On the 'Natural' in Natural Law--From Aspiration to Signification and Back Again

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I appreciate the turnout for an event that by its title would no longer create the buzz and excitement that it might have in the 17th century, much less the 13th. And yet there is much here of substantial relevance to a world in transformation in which today's people stand on the shoulders of giants and pretend they are reinventing the world on their own, They are, in fact, merely reprising old, very old, patterns of humans seeking not merely to understand the world around them, but to figure out how to project that meaning authoritatively into a community of believers.

I will speak today about the natural law of *natural law*. More precisely, I will address what goes into making law natural and nature law, and then consider what it suggests for the conversations virtually every global community is engaged in today about the sources, constraints and forms of both understanding and ordering the world around them and the societies meant to be embedded within these understandings. natural law both in and as nature. This touches as much on the reordering of liberal democratic societies around the core values of social justice, as it does Marxist Leninist societies on the purification of socialist law. It is the essential foundation of the conversations about the sources of core organizational premises--religion, science, or the collective intuition or practices of a collective--and the allocation of the power to find, value, interpret and apply these values within society. We are, in effect, in the middle of yet another revolution of natural law, the consequences of which will be imprinted on our various political, economic, social, and cultural collectives over the coming decades.

In that context, then, it does make a little sense to return, if only for an instant to the first principles driving these conversations with potent transformative effects.

Humans have looked around them, they have looked at and in themselves, and in the communities in which they find themselves. And they wonder. That wonderment has an object (here used in two senses--as a 'thing' and a 'goal'). That object is to make sense of themselves, their collectives, and more generally the world around them. Humans are ambitious, however. Not only do many seek to understand themselves and the world around them. They also seek to rationalize it--to order it. And to order the world around them, to make it rationale (even if that rationalization is anarchic or chaotic) it must be arranged. That arrangement requires identification of objects and actions (naming) and then the quite deliberate act of inscribing it with meaning. Meaning is understood in two senses--meaning of an object as object and in the context of the world around it. Object and process, naming and meaning, these are the fundamental characteristics of the ordering of a world. But it is not enough to recognize things and acts as distinct in themselves, or to name it, or to vest that named object thing with signification (meaning) in itself and as it may relate to other identified object-actions.

Two additional tasks are necessary to make meaning. The first is to ensure that meaning making is a communal act--that meaning can be transmitted, and used as a common language which is itself the

carrier of meaning (naming and identification) and of action and context (objects in interaction or relation to each other. Thus meaning requires a language. And language requires its own signs and guideposts. But not just language--language prepares human collectives to identify and follow rules. The first aspect of what is natural to communities seeking rationalization is rulemaking, in the form of language. *Language* then provides the baseline for application to the ordering of the things that the rule system of language represents. Thus meaning making requires rules--and rules can be understood, in the context of the creation of meaning as the first law of the rationalization of systems collectively appreciated in a substantially similar way. Language is law and law is language; what one says, and how one says it matters as an affirmation of the law of language and the rules that language expresses, or an announcement of an intention to challenge that order and its underlying rules of collective meaning and expression. Natural law requires fidelity, a faith in its constructs, even when based solely on the intuitions of the collective self, or the insights gained from the observation of the world around one, or in the receipt of pronouncements from a higher external source (traditionally a divine authority). Language orders this ordering, and policies that fidelity. And the observable is made palpable only when understood through the lens of the assumption of the natural or inevitable. These then are self-referencing systems that acquire their power when they are shared by a collective.

If the architecture of rules (law) is the first fundamental requirement of collective meaning making, the second tasks the creation of an architecture of legitimation, and of a system of preserving the rules around which meaning is created and used. Legitimation maybe understood as the baseline for the politics of rationalization: it is the source for an understanding of the *rule of law* of collective meaning *making*. Rule of law in this case may be understood as the curating of signs and auguries that serve to suggest that systems of meaning making within which humans may more granularly order their collective societies, are themselves evident in the world around the collective, and beyond the effective control of an individual (though as we will see later not beyond the interpretive power of groups, sub-collectives, created for that purpose). But it is in the manner of the construction of systems of justification that much of the history of human politics, religion, science, economics and culture may be written.

