.

Miscellaneous Sources

Acts 14:8-18 (Revised Standard Version).

The speaker, in discussing the sources of the natural law, refers to a discussion between Paul, the Apostle and the people of Lystra.

Acts 17:16-34 (Revised Standard Version).

This passage describes Paul speaking with the philosophers in Athens. The philosophers had heard of Paul's novel message and invited Paul to speak at their gathering on Mars Hill.

Romans 2:14-16 (Revised Standard Version).

The human conscience is an inexorable component of the human condition. Paul states the law of God is imprinted on the hearts of man.