Justification by analogy to the cosmic order that may be observed has tended to be a powerful means of moving from the wonderment of the individual to the constitution of complex ordered collectives (as states, religions, identity groupings, economic collectives and the like). But even that has produced many paths. In the Western tradition, justification (and its consequential structures for rationalization and ordering) could be reasoned by analogy to the cosmic order from the ideals of which human society could be ordered and to which it could aspire; or as a baseline (*jus naturale*) to test the legitimacy of human or collective law-rules (*jus gentium*); or it could be linked to eternal systems that were themselves positive manifestations of organizational intent (*lex aeterna*).[1] It is not enough then to extract the ideal forms of meaning and action; it is necessary as well to situate that meaning universe within processes and objectifications beyond easy manipulation.

[1] Brendan Brown, 'Natural Law and the Law-Making Function in American Jurisprudence,' *Notre Dame Lawyer* 15(1): 9-25 (1939).

> Objectively speaking, natural law, as a term of politics and jurisprudence, may be defined as a loosely knit body of rules of action prescribed by an authority superior to the state. These rules variously (according to the several differing schools of natural-law and natural-rights speculation) are derived from divine commandment; from the nature of humankind; from abstract Reason; or from long experience of mankind in community.[2]

At the same time, the idealized forms of meaning, and of rationalizing the world (the systems of baseline premises around which it is possible to build collective meaning) is essential for the construction of the rule-law systems on which collective orders are built and managed, and against which its particularized expressions may be tested, judged, assessed.

> *Ius naturale est, quod natura omnia animalia docuit: nam ius istud non humani generis proprium, sed omnium animalium, quae in terra, quae in mari nascuntur, avium quoque commune est.* (The law of nature is the law instilled by nature on all creatures: this law does not just pertain only to humans but is common to all creatures of the land and the sea, as well as birds.).[3]

This, then, provides the context in which it is possible to speak about natural law detached from the premises around which peculiar systems of natural law are built.

Humans appear to have spent the greater part of the millennia in which they have sought develop and institutionalize collective in a grand project of rationalization and legitimization of those efforts. That has produced an extraordinary ecology of system efforts--both exogenous and endogenous to the rationalized and legitimated collective--to provide the foundation against which the large forests of right and wrong, good and bad, ideal and deviation, can be identified, measured, cultivated, and protected. Such efforts have been rewarded at times by equally powerful countering systems of rationalization. All of this is ″natural″ in the sense that it is unavoidable. And it is unavoidable because it is inherent somehow either in the individual, in the fundamental character of collectives, or in the relationship of humans and their collectives to fundamental determinants of operating rules from which all values may be derived and against which they may be measured. Though nature may be understood in the singular, the naturalization of nature within human collectives exists in multiple variations.

Natural Law, like its successors and challengers, then, is ultimately semiotic--in the sense that whatever the nature of the ″natural″ it remains to be observed, discovered, revealed, and applied not by its source, but by those individuals who are charged with its interpretation. These priests--however they call themselves, and whatever they worship or draw their authority--then humanize the project.[4] And in the end, whether it is undertaken by the priests of religion (traditionally understood, or of liberal democracy, or of Marxist-Leninism, or of *identitarian* collectives; in the end it is in the relationship between the ideal and the priest that the great theories and machinery of collective institutions are built, operated and

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[2] Russell Kirk, ″The Case For and Against Natural Law″ The Heritage Lectures No. 469 (15 July 1993).
[3] Justinian, Institutes Book One Tit. I.2 (J. B. Moyle (trans) Gutenberg eBook No. 5983, 2013, from the 5th edition 1913).
[4] Friedrich Nietzsche, The Anti-Christ (HL Mencken trans) Gutenberg eBook No. 19322 (2006; 1918)-

ultimately challenged, progress, decline, or endure. One speaks here of the union of *fides* and of *ratio*; of faith and reason, the former providing the structure within which the latter may be used to rationalize the world around us. But which fides; which ratio? Natural law in the narrow sense assumed it aligned with the dominant religion and the dominant forms of collective political organization[5]--but really any such would do if the belief was strong enough and well enough developed.

That building, operation, challenge, progress, decline or enduring are all a function of the ideal against which these concepts are deployed. The ideal, then, serves as the great object of collectives, the infusion with meaning and the protection of that meaning becomes a core function of those charged with its protection. Natural law, then, speaks to the ways in which this process of meaning making may itself be idealized and given form. It serves as a complex of premises against which the ideal may be discerned, its meaning extracted, and then applied to the construction and operation of collectives. It becomes the rationalization of rationalization--and the imprimatur of legitimacy that may be deployed against competitor complexes of meaning making and their human priest-protectors. But it is important as well to realize that these priest-protectors, traditionally lawyers, politicians, aristocrats etc. under qualitative systems of meaning rationalization, can also be coders, modelers and data curators where the ideal can be quantified and human behavior as a function of that ideal can be assessed perhaps with greater precision.[6]

Natural Law is in a sense the striving toward perfection that requires the identification of the perfect--the perfect person, the perfect state, the perfect relationship among all of these. And yet perfection is impossible, and thus it might be argued that the search for perfection inherent in some versions of natural law is 'mere' ideology--as misdirection in the face of the 'natural' reality of unalterable imperfection in the human person, and the collectively in human institutions (including states). And yet it is important to recall that the possibility of perfection, like the natural in natural law is exogenous. It need to be reached; it need only be approached in every lifetime. That also is 'natural.' It produces its own forms of the performance of reaching toward perfection: the identification of imperfection of sin, and the striving to open oneself to perfection in the form of confession, contribution and penance; the progress of education grounded in the relationship of the student to the perfect state, the ideal state toward which education points; the systems of rewards and punishments in data driven nudging systems in the West and social credit regimes in China.

It is to the sources of the identification of that perfection, it is into the excavation of its manifestation and source, that one encounters the politics of perfection in which natural law, like other theories of perfection are both made and challenged. The first principles of liberal democracy and those of Marxist-Leninism; the core premises of the great orders of organized religions everywhere; and even the notions of the Anthropocene,[7] and of the identitarian lenses through which must of the world is now increasingly rationalized. All of these come to mind. Each creates a natural ordering that defined an ideal that can

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[5] John Paul II, *Fides et Ratio* (encyclical letter 14 September 1998) < https://www.vatican.va/content/john-paul-ii/en/encyclicals/documents/hf_jp-ii_enc_14091998_fides-et-ratio.html>.
[6] Larry Catá Backer, 'Next Generation Law: Data Driven Governance and Accountability Based Regulatory Systems in the West, and Social Credit Regimes in China,' *Southern Cal. Interdisciplinary Law Journal* (2018)
[7] Simon L. Lewis and Mark A. Maslin, "Defining the Anthropocene," *Nature* 519:171–180 (2015).

either be approached or that serves as the centering of the ideal state against which the human collective may be reflected and under the shadow of which it may legitimate its imperfections.

And everyone appears to have both their favorite, and within their favorite, their preferred means of rationalizing the unapproachable perfection of the ideal.[8] Notions of perfection around which individuals and collectives must be authoritatively constructed have permeated ancient and modern builders of states and government. It has become embedded in the expression of that search for perfection, its meaning, through the instruments of law and the law-administrative state. The opening of Book One of Justinian's Institutes provide the still relevant semiotic invitation to meaning founded on an unavoidable perfection the evidence of which exists around collectives to be discovered (the *"firstness"* of meaning objects, what is natural)[9] and then signified through the symbolic or generalized power of these objects (observable phenomena as signs or mediums) and thus privileged as foundations of meaning universes, abstracted into meaning legitimating the forms and approaches of collective organization.

The Institutes of Justinian provide a still relevant example of the form of this abstraction process deduced from observable phenomena and then detached from their confined form as objects through the symbolization of their existence. In the introduction to Book One of the Institutes, this rather abstract description is given its well-known form: "Justice is the set and constant purpose which gives to every man his due. . . Jurisprudence is the knowledge of things divine and human, the science of the just and the unjust."[10] It is the natural that is observable--and that applies both to the world around humans and to the state of human interaction itself. This semiosis is particularly evident in the discussion of the condition of slavery:

> Those are freedmen, or made free, who have been manumitted from legal slavery. Manumission is the giving of freedom; for while a man is in slavery he is subject to the power once known as 'manus'; and from that power he is set free by manumission. All this originated in the law of nations; for by natural law all men were born free—slavery, and by consequence manumission, being unknown. But afterwards slavery came in by the law of nations; and was followed by the boon of manumission; so that though we are all known by the common name of 'man,' three classes of men came into existence with the law of nations, namely men free born, slaves, and thirdly freedmen who had ceased to be slaves.[11]

What is natural is observable, and history is evidence of condition. Yet what is natural is not inevitable, but rather mutable. What was need not be natural forever; and what is natural need not be approached except as an ideal. Here the law of nations is opposed to natural law, and the gap is mediated by the law of manumission--a returning to the natural order, or the preservation of an equilibrium in the shadow of the

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[8] John Finnis, Natural Law and Natural Rights (2d ed, Oxford 2011).
[9] Göran Sonesson, "The Natural History of Branching: Approaches to the Phenomenology of Firstness, Secondness, and Thirdness," Signs and Society 1(2):297-325 (Fall 2013)
[10] Institutes Book One Tit. 1.
[11] Institutes Book One Tit. V.

natural state of humanity. One moves here from nature to politics." Of private law then we may say that it is of threefold origin, being collected from the precepts of nature, from those of the law of nations, or from those of the civil law of Rome."[12] This applies with equal force to the law of "things"--to property in which the law mediates between the natural law of individuals and the law of nations (Institutes Book 2).

For the US constitutional order the nature of this natural law also has a long history emerging during the period of the early Republic from the English colonial experience, the great transformations and multiple forms of the "natural" in law and its *situatedness* derived from religious and then secular philosophy and jurisprudence emerging from centuries of disputes and discovery efforts from the disappearance of the late classical Roman Empire in the West, and then revived in the *Medieval Law Schools* of Europe.[13] The deep embedding of natural law theories in the formation of American constitutionalism and its expression in written law (then elaborated by the exercise of an interpretive priestly function by its courts) is well known[14] (even if this knowledge, like everything else in the United States is both highly contested and mutable).

For U.S. thinkers the issue wasn't so much about the existence of higher law--natural or not--but rather revolved around the fundamental question of cause and effect: did higher (natural) law come first, or is it merely the rationalization of the collective will of the nation expressed through its acts of will. In other words does the Constitution embody the natural law declared as the will of the people of the United States, or does the Constitution reflect a set of core normative principles to which the people are subject and around which collective organization must be framed. The tension was embedded in the Declaration of Independence. That document invokes the "Laws of Nature and of Nature's God" as the referent that guides the interpretation of the "course of human events" in constituting and reconstituting states. At the same time it invokes the principle of self-evidence ("We hold these truths to be self-evident") in support of the core political principles that will then serve as the basis on which the collective will draw to interpret and reinterpret itself.[15]

That, in turn, implicates theories of democracy, of sovereignty, and of the relation of collectives to the principles around which it is organized. Intimately related to this fundamental question of identification of sources, was the related question of the location of the authoritative instruments for its interpretation. Does natural law, however conceived, require a class of "priests" as a legitimating source of interpretation to which the collective is obliged to conform? For Anglo-American jurisprudence developed through Independence, the answered varied. Law (and its ideal) might be the natural province of jurists; it might be that of the political representatives of the people. That also has its genesis

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[12] Institutes Book One Tit. I.4.
[13] The Medieval Law School available < https://www.law.berkeley.edu/wp-content/uploads/2020/08/Medieval-Law-School.pdf>
[14] Edward S. Corwin, *The 'Higher Law' Background of American Constitutional Law* 1928).
[15] U.S. Declaration of Independence (1776); generally Larry Catá Backer, "Some Thoughts on The American Declaration of Independence and the Irish Easter Proclamation," Tulsa Journal of Comparative & International Law 8:87 (2000).

in the early Republic--pitting the institutionalist ordering of the Federalist against Thomas Paine's *Common Sense*.[16]

For more traditionalists, it might not reside within the state at all.
But American jurisprudence has been obsessed not merely with issues of legitimating sources, but also perhaps more importantly, to modalities of justification. The result has been the constitution, almost from the inception of the Republic, of a grand market place within which the entire framework of collective meaning making has been offered up in a variety of forms (supply side) for consumption by the population (to use Foucault's term) of legitimate consumers (members of the collective) whose own role has been pre-determined by the constitution of the collective itself. That has proven to be a great source of stability as collective society remakes itself in fundamental form without destroying the collective itself. It has also proven to be a great source of instability in the form of the politics of the basic, that reflects the politics of sub collectives built into the system of the American Republic itself.[17] That--the fundamental polycentricity of natural law in the United States--in a sense the great power and weakness of the notion for American politics--and more spectacularly, its jurisprudence.

The consequences can be significant and have been much in evidence since constitution making became the preferred mode of expressing the ideal of organized political society within its own geographic territories. And, of course, these fundamental question continues to fuel the nature and form of fundamental political-coercive political discourse (through or with law) in the contemporary U.S.

> In an age when the natural law is no longer a common conviction, international crises have made the rational justification of our political institutions and beliefs a matter of the utmost importance. In searching for such justification, it is natural to turn to the sources of our political philosophy. And it is for this reason that the question of the true sources of that philosophy is far from academic.[18]

These are old question, of course. And virtually everyone has had a go at them. But they have been given a new and perhaps transforming life in contemporary times. As Robert Wilkins noted in 1949, quoting Etienne Gilson, "The natural Law always buries its undertakers"[19]

The questions return one to the fundamentals of social ordering grounded in both the language that a community uses to signify objects, and the importance that they give to the identification of those objects and their function within the operation of the collective. To those ends the connection between objects--material and abstract, serve as the way in which meaning is both made and applied. Consider the changes in the connection between the meaning of the concept 'equality' and the constitution of 'gender', 'race', 'religion', 'disability' and the like. In one meaning universe the notion of equality as an ideal might presume an equality within but not between categories of natural objects given privileging distinguishing

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[16] Thomas Paine, Common Sense (Project Gutenberg eBook No 147 (1994, original February 14, 1776).
[17] James Madison, Federalist Papers No. 10.
[18] Charles M. Whelan, "Corwin: The "Higher Law" Background of American Constitutional Law" (1956), p. 728.
[19] Robert N. Wilkin, Status of Natural Law in American Jurisprudence, *Nat. L. Inst. Proc.* 2:125-149 (1949).

characteristics. In another the opposite is truth, and natural, and beyond the power of the autonomous human (though perhaps not the human collective) to alter. Whichever is chosen, each focus can then be used both to reify those characteristics as something more than means of classification to their infusion with characteristics that are essential to the realization of another ideal--'representation.' And so one.

The impulse of natural law posits that the ideal lies beyond question, but that its operationalization can be modified to suit the times and conditions of society. That is unaffected by the marketplace of nature within the American Republic as the vendors of quite different orders of the 'natural' and its ideal expression as and through 'law' view in law, politics, jurisprudence, and culture, for dominance, and thus for the suppression of competition versions of core premises for the rationalization of the world. In this all forms of natural law--liberal democratic, identitarian, Marxist-Leninist, religious, etc.--are the same and share the same characteristics and drives. They are at their core eminently illiberal. *Within 'nature' everything; outside of 'nature' nothing*. The only real question, then, is what is authentically natural and what is not. And in that one moves from the philosophy of natura law to its politics.[20]

In all these forms, the migration of notions of ideological anchoring does not depart far from its natural law origins. And the role of these framing perspectives play a key role in critical modern movements--from social justice ideologies, to the forms of attacks on the structural corruption of the institutions of government. In each of these cases, the old modalities of the natural in natural law as a semiotic-linguistic experience is unavoidable.

One sees the world around one (individual and collective) and seeks to make sense of it. Here one can produce identity--of objects, processes, events, conditions and the like. One identifies and names. But making sense of the world is not enough. One might also need to rationalize the world. One here is not satisfied with identification, but with explanation. And one is not necessarily satisfied with explanation but also with inserting a person or collective within the flows of explanation not merely to understand it but to participate in it as well. One centers here, the human.

Rationalization then changes the role of naming. Names are objects inscribed with meaning. And that meaning is meant to inscribe the connection between the named object and its role or place or function in the rationalized world. But signification itself requires a language of some sort. And language is itself an object with an objective--it incarnates the rationalized world in itself and through its rules of construction produces the rule-system through which it is possible to understand the rationalized world. Language naturalizes rule systems that are themselves the way in which signification is embedded in the identification of things and their ordering.

To understand languages to be wholly embedded in the rationalizing system to which it is attached--not as an individual but as a collective. One speaks the language of equality, of human rights, of markets, of collective responsibility. But ins peaking one also affirms fidelity to the rationalization of the world in

[20] For an example, Kirk Kennedy, 'Reaffirming the Natural Law Jurisprudence of Justice Clarence Thomas,' Regent University Law Review 9:33-88 (1997).

which such language acquires communal meaning and power. To reject the language is to reject the system that language affirms. The language of Marxist-Leninism and liberal democracy then produce meaning in ways that make them incompatible bot because the meaning is different but because the fundamental rationalization to which they give effect cannot be reconciled. The same applies to the differences between the language of equality and the language of opportunity.

The process becomes 'natural' where it is directed toward its own justification. It is here that the great political and jurisprudential contests around 'natural law' have been fought in the US almost since the time of its establishment. Here one arrives at the essence of the 'natural' in law, its legitimating power by referencing something beyond the easy power of manipulation except by the collective itself. And it is in the construction and deployment of systems of justification that the great social and political movements in the United States certainly since the 20th century have been built.

From these 'natural' and unassailable ordering origins, human systems can then be established, nurtured based on quite specific rationalizations of the "common good" for example and the need of the collective to discipline its members through positive law toward the idealization of this common good by reference to the natural. And from here one encounters the marketplace of ideas, and of jurisprudence, as any number of sub-collectives seek to sell their authoritative rationalizations advertised through the depiction of personally appealing ideals, to the populations whose consent to be subject to a view is decisive for its authority. One enters here the world of rationalized power and politics that is perhaps the true marker of natural law in the United States.

One also opens oneself to a new world as well. Natural law systems have started from the usually uncontested baseline assumption of the autonomy and singularity of the human person. Systems that seek to break down or disaggregate that basic building block tend to be rejected because they reject the core notion of humanity at the center of the rationalizing system around which human collectives are built. Modern predictive analytics, contemporary systems of compliance based accountability driven by the possibilities of technology and operationalized by data driven governance now potentially reveal that the human person is itself a system. The human person may not in fact be understood in the singular. The human person may themselves be disaggregated. That is the new and potentially transformative frontier of natural law and the rationalization of the human within it. Technology might make observable what had before been hidden; and that mat require observation based systems of nature to be approached anew.

It is through these new questions that the old forms of natural law may provide some insight. These, in turn, suggest some of the questions and issues that we endeavored to build into our discussion at the seminar, ″Natural Law and the US Constitutional Order″ Organized by the Penn State Law Federalist Society this 12 April 2022. "There is in fact a true law-namely, right reason - which is in accordance with nature, applies to all men, and is unchangeable and eternal."[21] The search for that "true" law will continue to animate law and jurisprudence for at least a little while more.

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[21] Wilkin, *Eternal Lawyer: A Legal Biography of Cicero* 225 (1947).